tax payments, tax liens, and default notices"; (2) had significant employment-related issues with his assisted-living business and his prior dental practice; and (3) appeared to have "significant cash flow problems." These concerns directly relate to Malfitano's financial standing under SCC § 5.12.010(A), and therefore, the Liquor Board had a rational basis for distinguishing Malfitano's application from those of previous applicants.[6]

CONCLUSION

We hold that the term "satisfactory" does not render SCC § 5.12.010(A) unconstitutionally vague. In addition, we hold that the district court did not abuse its discretion when it concluded that Malfitano's due process and equal protection rights were not violated by the denial of his license applications. Accordingly, we affirm the district court's order.

HARDESTY and STIGLICH, JJ., concur.

JERICHO JAMES BRIOADY, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 70311

June 29, 2017 396 P.3d 822

Appeal from a judgment of conviction, pursuant to jury verdict, of two counts of lewdness with a minor under the age of fourteen years. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Reversed and remanded.

[Rehearing denied October 2, 2017]

Karla K. Butko, Verdi, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Terrence P. McCarthy*, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

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[6]We also reject Malfitano's argument that the Liquor Board's decision to deny his applications was guided by animus. Each member that voted to deny Malfitano's liquor license applications stated that they denied the applications because of concerns regarding Malfitano's financial standing. Nothing in the record indicates that any member of the Liquor Board harbored a personal animus towards Malfitano.

Malfitano has not argued that the Board of Commissioners' denial of one of his business license applications violated his equal protection rights.

OPINION

By the Court, STIGLICH, J.:

To prevail on a motion for a new trial on the basis of juror misconduct during voir dire, a defendant must demonstrate (1) that the juror at issue failed to honestly answer a material question, and (2) that a correct response would have provided a valid basis for a challenge for cause. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Based on the facts of this case, we further conclude that the district court erred in denying appellant Jericho Brioady's motion for a new trial on the basis of juror misconduct.

FACTS AND PROCEDURAL HISTORY

This case involves allegations by C.P. that she was molested by appellant Jericho Brioady, a family friend. C.P. was twelve years old at the time.

Following an investigation, the State charged Brioady with two counts of sexual assault on a child and three counts of lewdness with a child under fourteen years of age. Brioady proceeded to trial in January 2016.

During voir dire, the district court informed the venire of the importance of giving full, complete, and honest answers to any questions asked. The district court asked, "Has anybody been a victim of a crime? And if it's a personal matter, we'll take it on sidebar which means we'll talk privately." Two veniremembers advised that they had been molested as children. Another stated that her child had been a victim of molestation. Several other veniremembers indicated that they had been the victim of various property crimes. A veniremember who would later be selected for the jury, serving as Juror Three, said nothing during this line of questioning. The State extensively questioned the veniremembers who had been molested or related to victims of molestation about their ability to be impartial. Juror Three did not volunteer any information during these inquiries.

The State also asked the venire to think of their "most serious secret," qualifying that they would not have to tell the secret. The State then asked veniremembers if they had ever told anyone their secret.[1] Juror Three indicated that she had a secret, and had eventually told a doctor whom she trusted. She did not reveal any further details about the secret. The defense exercised seven of its peremptory challenges, and waived the eighth.

[1]This line of questioning could reveal how the veniremembers would react to evidence that the victim in this case waited several months to report the molestation.

Following the presentation of evidence, and after approximately ten hours of deliberation, the jury returned a verdict of guilty with respect to two counts of lewdness with a minor, and not guilty with respect to the remaining counts of sexual assault and lewdness.

On February 10, 2016, eleven days after entry of the verdict, Brioady filed a motion for new trial on the basis of juror misconduct. Brioady specifically alleged that it had come to his attention that Juror Three had failed to inform the court that she had been a childhood victim of molestation. At a hearing on the matter, Juror Three testified that she did not remember the court asking if anyone had ever been a victim of a crime. Despite the fact that she did not remember the question, Juror Three also stated that while she had been the victim of molestation as a child, she did not volunteer that fact, because she believed she could be a fair and impartial juror and did not consider herself to be a victim. She clarified, "[T]he truth is, I didn't feel it was necessary for me to bring up an event that happened when I was four years old."

Nonetheless, Juror Three acknowledged that she had thought of her prior molestation during the voir dire process, as she considered those events to be the "most serious secret" that she identified in response to the prosecutor's questions. Juror Three also testified that when she had disclosed the molestation, it was to a therapist that she had seen when she was an adult.

Juror Three testified that during deliberations she disclosed to the other jurors that she had been a victim of childhood sexual abuse. Nonetheless, Juror Three contended that she persuaded other jurors to find Brioady not guilty of the two sexual assault charges. On the apparent basis of this testimony, the district court denied the motion for a new trial, finding that Brioady had failed to demonstrate prejudice arising from the alleged misconduct of Juror Three.

Brioady appeals. Among other claims, he contends that the district court erred in denying his motion for a new trial on the basis of juror misconduct.

Standard of review and timeliness of motion

This court generally reviews the denial of a motion for a new trial following juror misconduct for an abuse of discretion. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003).

With respect to the timeliness of a motion for a new trial, NRS 176.515 provides that:

> 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
>
> . . . .
>
> 3. Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly discovered

evidence may be made only within 2 years after the verdict or finding of guilt.

4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

In this case, the verdict was entered on January 22, 2016. Brioady did not file his motion for a mistrial until February 10, 2016. Because Brioady filed his motion more than seven days after entry of the verdict, the State argues that pursuant to NRS 176.515(4), his motion was untimely.

The State does not dispute that neither Brioady nor his counsel were aware of any potential misconduct by Juror Three until February 4, 2016, during a conversation with several deputy district attorneys. Under these circumstances, we conclude that any information related to misconduct by Juror Three was newly discovered evidence, which is governed by the provisions of NRS 176.515(3). Because Brioady filed his motion for a new trial within two years of the verdict, the district court did not err in considering the motion on the merits.

The district court abused its discretion in denying the motion for a new trial

Both this court and the United States Supreme Court have indicated that to obtain a new trial on the basis of juror misconduct during voir dire, "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *see also Lopez v. State*, 105 Nev. 68, 89, 769 P.2d 1276, 1290 (1989). With respect to the "honesty" prong of this inquiry, "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *United States v. Edmond*, 43 F.3d 472, 473 (9th Cir. 1994) (quoting *McDonough*, 464 U.S. at 556). Generally, this "determination . . . turns upon whether or not [a juror] is guilty of *intentional concealment*." *Lopez*, 105 Nev. at 89, 769 P.2d at 1290 (quoting *Walker v. State*, 95 Nev. 321, 323, 594 P.2d 710, 711 (1979)).

In *Edmond*, the Ninth Circuit examined a situation in which a juror, during a prosecution for armed robbery, disclosed that his family car had been stolen a year earlier but failed to disclose that he had also been an armed robbery victim 26 years earlier. 43 F.3d at 473. By way of explanation, the juror stated, "I just didn't think of it at the time. . . . It never really entered my mind. Being that long ago . . . I didn't even think of it . . . ." *Id*. Under these circumstanc-

es, the Ninth Circuit concluded that "simple forgetfulness" did not fall "within the scope of dishonesty as defined by *McDonough*," indicating that a new trial was not required. *Id*. at 474. Similarly, in *Lopez*, this court concluded that two jurors had not intentionally concealed information when they failed to disclose that they had been victims of child abuse. Both jurors indicated that they had not thought of child abuse as a crime, and were not deliberately attempting to withhold information. 105 Nev. at 89-90, 769 P.2d at 1290-91.

In this case, the district court concluded that while Juror Three had withheld information related to the prior molestation, her belief that she could be impartial indicated that her actions were not "intentional." This conclusion is clearly belied by the record. Regardless of Juror Three's motives, the record indicates a level of intentional concealment not present in either *Edmond* or *Lopez*. Juror Three's first explanation that she had forgotten about her childhood molestation was clearly belied by her subsequent testimony that she chose not to disclose because she believed she could be a fair and impartial juror, and did not consider herself to be a victim. Juror Three again acknowledged that she had thought of her prior molestation during the prosecutor's questions regarding a "most serious secret." Nonetheless, Juror Three still failed to disclose this information to the court.

Rather than forgetting her childhood experiences, Juror Three's testimony more consistently indicated that she believed the prior incident of molestation "wasn't relevant to me being an impartial juror." In this situation, the question of Juror Three's ability to be impartial was not a determination for her to make. It appears that any incident of molestation was serious enough that Juror Three discussed the incident with a therapist as an adult, and still regarded the molestation as a "serious secret." Juror Three's testimony at the post-trial hearing demonstrates that she knowingly failed to honestly answer a question during voir dire.

Given the nature of the allegations in this case, a truthful response by Juror Three would have very likely provided a basis for a challenge for cause.[2] In addition, Brioady used one of his peremptory challenges to remove a veniremember who disclosed prior sexual abuse. As a result of Juror Three's failure to disclose, Brioady was

[2]In *Bowman v. State*, this court recently reiterated that to prevail on a motion for a new trial on the basis of juror misconduct during deliberation, a defendant must establish both (1) juror misconduct, and (2) that the conduct was prejudicial. 132 Nev. 757, 762, 387 P.3d 202, 205 (2016). To the extent the district court applied *Bowman*, and relied on Juror Three's testimony that she had persuaded certain jury members to acquit Brioady of several charges to find a lack of prejudice, we note that this information is not relevant to the analysis set forth in *McDonough* or *Edmonds*. Further, we note testimony that "delve[s] into a juror's thought process [to reach a verdict] cannot be used to impeach a jury verdict and must be stricken." *Meyer v. State*, 119 Nev. 554, 563, 80 P.3d 447, 454 (2003).

deprived of any opportunity to use his remaining peremptory challenge to excuse Juror Three. Therefore, as the record in this case indicates both juror misconduct and resulting prejudice, the district court abused its discretion in denying Brioady's motion for a new trial.

CONCLUSION

The testimony at the post-trial hearing indicated that Juror Three failed to honestly answer a material question during voir dire. Had Juror Three truthfully disclosed that she had been a childhood victim of molestation, this disclosure could have provided a valid basis for a challenge for cause. Under these circumstances, the district court abused its discretion in denying Brioady's motion for a new trial on the basis of juror misconduct. Accordingly, we reverse the judgment of the district court and remand this matter for a new trial.[3]

HARDESTY and PARRAGUIRRE, JJ., concur.

RAYMOND DELUCCHI; AND TOMMY HOLLIS, APPELLANTS, *v.* PAT SONGER, RESPONDENT.

No. 68994

June 29, 2017 396 P.3d 826

Appeal from a final judgment granting a special motion to dismiss in a tort action. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Reversed and remanded with instructions.

Law Office of Daniel Marks and *Adam Levine* and *Daniel Marks*, Las Vegas, for Appellants.

Lipson, Neilson, Cole, Seltzer & Garin, P.C., and *Joseph Garin* and *Siria L. Gutierrez*, Las Vegas, for Respondent.

Before the Court EN BANC.

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[3]We have reviewed Brioady's remaining claims, including his claims that his statement to police detectives was wrongfully admitted; that his conviction was not supported by sufficient evidence; that his conviction violates the rule of *corpus delicti*; that the trial court erred in restricting cross-examination regarding prior false accusations by the victim; that the trial court wrongfully refused to give Brioady's proposed jury instruction on unlawful contact with a child; and that the imposition of a life sentence constitutes cruel and unusual punishment, and conclude that these claims lack merit.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we address whether the 2013 amendments to Nevada's anti-SLAPP statutes clarified, rather than substantively altered, existing law, such that they may apply retroactively in resolving a special motion to dismiss a defamation action grounded on a pre-2013 communication. Because portions of the applicable 2013 amendments (defining protected conduct) are consistent with a reasonable interpretation of the prior anti-SLAPP enactment, and those portions resolved an ambiguity that existed in the prior enactment, they are clarifying and thus apply retroactively. However, because the remaining applicable portions of the 2013 amendments (changing the summary judgment standard of review to clear and convincing) effected a substantive change in the prior anti-SLAPP legislation, those portions are not applicable retroactively. Therefore, although we conclude that in resolving respondent's special motion to dismiss, the district court properly applied the 2013 clarifying portions of the amendments in determining that respondent's communication to the town of Pahrump is potentially protected, the district court erred in applying the remaining substantive portions of the 2013 amendments retroactively in determining that appellants failed to meet the high burden set forth in the 2013 amendments of establishing a probability of prevailing on their claims. We thus reverse and remand.

FACTS AND PROCEDURAL HISTORY

In May 2012, Pahrump Valley Fire and Rescue Service (PVFRS) paramedics Raymond Delucchi and Tommy Hollis were involved in an incident on Highway 160 (the incident). Delucchi and Hollis were driving their ambulance to Pahrump when they were flagged down by passing motorists later identified as James and Brittnie Choyce. The Choyces stopped Delucchi and Hollis because Brittnie had miscarried and James requested transport to a hospital in Las Vegas. For reasons that are still in dispute, Delucchi and Hollis never transported Brittnie to Las Vegas or any other hospital. Following the incident, PVFRS Lieutenant Steve Moody and Fire Chief Scott Lewis received a telephone complaint from the Choyce family regarding the incident and began an internal investigation.

In June 2012, the town of Pahrump (the Town), through its outside counsel, the law firm of Erickson, Thorpe, & Swainston, Ltd. (ETS), retained Pat Songer, Director of Emergency Services at Humboldt General Hospital, to conduct a third-party investigation of the incident. During his investigation, Songer reviewed notes of

the telephone complaint from the Choyce family, reviewed notes of interviews conducted by Chief Lewis and Lt. Moody, conducted interviews, and collected other evidence. Based on his investigation, Songer prepared a report (the Songer Report) including his findings, conclusions, and recommendations to the Town regarding Delucchi and Hollis. In his report, Songer concluded that Delucchi and Hollis violated several sections of the Town's Personnel Policies, the PVFRS Rules and Regulations, and the PVFRS Emergency Medical Service Protocols. Based on those findings, Songer recommended that Delucchi and Hollis be terminated. On September 18, 2012, Delucchi and Hollis were notified in writing of the Town's intent to terminate their employment based on the findings within the Songer Report.

Delucchi, Hollis, and their union challenged the termination at a four-day arbitration hearing pursuant to their collective bargaining agreement. After the hearing, the arbitrator issued an opinion and award finding that there was not just cause for Delucchi's and Hollis's terminations and ordering reinstatement. Based on testimony at the hearing, and upon review of the evidence presented, the arbitrator concluded that the Songer Report lacked reliability, contained misrepresentations, and was not an adequate basis for termination.

In June 2014, Delucchi and Hollis filed a complaint in district court against Songer and ETS[1] alleging defamation and intentional infliction of emotional distress (IIED) based on the investigation commissioned by the Town and the Songer Report. Following Delucchi's and Hollis's complaint, Songer filed a special motion to dismiss pursuant to Nevada's anti-SLAPP statutes. In opposition to Songer's special motion, Delucchi and Hollis argued that (1) the Songer Report was unprotected conduct under Nevada's anti-SLAPP statutes; (2) under the pre-2013 version of the anti-SLAPP statute, Delucchi and Hollis demonstrated a genuine issue of material fact to defeat the motion; and (3) while the pre-2013 version should apply to Songer's 2012 conduct, they could nevertheless demonstrate by clear and convincing evidence a probability of prevailing on their claims.

The district court interpreted the 2013 amendments to Nevada's anti-SLAPP statutes as clarifying the legislative intent, and it thus applied the 2013 statutory amendments retroactively in deciding Songer's special motion to dismiss. In analyzing the special motion to dismiss under the 2013 version of NRS 41.660(3)(a), the district court recognized that the 2013 statutes required a two-step analysis, which requires the defendant to demonstrate that the communication was protected, and if so demonstrated, the burden shifts to the plaintiffs to show a probability of prevailing on their claims. Under that framework, the district court found that Songer demonstrated

[1]ETS is no longer a party to this action.

by a preponderance of the evidence that his report was protected good faith communication in furtherance of the right to free speech on an issue of public concern under Nevada's anti-SLAPP statutes because (1) it was a communication of information to Pahrump regarding a matter reasonably of concern to Pahrump based on the incident, and (2) it was a written statement made in direct connection with an issue under consideration by Pahrump authorized by law in the disciplinary actions against Delucchi and Hollis. *See* 2013 Nev. Stat., ch. 176, §§ 1 and 3. Moving to the second step, the district court found that Delucchi and Hollis failed to establish a probability of prevailing on the defamation and IIED claims by clear and convincing evidence such that the special motion could be defeated. *See id.* § 3(3)(b), 623-24.[2] Based on these findings, the district court granted Songer's special motion to dismiss. This appeal followed.

DISCUSSION

Nevada's anti-SLAPP statutes, codified in NRS Chapter 41, were amended in 2013 and became effective on October 1, 2013. *See* 2013 Nev. Stat., ch. 176, §§ 1-4. The incident giving rise to this appeal occurred in May 2012, the Town retained Songer in June 2012, and Delucchi and Hollis were notified of the Town's intent to terminate in September 2012. Thus, all of the conduct relevant to our anti-SLAPP analysis occurred in the 2012 calendar year. However, the district court retroactively applied the 2013 amendments as a whole in deciding whether to grant Songer's special motion to dismiss based on its determination that the amendments were meant to clarify the legislative intent behind Nevada's anti-SLAPP statutes. In resolving this appeal, we must first determine whether the 2013 amendments apply retroactively or whether the pre-2013 version of Nevada's anti-SLAPP statutes applied to the facts of this case. Specific to the issues presented in this appeal are the amendments to NRS 41.637 and NRS 41.660. After determining that portions of the 2013 amendments applied to this case, we then address whether the communication at issue is protected under the applicable versions of Nevada's anti-SLAPP statutes.

Legislative amendments to Nevada's anti-SLAPP statutes

When the Legislature amends a statute, "[t]here is a general presumption in favor of prospective application." *See McKellar v. McKellar*, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994). When an amendment clarifies, rather than substantively changes a prior stat-

[2]NRS 41.660(3)(b) was amended again in 2015, and under that amendment, a plaintiff must demonstrate "with prima facie evidence a probability of prevailing on the claim." However, under the 2013 version, a plaintiff had to establish "by clear and convincing evidence a probability of prevailing on the claim." 2013 Nev. Stat., ch. 176.

ute, the amendment has retroactive effect. *Fernandez v. Fernandez*, 126 Nev. 28, 35 n.6, 222 P.3d 1031, 1035 n.6 (2010); *see also In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (explaining that "[w]here a former statute is amended, or a doubtful interpretation of a former statute rendered certain by subsequent legislation, it has been held that such amendment is persuasive evidence of what the Legislature intended by the first statute" (alteration in original) (quoting *Sheriff, Washoe Cty. v. Smith*, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975)); 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 22.34 (7th ed. 2009) ("Where an amendment clarifies existing law but does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive, especially where the amendment is enacted during a controversy over the meaning of the law.").

The pre-2013 version of NRS 41.637 provided:

> Good faith communication in furtherance of the right to petition means any:
>
> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law,
>
> which is truthful or is made without knowledge of its falsehood.

NRS 41.637 (1997). Under the 2013 amendments, the Legislature amended NRS 41.637 to add the phrase "or the right to free speech in direct connection with an issue of public concern" to the phrase that statute defines. 2013 Nev. Stat., ch. 176, § 1, at 622. The Legislature also added subsection (4) to NRS 41.637, which provides that "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" includes "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." *Id*.

The pre-2013 version of NRS 41.660 provided that special motions under Nevada's anti-SLAPP statutes were treated as motions for summary judgment. NRS 41.660 (1997). However, under the 2013 amendments, when a party filed a special motion under the anti-SLAPP statutes, the court would begin its analysis by "[d]etermin[ing] whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith

communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a) (2013); 2013 Nev. Stat., ch. 176, § 3, at 622. We turn now to the legislative history of those amendments in order to determine whether those amendments clarified, or substantively changed, the law.

Legislative history indicates that the 2013 amendments to Nevada's anti-SLAPP statutes were prompted by a ruling from the Ninth Circuit Court of Appeals in *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012). *See* Hearing on S.B. 286 Before the Assembly Judiciary Comm., 77th Leg. (Nev., May 6, 2013) (Statement of Senator Justin C. Jones explaining that he introduced the 2013 amendments to resolve limitations on NRS Chapter 41 imposed by the Ninth Circuit Court of Appeals in its *Metabolic Research* decision). In *Metabolic Research*, the court held that Nevada's anti-SLAPP provisions only protect communications made directly to a governmental agency, and only protected defendants from liability, not from suit, and that there was no right to an immediate appeal from an order denying a special motion to dismiss. 693 F.3d at 800-02.

In response to the *Metabolic Research* holding, the Legislature amended Nevada's anti-SLAPP statutes in 2013. One of those amendments clarified that, under NRS 41.637, the scope of the anti-SLAPP protections is not limited to a communication made directly to a governmental agency.[3] *See* 2013 Nev. Stat., ch. 176, § 1, at 623. Indeed, the Legislature set out to cure the limitation that the Ninth Circuit erroneously read into NRS 41.637 because "the Ninth Circuit [c]ourt has said that [Nevada's anti-SLAPP law] does not protect people in the way that it should, and that is what this bill [was] trying to address." *See* Hearing on S.B. 286 Before the Assembly Judiciary Comm., 77th Leg. (Nev., May 6, 2013) (Statement of Senator Justin C. Jones). The Legislature's purpose in revisiting NRS 41.637 and the language of the amendment itself "clearly, strongly, and imperatively . . . [shows] that the [L]egislature intended the statute to be retrospective in its operation." *In re Estate of Thomas*, 116 Nev. at 495-96, 998 P.2d at 562. We thus conclude that this amendment to NRS 41.637 was meant to clarify legislative intent in response to *Metabolic Research*, and thus, retroactive application of that statute is proper. *See McKellar*, 110 Nev. at 203, 871 P.2d at 298.

The Legislature also reexamined NRS 41.660 in 2013. As noted above, before the 2013 amendments, the district court was to treat a

[3]The Legislature also clarified that under NRS 41.670(4), there is an immediate appeal from a denial of a special motion to dismiss a SLAPP suit, and this court has jurisdiction to hear these appeals, *see* 2013 Nev. Stat., ch. 176, § 4, at 624.

special motion to dismiss pursuant to the anti-SLAPP statutes as a motion for summary judgment. NRS 41.660(3)(a) (1997); *see also John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009), *superseded by statute as stated in Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 266 (2017). Therefore, before the 2013 amendments to the anti-SLAPP statutes, the party filing a special motion to dismiss had the "initial burden of production and persuasion. This means the moving party must first make a threshold showing that the lawsuit is based on" a protected communication pursuant to NRS 41.637. *John*, 125 Nev. at 754, 219 P.3d at 1282. "If the moving party satisfies this threshold showing, then the burden of production shifts to the nonmoving party, who must demonstrate a genuine issue of material fact." *Id*.

As part of the 2013 amendments, the Legislature made a substantive change to the manner in which courts consider anti-SLAPP special motions to dismiss. Under the 2013 amendments, a court must first "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a) (2013); 2013 Nev. Stat., ch. 176 § 3(3)(a). "If the court determines that the moving party has met the burden pursuant to paragraph (a), [the court must] determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim."[4] NRS 41.660(3)(b) (2013); 2013 Nev. Stat., ch. 176 § 3(3)(b). If the district court determines that the plaintiff has shown by clear and convincing evidence a likelihood of succeeding on the merits, the determination on the special motion has no effect on the remainder of the proceedings. NRS 41.660(3)(c)(1)-(2); 2013 Nev. Stat., ch. 176 § 3(3)(c)(1)-(2).

We cannot say that the Legislature's 2013 amendment to NRS 41.660 is "persuasive evidence of what the Legislature intended by the first statute." *In re Estate of Thomas*, 116 Nev. at 495, 998 P.2d at 562. The 2013 amendment completely changed the standard of review for a special motion to dismiss by placing a significantly different burden of proof on the parties. Furthermore, the legislative history shows that the Legislature knew it was making a substantive change to the law, and there was no conflict as to a questionable interpretation of NRS 41.660 at the time of the 2013 amendment. *See* Hearing on S.B. 286 Before the Assembly Judiciary Comm., 77th Leg. (Nev., March 28, 2013). Thus, we conclude that the 2013 amendments to NRS 41.660 were a substantive change in the law such that retroactive application is improper. Accordingly, we conclude that the district court erred by requiring that Delucchi and

[4]The standard of proof the plaintiff must demonstrate has since been amended as noted *supra* note 2.

Hollis establish a probability of prevailing on the defamation and IIED claims by clear and convincing evidence based on the 2013 version of NRS 41.660.

Having determined the applicable statutes, we now turn to the application of each to this case in reviewing the district court's holdings.

The Songer Report was not a protected communication

"[I]ssues of statutory construction are questions of law reviewed de novo." *Simmons v. Briones*, 133 Nev. 59, 61, 390 P.3d 641, 643 (2017). When the language of a statute is unambiguous, this court will give that language its plain and ordinary meaning and not go beyond it. *Id*. at 62, 390 P.3d at 644. "A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 682, 627, 310 P.3d 560, 566 (2013) (quoting *Williams v. Clark Cty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002)).

As amended in 2013, NRS 41.637 provides:

> Good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern means any:
>
> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity;
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law; or
>
> 4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,
>
> which is truthful or is made without knowledge of its falsehood.

Delucchi and Hollis argue that the district court erred in granting Songer's motion because Songer created the Songer Report pursuant to an employment contract with the Town, not "in furtherance of the right to petition or the right to free speech." NRS 41.637. Thus, Delucchi and Hollis argue that the Songer Report was not protected communication under Nevada's anti-SLAPP statutes because Songer's conduct was not in furtherance of his First Amendment rights of free speech or petition. Songer contends that NRS 41.637's language that "[g]ood faith communication in furtherance of the right to petition or the right to free speech in direct connection with

an issue of public concern" is expressly defined by statute, and the Songer Report falls within that statutory definition.

In reviewing Nevada's anti-SLAPP statutes, this court has recognized that "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" is a phrase that "is explicitly defined by statute in NRS 41.637." *Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 267 (2017). In *Shapiro*, the petitioners challenged the constitutionality of NRS 41.637, arguing that the term "good faith" rendered the statute unconstitutionally vague. *Id*. at 266. This court "conclude[d] that the term 'good faith' does not operate independently within the anti-SLAPP statute. Rather, it is part of the phrase 'good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.'" *Id*. at 267.

Consistent with our holding in *Shapiro*, we conclude that the term "in furtherance of the right to petition or the right to free speech" does not operate independently within the anti-SLAPP statute. It too is part of the phrase "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern," which must be given its express definition as provided in NRS 41.637. *See Nev. Pub. Emps. Ret. Bd.*, 129 Nev. at 627, 310 P.3d at 566.

Interestingly, the Supreme Court of California recently decided a case involving an interpretation of its own anti-SLAPP statute, which we have previously recognized as "similar in purpose and language" to our anti-SLAPP statute. *Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (internal quotation marks omitted). In *City of Montebello v. Vasquez*, the Supreme Court of California reviewed a lower court's denial of an anti-SLAPP motion because the communication did not implicate First Amendment rights. 376 P.3d 624, 632 (Cal. 2016). The *Vasquez* court disagreed, stating that "[t]he Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition." *Id*. The court reasoned that

> [t]he Legislature spelled out the kinds of activity it meant to protect in [the applicable section of California's anti-SLAPP statutes]: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by

> law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Id. (quoting Cal. Civ. Proc. Code § 425.16(e) (West 2016)).

The court explained that "courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions" within California's anti-SLAPP statutes. *Id*. at 633. And "courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law." *Id*. Thus, a defendant establishes that he or she has engaged in protected conduct when that "defendant's conduct . . . falls within one of the four categories . . . defining [the statutory] phrase, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" *Id*. (first alteration in original) (quoting Cal. Civ. Proc. Code § 425.16(e) (West 2016)).

We find the Supreme Court of California's rationale persuasive and consistent with our own anti-SLAPP caselaw. Thus, we conclude that a defendant's conduct constitutes "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" if it falls within one of the four categories enumerated in NRS 41.637 and "is truthful or is made without knowledge of its falsehood."

Here, the district court concluded that the Songer Report was a protected communication under NRS 41.637(2). However, the district court incorrectly applied the standard set forth in the 2013 amendments to NRS 41.660, concluding that Songer met his burden of establishing by a preponderance of the evidence that the Songer Report was protected communication. The correct inquiry is whether Songer's special motion should have been granted under the summary judgment-based standard under the pre-2013 version of NRS 41.660.

Under the pre-2013 version of NRS 41.660, Songer made his initial threshold showing that his report was a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." Specifically, Songer initially showed that the Songer Report was a "[c]ommunication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity" pursuant to NRS 41.637(2). The incident was a matter reasonably of concern to the Town, as it

received a complaint from citizens that emergency protocols were not followed, and the Town retained ETS to conduct an independent investigation into that complaint and then followed Songer's recommendations to terminate Delucchi and Hollis.

Songer also made an initial showing that the Songer Report was true or made without knowledge of its falsehood. In a declaration before the district court, Songer stated, "[t]he information contained in [his] reports was truthful to the best of [his] knowledge, and [he] made no statements [he] knew to be false." Because Songer made the required initial showing, the question becomes whether in opposing the special motion to dismiss, Delucchi and Hollis set forth specific facts by affidavit or otherwise to show that there was a genuine issue for trial regarding whether the Songer Report fit within the definition of protected communication. *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1031 (2005) (explaining that the substantive law controls which factual disputes are material and will thus preclude summary judgment).

We conclude that Delucchi and Hollis presented sufficient evidence to defeat Songer's special motion under the summary judgment standard. In opposing Songer's special motion to dismiss, Delucchi and Hollis presented the arbitrator's findings as well as testimony offered at the arbitration hearings. The arbitrator concluded that the Songer Report was not created in a reliable manner and contained misrepresentations. The arbitrator's determination was based on the evidence presented at the hearing, which included testimony from Songer. Delucchi and Hollis thus presented facts material under the substantive law and created a genuine issue for trial regarding whether the Songer Report was true or made with knowledge of its falsehood. *See City of Montebello v. Vasquez*, 376 P.3d at 633 (providing that the substantive law in deciding whether a communication is protected is the definition of protected communication contained in the anti-SLAPP legislation). We thus conclude that the district court erred in granting Songer's special motion to dismiss.

CONCLUSION

We conclude that the 2013 amendments to NRS 41.637 were meant to clarify legislative intent, thus making retroactive application of the statute's amendments proper. However, having concluded that the 2013 amendments to NRS 41.660 were a change in the law such that retroactive application is improper, we conclude that the district court erred in requiring Delucchi and Hollis to establish a probability of prevailing on the defamation and IIED claims by clear and convincing evidence based on the 2013 version of NRS 41.660. We further conclude that Delucchi and Hollis presented sufficient evidence to create a genuine issue of material fact, and the district

court erred in granting Songer's special motion to dismiss. We thus reverse the district court's order granting Songer's special motion, and remand this matter to the district court and instruct the court to enter an order denying Songer's special motion to dismiss.

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

WASHOE COUNTY SCHOOL DISTRICT, APPELLANT, *v.* KARA WHITE; AND WASHOE SCHOOL PRINCIPALS' ASSOCIATION, RESPONDENTS.

No. 69385

June 29, 2017 396 P.3d 834

Appeal from a district court order vacating an arbitration award. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Reversed.

Washoe County School District Legal Department and *Christopher B. Reich, Neil A. Rombardo*, and *Sara K. Almo*, Reno, for Appellant.

Reese Kintz Guinasso, LLC, and *Devon T. Reese* and *Jason D. Guinasso*, Reno, for Respondents.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked to determine whether the district court erred in granting a motion to vacate an arbitration award affirming a school district's termination of a principal. We answer in the affirmative and conclude that (1) the arbitrator did not exceed his authority because his decision did not conflict with the language of the parties' collective bargaining agreement, (2) the arbitrator did not manifestly ignore the law because he acknowledged NRS 391.3116 and applied the statute in reaching his decision, and (3) the arbitration award was not arbitrary or capricious because it was supported by substantial evidence. Accordingly, we reverse the district court's order granting respondents' motion to vacate the arbitration award.

FACTS AND PROCEDURAL HISTORY

From 2008 until 2013, respondent Kara White was employed as the principal of Lemmon Valley Elementary School (Lemmon Valley). White was a member of respondent Washoe School Principals' Association (WSPA), and the WSPA and appellant Washoe County School District (District) were parties to a collective bargaining agreement (CBA) governing the District's employment terms.

During White's first year as the principal of Lemmon Valley, she received training on the use of school funds, including student activity funds (SAFs). The training emphasized that SAFs could not be used to purchase gift cards for employees. In 2009, Lemmon Valley was randomly selected for auditing, and the audit report revealed that the school had issued gift cards to teachers and staff employees that could expose the District to IRS penalties and fines, and that White had signed off on checks that she had issued to herself. The District sent White a report of the audit and discussed it with her, and White was told to reference the Student Activity Funds Policies and Procedures Manual (Manual) regarding any uncertainties with the use of school funds. The Manual specifically prohibits using SAFs to purchase meals and gifts for administrators or staff. White responded in writing that she would no longer permit or engage in the improper use of school funds. In 2011, training materials for SAFs were emailed to White, which again referenced the Manual.

In February 2013, a counselor at Lemmon Valley notified the District that White had gifted her a $149 necklace purchased with school funds. The District began an investigation into the matter, which included a special audit of expenditures from Lemmon Valley's spring and fall SAFs from 2011 to 2013. At that time, Lemmon Valley participated in biannual fundraisers during the fall and spring, and the proceeds were deposited as SAFs. The fall fundraiser SAF was designated for purchasing playground equipment, and the spring fundraiser SAF was designated for funding student and classroom-based activities and supplies.

The special audit for 2011-2012 revealed that around $5,960 of the expenditures from the fall and spring SAFs were inappropriate.[1] The special audit for 2012-2013 revealed that around $3,287 of the fall fundraiser SAF expenditures were inappropriate.[2] In March 2013, White received a letter notifying her of pending investigations and a mandatory meeting with the District regarding her misuse of SAFs. In particular, the letter stated that White's actions resulted in a violation of NRS 391.312 for:

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[1]The inappropriate expenditures were generally for the purchasing of food and beverages (including alcohol) for school meetings and parties, and gifts for the teachers and staff.

[2]The inappropriate expenditures were similar to the previous year and included the $149 necklace.

> (c) Unprofessional conduct; . . . (i) Inadequate performance; . . . (k) Failure to comply with such reasonable requirements as a board may prescribe; (*l*) Failure to show normal improvement and evidence of professional training and growth; . . . (p) *Dishonesty*.

(Emphasis added.)

In April 2013, White received a notice of recommended dismissal following the District's investigation of her misuse of SAFs. During the investigation, the District found White's responses to the audit during her meeting with the District to be "less than credible" when she claimed to be unaware of the Manual, despite her prior misuse of SAFs during the 2009 audit, which was discussed with her personally. As such, the District concluded that White's responses were "dishonest" and resulted in a violation of NRS 391.312 for "[d]ishonesty." The following month, the District's Deputy Superintendent Traci Davis upheld the recommendation for termination, and White appealed the termination decision to arbitration.

The arbitration hearing was conducted in February 2014 during the course of four days. When the original arbitrator became sick post-hearing, the parties selected Alexander Cohn to render a decision in her place. Arbitrator Cohn received post-hearing briefs and the arbitration record for review. Thereafter, Arbitrator Cohn issued a 61-page opinion and award (Award) affirming the District's decision to terminate White because she "was discharged for just cause" for her dishonesty in the matter. In March 2015, White filed a motion to vacate the Award in the district court. The district court granted White's motion, holding that (1) Arbitrator Cohn exceeded his authority, (2) Arbitrator Cohn manifestly disregarded NRS 391.3116, and (3) the Award was arbitrary and capricious. The District now appeals the district court's order.

DISCUSSION

Standard of review

This court reviews a district court's decision to vacate or confirm an arbitration award de novo. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004).

Similarly, we review a district court's interpretation of a contract de novo. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). When interpreting a contract, this court "look[s] to the language of the agreement and the surrounding cir-

cumstances" in order "to discern the intent of the contracting parties." *Id.* (internal quotation marks omitted). If "the contract is clear and unambiguous," then "[it] will be enforced as written." *Id.* (internal quotation marks omitted).

Arbitrator Cohn did not exceed his authority

White argues that Arbitrator Cohn exceeded his authority as an arbitrator because, pursuant to the express requirements of Article 18.1 of the CBA, she was neither given progressive discipline nor provided with a reasonable opportunity to correct the alleged misconduct. We disagree.

"The Nevada Arbitration Act provides specific grounds for invalidating an arbitration award. NRS 38.241(1)(d) dictates that a court shall vacate an arbitration award if the arbitrator exceeded his powers." *Health Plan of Nev., Inc.*, 120 Nev. at 697, 100 P.3d at 178 (internal citation omitted). In particular, "[a]rbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract." *Id.* "However, allegations that an arbitrator misinterpreted the agreement or made factual or legal errors do not support vacating an award as being in excess of the arbitrator's powers." *Id.* Moreover, "[a]rbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement." *Id*. at 698, 100 P.3d at 178. As such, "[t]he question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided." *Id.*

Therefore, "[a]n award should be enforced so long as the arbitrator is arguably construing or applying the contract" and "there is a colorable justification for the outcome." *Id.* Nonetheless, "[t]he deference accorded an arbitrator . . . is not limitless; he is not free to contradict the express language of the contract." *Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas*, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991).

In *International Ass'n of Firefighters*, the appellant challenged an arbitration award sustaining his disciplinary demotion on the basis that the arbitrator exceeded the scope of his authority. *Id.* at 909-10, 823 P.2d at 878-79. This court examined the parties' collective bargaining agreement and concluded that the appellant's demotion did not contradict the express provisions of the agreement. *Id.* at 913, 823 P.2d at 881. In particular, this court explained that "[t]he language contained in the positive discipline manual is ambiguous with respect to demotion. *There is neither an express provision permitting demotion nor one forbidding it*." *Id.* (emphasis added). Moreover, the agreement did not "provide particular discipline for specified offenses." *Id.* Therefore, this court held that the arbitrator did not exceed his authority in upholding the appellant's demotion. *Id.*

Here, we conclude that there is colorable justification for White's termination and that it does not contradict the express language of Article 18.1 of the CBA. Article 18.1 of the CBA provides that:

> Disciplinary actions . . . taken against post-probationary unit members . . . *shall be progressive in nature and related to the nature of the infraction*. Unit members shall be given *reasonable* opportunity for improvement.
>
> The School District shall not discharge . . . a post probationary bargaining unit member of this unit *without just cause*.

(Emphases added.)

First, Article 18.1 does not designate or require particular disciplinary actions for corresponding offenses, nor does it disallow termination as a form of disciplinary action. *See Int'l Ass'n of Firefighters*, 107 Nev. at 913, 823 P.2d at 881. Instead, under Article 18.1, the District is afforded discretion to determine the appropriate disciplinary action for an employee's misconduct, and if the District elects to terminate an employee, the termination must be supported by "just cause."

Nonetheless, White argues that the arbitrator's award contradicted the plain language of Article 18.1 because her termination was not "progressive in nature." However, Article 18.1 also requires that the disciplinary action be "related to the nature of the infraction," which unambiguously provides that the disciplinary action must be determined by the severity of the misconduct. Accordingly, the phrase "related to the nature of the infraction" qualifies the phrase "progressive in nature," and the two combined modify "[d]isciplinary actions." As such, Article 18.1 serves to preclude the District from choosing disciplinary actions that are clearly disproportionate to the proscribed conduct, while permitting the District to impose more severe penalties for repeated infractions. Otherwise, under White's rationale, any employee's first instance of misconduct, no matter how egregious, could not result in termination, and would effectively render the term "related to the nature of the infraction" meaningless. *See Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (providing that "[a] court should not interpret a contract so as to make meaningless its provisions" (internal quotation marks omitted)); *see also Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) (providing that "[a] contract should not be construed so as to lead to an absurd result").

Therefore we conclude that Article 18.1 does not prohibit the District from terminating an employee for a first offense, and that because Arbitrator Cohn's decision did not contradict the express language of Article 18.1, he did not exceed his authority. *Health Plan of Nev., Inc.*, 120 Nev. at 698, 100 P.3d at 178.

Two common-law grounds in Nevada for reviewing private binding arbitration awards

White also argues that Arbitrator Cohn manifestly disregarded the law and that the Award was arbitrary and capricious. We disagree.

"There are two common-law grounds recognized in Nevada under which a court may review private binding arbitration awards: (1) whether the award is arbitrary, capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly disregarded the law." *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist*., 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). In particular, "the former standard ensures that the arbitrator does not disregard the facts or the terms of the arbitration agreement," while "the latter standard ensures that the arbitrator recognizes applicable law." *Id.*

Arbitrator Cohn did not manifestly disregard the law

The Award provides that (1) "any inclination to reverse [White's] discharge and substitute progressive discipline[,] such as . . . an opportunity to improve . . . , is washed away by the dishonesty finding"; and (2) "the District has carried its burden to show [that White] violated NRS 391.[3]12(1)(c); (i); (k); (*l*); (p)." Pursuant to this language, White argues that Arbitrator Cohn manifestly disregarded NRS 391.3116[3] by ignoring Article 18.1 of the CBA and relying on NRS 391.312[4] in finding just cause to discharge her. We conclude that White's argument is without merit.

"[J]udicial inquiry under the manifest-disregard-of-the-law standard is *extremely limited*. A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration." *Clark Cty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8 (emphasis added) (internal quotation marks and citation omitted). Thus, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law." *Id.* (internal quotation marks omitted); *see also Health Plan of Nev., Inc.*, 120 Nev. at 699, 100 P.3d at 179 (stating that manifest disregard of the law requires a "conscious disregard of applicable law").

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[3]NRS 391.3116 (2013) (replaced in revision by NRS 391.660 in 2015) provides that "the provisions of NRS 391.311 to 391.3197, inclusive, do not apply to a . . . licensed employee who has entered into a contract with the board negotiated pursuant to chapter 288 of NRS if the contract contains separate provisions relating to the board's right to dismiss . . . the employee."

[4]NRS 391.312 (2011) (substituted in revision by NRS 391.31297 in 2013 and then by NRS 391.750 in 2015) provides that "an administrator may be . . . dismissed . . . for the following reasons: . . . [u]nprofessional conduct; . . . [i]nadequate performance; . . . [f]ailure to comply with such reasonable requirements as a board may prescribe; [f]ailure to show normal improvement and evidence of professional training and growth; . . . [d]ishonesty."

In *Clark County Education Ass'n*, a teacher and union filed a petition to vacate an arbitrator's decision affirming the school district's nonrenewal of the teacher's employment contract. 122 Nev. at 340-41, 131 P.3d at 8. In particular, the teacher argued that the school district violated NRS 391.313 "because it did not provide [her] with the opportunity to improve her job performance after the . . . admonition," and that the arbitrator's award manifestly disregarded NRS 391.313 by upholding the school district's decision.[5] *Id.* at 342, 131 P.3d at 9. The district court upheld the arbitrator's decision, and this court affirmed the district court, concluding that the teacher and union "[did] not contend that the arbitrator *willfully ignored* the requirements of NRS 391.313. Rather, they argue[d] that the arbitrator's *interpretation* of NRS 391.313 constituted a manifest disregard of the law." *Id.* at 344-45, 131 P.3d at 10 (emphases added). Moreover, this court noted that the arbitrator "clearly appreciated the significance of NRS 391.313" by citing to it in the arbitration award. *Id.* at 345, 131 P.3d at 10. Thus, this court concluded that "we may not concern ourselves with the correctness of the arbitrator's interpretation of the statute" and that "the arbitrator did not manifestly disregard the statute." *Id.*

Here, Arbitrator Cohn cited to NRS 391.3116 in a footnote, which states "NRS 391.3116 provides that a collective bargaining agreement may super[s]ede the provisions of NRS 391.311 to 391.397." Although the footnote misstates the language of NRS 391.3116 by characterizing its mandatory exclusion of the relevant statutes as being optional, "we may not concern ourselves with the correctness of the arbitrator's interpretation of [NRS 391.3116]." *Clark Cty. Educ. Ass'n*, 122 Nev. at 345, 131 P.3d at 10. Instead, we conclude that Arbitrator Cohn's citation to NRS 391.3116 shows that he "clearly appreciated the significance" of the statute, regardless of whether he correctly applied it. *Id.*

Moreover, in finding that there was just cause to terminate White, the Award provides that "whether the 'just cause' standard is viewed under the NRS or [Article 18.1 of the CBA], given the totality of [White's] performance errors and misconduct, summary discharge is warranted." This statement merely creates ambiguity as to whether Arbitrator Cohn relied on the NRS or Article 18.1 in reaching his conclusion and is contrary to White's proposition that Arbitrator Cohn solely relied upon the provisions of NRS Chapter 391. Accordingly, we conclude that White failed to show by clear and convincing evidence that Arbitrator Cohn willfully ignored Article 18.1

[5]NRS 391.313 (2013) (replaced in revision by NRS 391.755 in 2015) provides, in relevant part, that if "an administrator . . . believes it is necessary to admonish [an] employee . . . , the administrator shall: . . . make a reasonable effort to assist the employee to correct whatever appears to be the cause for the employee's potential demotion . . . and allow reasonable time for improvement."

in rendering the Award.[6] Therefore, we hold that Arbitrator Cohn did not manifestly disregard the law.

The Award is neither arbitrary nor capricious

White argues that the Award was arbitrary and capricious because substantial evidence does not support Arbitrator Cohn's finding of dishonesty.[7] We disagree.

"The arbitrary-and-capricious standard does not permit a reviewing court to vacate an arbitrator's award *based on a misinterpretation of the law*." *Clark Cty. Educ. Ass'n*, 122 Nev. at 343-44, 131 P.3d at 9 (emphasis added). Instead, a court's review of the arbitrary and capricious standard is "limited to whether the arbitrator's findings are supported by substantial evidence in the record." *Id.* at 344, 131 P.3d at 9-10.

First, we conclude that Arbitrator Cohn's primary justification for affirming White's discharge was her dishonesty in regard to the misuse of SAFs. Arbitrator Cohn defines "dishonesty" in a footnote, which states that "[a]n '[u]ntruthful' finding requires preponderant proof of a willful misstatement or omission of material fact." Arbitrator Cohn then examined the records of the arbitration proceedings and concluded that, based on considerable documentary evidence and testimonies, White's alleged lack of understanding in regard to the use of SAFs and her inability to recall the Manual was implausible such that her responses to the District during her investigatory meeting were dishonest.

We further conclude that there is substantial evidence to support Arbitrator Cohn's findings of dishonesty. First, training on SAFs was provided during White's first year as a principal for Lemmon Valley, in which she was advised that principals were accountable for all school funds and accounts under their supervision. Moreover, the training emphasized that SAFs could not be used to purchase gift cards for employees. Second, following the 2009 random audit of Lemmon Valley, White was specifically told to reference the Manual. White also responded in writing that she would no longer engage in the improper use of school funds, including the use of SAFs to purchase gift cards for employees. Third, a copy of the Manual was

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[6]We also note that at no point during White's arbitration did she mention or rely upon NRS 391.3116 in arguing for the exclusion of NRS 391.312's application.

[7]White also argues that (1) there is not substantial evidence to support the District's compliance with Article 18.1's requirements before terminating White, and (2) Arbitrator Cohn did not personally participate in the actual arbitration proceedings and merely "based his credibility determinations on documentary evidence and transcripts." We need not address the first argument because, as discussed below, the proper analysis concerns whether substantial evidence supports Arbitrator Cohn's findings that White was dishonest. We also reject the second argument because White agreed to let Arbitrator Cohn render a decision based on the previously generated record.

available at Lemmon Valley, and was provided on the school website. Finally, training materials for SAFs were emailed to White in 2011, which again referenced the Manual. As such, the record shows that the District ensured that principals were well-informed of the policies and restrictions relating to the use of SAFs, and that White was personally educated on the matter. Accordingly, we hold that the Award is neither arbitrary nor capricious.

CONCLUSION

We hold that Arbitrator Cohn did not exceed his authority in affirming the District's termination of White. We further hold that Arbitrator Cohn did not manifestly disregard the law and that his decision was not arbitrary or capricious. As such, we reverse the district court's order granting White's motion to vacate the Award.

HARDESTY and STIGLICH, JJ., concur.

MARGARET RAWSON, PETITIONER, *v.* THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF DOUGLAS; AND THE HONORABLE MICHAEL P. GIBBONS, DISTRICT JUDGE, RESPONDENTS, AND PEGGY CAIN; JEFFREY CAIN; AND HELI OPS INTERNATIONAL, LLC, REAL PARTIES IN INTEREST.

No. 71548

June 29, 2017 396 P.3d 842

Original petition for writ of mandamus or prohibition challenging a district court order adding petitioner to a prior judgment in a judgment debtor action.

Petition denied.

Dubowsky Law Office, Chtd., and *Peter Dubowsky*, Las Vegas, for Petitioner.

Matuska Law Offices, Ltd., and *Michael L. Matuska*, Carson City, for Real Parties in Interest.

Before PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this original petition for extraordinary relief, we examine whether proceedings under the judgment debtor statutes, NRS 17.030-.080,

give rise to a final, appealable judgment that would preclude review of the judgment through a petition for extraordinary writ relief and, if so, whether we should nevertheless consider this writ petition because the underlying district court order is allegedly void. We conclude that a judgment debtor proceeding is a postjudgment action independent from the underlying action with its own statutory procedure allowing for notice and an opportunity to be heard and a resulting judgment. Thus, a final order adjudicating a judgment debtor proceeding is appealable under NRAP 3A(b)(1), and such an appeal is generally a plain, speedy, and adequate remedy that precludes extraordinary writ relief. Although petitioner asserts that the challenged order is void and may be challenged by writ petition on that basis, the principles governing extraordinary writ relief direct otherwise when the petitioner could have appealed the challenged order. Accordingly, we decline to consider petitioner's arguments concerning whether the challenged order is void and deny this petition for extraordinary writ relief.

FACTS AND PROCEDURAL HISTORY

Real parties in interest Peggy and Jeffery Cain are the principals of Heli Ops International, LLC (collectively Heli Ops). Heli Ops loaned C4 Worldwide, Inc., $1 million to invest in collateralized mortgage obligations (CMOs), and C4 was required to repay Heli Ops $20 million with 9 percent interest. Instead of investing in CMOs, C4's principals, among them Chairman and CEO D.R. Rawson, allegedly diverted the $1 million for their personal use. C4 defaulted on the loan, and D.R. Rawson signed a settlement agreement acknowledging the $20 million debt. D.R. Rawson defaulted on the settlement agreement, and Heli Ops sued, naming D.R. Rawson, C4, and five other defendants, but not naming petitioner Margaret Rawson, who is the wife of D.R. Rawson and was listed as C4's treasurer. D.R. Rawson, C4, and two of the other defendants failed to defend the lawsuit, and Heli Ops obtained a $20 million default judgment against them, plus interest, costs, and attorney fees, for a total judgment in excess of $29 million.

In the collection process on the default judgment, Heli Ops traced some loan proceeds to Margaret's accounts and instituted garnishment and joint debtor proceedings against her. The district court issued an NRS 17.040 summons directing "Margaret Rawson to appear and show cause why she should not be bound by the Default Judgment," and the summons was served on her. Margaret requested garnishment exemptions and moved to quash the summons, challenging the legal bases for Heli Ops' institution of judgment debtor proceedings against her under NRS 17.030. Heli Ops opposed the motion. After the district court asked the parties if they wanted a hearing on the motion to quash and neither party responded, the motion was submitted on the briefs, evidence, and previous testi-

mony. In a February 2014 order, the district court denied Margaret's request for garnishment exemptions and her motion to quash, finding that she failed to present "a credible defense to the wrongful diversion of funds from [C4] to her bank accounts" and "failed to show cause why she should not be added to the [default] judgment and be bound by its terms." *See* NRS 17.030. The order concluded that Margaret "shall be bound by the Default Judgment in all respects and as if she had been named in the original complaint and the Default Judgment." Heli Ops served notice of the order in February 2014.

Margaret filed a bankruptcy petition in February 2015, staying enforcement of the judgment. The Bankruptcy Court denied Margaret discharge of the judgment debt in August 2016, and Heli Ops has since sought to enforce the judgment. In October 2016, Margaret filed this writ petition challenging the portion of the district court's order that added her to the default judgment as a joint debtor.[1] Thereafter, we directed Margaret to show cause why the petition should not be denied because the challenged order was a final judgment, from which she had an adequate remedy in the form of an appeal. Margaret responded, and Heli Ops filed a reply.

DISCUSSION

In general, this court declines to consider petitions for extraordinary writ relief when the petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law, such as an appeal that will encompass the challenged order. NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224-25, 88 P.3d 840, 841 (2004) (explaining that writ relief is not available to correct an untimely notice of appeal). In addressing whether the challenged order is a final judgment from which she could have appealed, Margaret argues that the order was interlocutory and, regardless, she was not a party to the underlying litigation and thus did not have the right to appeal the order. She further argues that writ relief is appropriate because this court has never explained the judgment debtor statutes and the order adding her to the default judgment is void on due process grounds. In determining whether to consider Margaret's writ petition, we must examine the joint debtor statutes to determine whether an order resolving a joint debtor proceeding is a final, appealable order. *See Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *cf. Meritage Homes of Nev., Inc. v. FDIC*, 753 F.3d 819, 825-26 (9th Cir. 2014) (commenting that Nevada has no caselaw on the statutes governing joint debtor proceedings).

[1]Margaret's writ petition does not challenge the portion of the district court's order pertaining to garnishment.

An order resolving a joint debtor proceeding is a final, appealable order, rendering extraordinary writ relief unavailable

At common law, a creditor could sue joint debtor defendants together, but if all of them could not be found, then the creditor could elect to serve those defendants that could be found and served. *See Tay, Brooks & Backus v. Hawley*, 39 Cal. 93, 98 (1870); *Meller & Snyder v. R & T Props., Inc.*, 73 Cal. Rptr. 2d 740, 744 (Ct. App. 1998). If a creditor did elect to so proceed, then he forfeited his right to proceed against the non-served joint debtors because the joint obligation was deemed to merge into the judgment obtained against the served and prosecuted debtors. *Tay, Brooks & Backus*, 39 Cal. at 98; *Meller & Snyder*, 73 Cal. Rptr. 2d at 744.

Nevada modified the merger effect of the common law rule in NRS 14.060(1) and created a process to extend a judgment entered against one joint debtor to an unserved joint debtor through NRS 17.030-.080. *See Tay, Brooks & Backus*, 39 Cal. at 98 (stating that the comparable California statutes were also enacted to address the common law merger effect); *Meller & Snyder*, 73 Cal. Rptr. 2d at 744. Together, these statutes provide that joint debtors who were named as defendants, but not originally served, may be served with a summons after the judgment has been entered against the other joint debtors and "summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons." NRS 17.030. The summons "shall describe the judgment, and require the person summoned to show cause why the person should not be bound by" the judgment. NRS 17.040. "It shall not be necessary to file a new complaint." *Id.* Instead, the summons, affidavit, original complaint, original judgment, and the joint debtors' answers constitute the pleadings in the joint debtor action. NRS 17.070. Joint debtors who were not originally served may raise any available defenses that arose subsequent to the original judgment or any defenses to the original action, except for the statute of limitations. NRS 17.060; NRS 17.070. If the joint debtors contest the debt and file answers, "[t]he issues formed may be tried as in other cases," but if a judgment is rendered against the joint debtor defendants, the damages may only be for the "amount remaining unsatisfied on such original judgment, with interest thereon." NRS 17.080.

These statutes provide for new service of process, a new set of pleadings, the availability of all defenses except for the statute of limitations, a trial on the issues "as in other cases," and a separate judgment. NRS 17.030-.080. Therefore, a joint debtor action is a new action against the previously unserved joint debtors, independent from the underlying action against the originally served debtors. *Id.*; *see also* 30 Am. Jur. 2d *Executions and Enforcements of Judgments* § 10 (2005).

This interpretation is consistent with jurisprudence interpreting California's joint debtor statutes, *see, e.g.*, *Waterman v. Lipman*, 6 P. 875, 875-76 (Cal. 1885); *Tay, Brooks & Backus*, 39 Cal. at 94; *Colquhoun v. Pack*, 161 P. 1168, 1168-69 (Cal. Ct. App. 1916), which are analogous to Nevada's statutes, Nev. Rev. Laws §§ 5243-5248 (1912) (referencing Cal. Civ. Proc. Code (CCP) §§ 989-994 (1909)).[2] The court in *Meller & Snyder* examined CCP §§ 989-994, noting that the statutory language contemplated that the joint debtors were required to be summoned "*in the same manner as though they had been originally served with the summons*," the joint debtors could deny liability and assert "*any defense existing at the commencement of the action*," and that "[t]he issues so formed '*may be tried as in other cases*.'" 73 Cal. Rptr. 2d 740, 748-49 (quoting CCP §§ 989, 992, and 994, italics added by *Meller & Snyder*). The *Meller & Snyder* court interpreted this language to mean that where joint debtors deny the underlying liability, the joint debtors "thereby put[ ] in issue all the material allegations of the plaintiff's complaint as fully and effectively as [they] might have done in the first instance had the original summons been served upon" them, and the joint debtors must "be given [their] day in court as in any other case . . . as if [they] had been served in the original proceeding." *Id.* at 748-49 (quoting *Colquhoun*, 161 P. at 1168). Although the court did not examine the particular issue of whether a joint debtor action was independent from the underlying action, the matter in *Meller & Snyder* was itself an appeal from a joint debtor judgment, and the court held that where liability on the debt was contested, summary procedures were inappropriate and the plaintiff was required "to prove the merits of its case against th[e] [joint debtor] defendant[s]." *Id.* at 741, 750.

Also supporting our conclusion is the California courts' analysis of the role of due process in joint debtor proceedings. The California courts have recognized that due process requires a new action against the previously unserved joint debtors, because "a judgment which subjects to execution the interest of a person who has had no opportunity to be heard in the action[ ] cannot be upheld without violating [due process] principles." *Id.* at 747 (quoting *Tay, Brooks & Backus*, 39 Cal. at 97); *see Colquhoun*, 161 P. at 1168. This court has held similarly in related contexts. *Callie v. Bowling*, 123 Nev. 181, 184, 160 P.3d 878, 880 (2007) (holding, where a plaintiff sought to add a corporation's president to a judgment against the corporation, that "[t]he only method by which Bowling could have asserted her alter ego claim without jeopardizing Callie's due process rights was through an independent action against Callie with the appropriate notice").

[2]While Nevada's statutes have remained unchanged, the California Legislature has amended California's joint debtor statutes, but those amendments are not material to our discussion here. *See* CCP §§ 989-994 (West 2009).

Further, in analyzing the statutes governing postjudgment garnishment proceedings, this court recognized that garnishment proceedings are independent from the underlying action and that the resulting judgment in favor of or against the garnishee defendant constitutes a final judgment in the garnishment proceeding, which may be appealed under NRAP 3A(b)(1) and NRS 31.460. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1213-14, 197 P.3d 1051, 1056-57 (2008). In doing so, we observed that "writs of garnishment must be served in the same manner as a summons in a civil action," and that where contested, "the matter must be tried and judgment rendered, in a manner similar to civil cases." *Id.* As garnishment procedures are similar to those followed in joint debtor proceedings, both incorporate due process protections, and both are designed to result in a final judgment as to the garnishee or joint debtor, we perceive no reason to conclude that a judgment rendered in a joint debtor proceeding is not appealable.

Accordingly, we conclude that a joint debtor proceeding is an action independent from the underlying action, giving rise to a final judgment that may be appealed by an aggrieved party under NRAP 3A(a) and (b)(1). Therefore, Margaret had the right to appeal the joint debtor order in this case. She failed to do so. A right to an appeal is generally an "adequate and speedy legal remedy" that precludes writ relief, *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558, and a writ petition may not be used as a substitute to correct a party's failure to timely appeal, *Pan*, 120 Nev. at 224-25, 88 P.3d at 841. *See* 52 Am. Jur. 2d *Mandamus* §§ 38, 39 (2011). In these circumstances, Margaret's writ petition is generally subject to dismissal without further discussion. Margaret also argues, however, that even if the order was appealable, we should nevertheless consider her writ petition because the joint debtor order is void for lack of due process.[3]

[3]In her writ petition, Margaret also argues that she was not a party to the judgment debtor action because she was never named as a defendant and, thus, as a nonparty she did not have a right to appeal the judgment debtor order. Margaret does not dispute, however, that she was properly served and appeared in the judgment debtor action. This is sufficient to provide the district court with jurisdiction over her. *See Frank Settelmeyer & Sons, Inc.*, 124 Nev. at 1213, 197 P.3d at 1056 ("[G]arnishees who are properly served or appear formally become parties of record to the garnishment proceeding."). We therefore reject Margaret's argument that she could not appeal because she was not a party to the judgment debtor action. *Cf. Mona v. Eighth Judicial Dist. Court*, 132 Nev. 719, 728, 380 P.3d 836, 842-43 (2016) (holding that one of the petitioners could seek writ relief because she had not been named or served in her individual capacity in a foreign action and was thus not a party in that capacity to the domesticated collection action). We express no opinion, however, with respect to Margaret's arguments that the joint debtor statutes were improperly applied to her. Nothing in this opinion precludes Margaret from raising those arguments in another proceeding.

We decline to consider a writ petition challenging an allegedly void order when an appeal was available

We have not previously considered whether a final, appealable judgment that is allegedly void may be challenged via writ petition when the petitioner failed to appeal the judgment. Many courts have concluded that an appealable, but void, order may be attacked through a petition for a writ of mandamus. This view is supported by two interrelated lines of reasoning. First, some courts have reasoned that a void order may be collaterally attacked at any time. *E.g.*, *Friesen v. Friesen*, 410 P.2d 429, 431 (Kan. 1966) ("[A] void judgment or order is a nullity and may be collaterally attacked at any time."); *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012) ("A void judgment . . . can be collaterally attacked at any time."); *In re CAS Cos., LP*, 422 S.W.3d 871, 874 (Tex. App. 2014) ("Mandamus is available to correct a void order even if the order was appealable and the party requesting relief failed to pursue an appeal."); *see also Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973) ("It is one thing to say that a void order *may* be appealed from but it is another thing to say that it *must* be appealed from for it would be anomalous to say that an order void upon its face must be appealed from before it can be treated as a nullity and disregarded." (internal quotation marks omitted)). Second, other courts have reasoned that a void order is a nullity and will not confer jurisdiction upon an appellate court, and thus there is no appellate remedy for a void order even if the order would have otherwise been appealable. *E.g.*, *Luken v. BancBoston Mortg. Corp.*, 580 So. 2d 578, 581 (Ala. 1991) ("[A] void judgment will not support an appeal . . . ."); *Universal Underwriters Ins. Co. v. Judge & James, Ltd.*, 865 N.E.2d 531, 543 (Ill. App. Ct. 2007) ("Additionally, although a void order may be attacked at any time, either directly or collaterally, the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts. If a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that are void. The reason is obvious. Absent jurisdiction, an order directed at the void judgment would itself be void and of no effect." (citations and internal quotation marks omitted)); *see also In re Trey H.*, 798 N.W.2d 607, 613 (Neb. 2011) (holding that while "[a] void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction," an appellate court may nevertheless determine if jurisdiction is lacking and order the lower court to vacate a void order or take other appropriate action).

Other courts have concluded that because the aggrieved party could have obtained all available relief through an appeal, a petition for a writ of mandamus challenging the void order is not an appropriate means to compel such relief. *E.g.*, *Ex parte Town of Valley Grande*, 885 So. 2d 768, 771 (Ala. 2003) (holding that extraordinary writ relief may not be used "as a substitute for an appeal," and

that because the parties seeking writ relief "had an adequate remedy by appeal . . . a writ of mandamus . . . was not the appropriate means of review"); *Mischler v. Thompson*, 436 S.W.3d 498, 503 (Ky. 2014) ("Appellant's remedy for negating the entry of an invalid order signed, ostensibly by the judge, is to appeal. Appellant had the remedy of appeal, and she declined to do so. She is not, therefore, entitled to a writ of mandamus to compel the remedy she could have received on appeal."); *see also Gran v. Hale*, 745 S.W.2d 129, 130 (Ark. 1988) ("Had he appealed the convictions, the complaints he now raises could have been reviewed. Neither mandamus, certiorari, nor prohibition may be used as a substitute for appeal."). This reasoning focuses on the principles governing extraordinary writs, which direct generally that extraordinary writ relief will not issue in cases where the aggrieved party had "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.330; *see also* NRS 34.020.

In Nevada, however, void orders have historically been appealable. In *Osman v. Cobb*, we recognized that although the various jurisdictions "are in hopeless conflict with reference to the appealability of a void judgment[,] . . . [t]his court . . . has since its beginnings held that an appeal from a void judgment might properly be considered and acted upon." 77 Nev. 133, 135-36, 360 P.2d 258, 259 (1961) (citing *Hastings v. Burning Moscow Co.*, 2 Nev. 93, 97 (1866) (holding that an appellate court may on appeal set aside a void judgment or modify the portions of a judgment that are void)). This eliminates from our consideration the line of reasoning that a void order is a nullity that does not confer appellate jurisdiction.

Although there remains a conflict between the cases holding that a void order may be collaterally attacked at any time through a petition for an extraordinary writ, despite the availability of an appeal, and the cases holding that mandamus is not appropriate where there is a plain, speedy, and adequate remedy, the second approach is specific to extraordinary writ relief and consistent with our jurisprudence. We have long held that the right to an appeal is generally a plain, speedy, and adequate remedy that precludes writ relief. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *Pan*, 120 Nev. at 224, 228, 88 P.3d at 841, 843; *Bowler v. First Judicial Dist. Court*, 68 Nev. 445, 453-55, 234 P.2d 593, 598-99 (1951); *Walcott v. Wells*, 21 Nev. 47, 51, 24 P. 367, 368 (1890); *see also* NRS 34.020; NRS 34.170; NRS 34.330. This principle is not inconsistent with caselaw establishing that void orders may be collaterally attacked at any time. *See State ex rel. Smith v. Sixth Judicial Dist. Court*, 63 Nev. 249, 256-57, 167 P.2d 648, 651 (1946), *overruled on other grounds by Poirier v. Bd. of Dental Exam'rs*, 81 Nev. 384, 387, 404 P.2d 1, 2 (1965), *overruled on other grounds by Pengilly v. Rancho Santa*

Fe Homeowners Ass'n, 116 Nev. 646, 648-49, 5 P.3d 569, 570-71 (2000). While void orders may indeed be collaterally attacked at any time, a party may use an extraordinary writ petition as the vehicle to attack a void order only when extraordinary writ relief is otherwise available. Such relief is not available when the petitioner had the right to appeal the challenged order because an appeal is a plain, speedy, and adequate remedy. Therefore, we decline to consider petitions for extraordinary writ relief challenging a void order where the petitioner had a right to appeal the challenged order.

Accordingly, as Margaret had a right to appeal the challenged order, but failed to pursue it, we decline to consider the merits of her writ petition and deny it.[4]

PICKERING and PARRAGUIRRE, JJ., concur.

MICHAEL P. ANSELMO, PETITIONER, *v*. CONNIE BISBEE, CHAIRMAN; SUSAN JACKSON, TONY CORDA, AND ADAM ENDEL, COMMISSIONERS; AND THE STATE OF NEVADA BOARD OF PAROLE, REAL PARTIES IN INTEREST.

No. 67619

June 29, 2017 396 P.3d 848

Original petition for extraordinary relief requesting the Parole Board to reconsider its decision to deny parole partially based on an inapplicable aggravating factor.

Petition granted.

[Rehearing denied November 16, 2017]

[En banc reconsideration denied January 19, 2018]

Brownstein Hyatt Farber Schreck, LLP, and *Kirk B. Lenhard* and *Emily A. Ellis*, Las Vegas, for Petitioner.

Adam Paul Laxalt, Attorney General, *Jeffrey M. Conner*, Assistant Solicitor General, and *Daniel M. Roche*, Deputy Attorney General, Carson City, for Real Parties in Interest.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

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[4]In light of our conclusion, we decline to address the underlying question of whether the order is void for lack of due process. Nothing in this opinion, however, prohibits Margaret from challenging the joint debtor order as void in a different procedural context. *See* NRCP 60(b)(4); *Foster v. Dingwall*, 126 Nev. 49, 53-54 n.3, 228 P.3d 453, 456 n.3 (2010); *State ex rel. Smith*, 63 Nev. at 256-57, 167 P.2d at 651.

OPINION

By the Court, STIGLICH, J.:

Generally, an inmate does not have any protectable due process or liberty interest in release on parole, unless that right is created by state statute. Given the clear discretionary language of Nevada's parole statute, this court has consistently held that Nevada inmates have no protectable liberty interest in release on parole. Accordingly, this court will not disturb a determination of the Nevada Parole Board (Board) to deny parole for any reason authorized by regulation or statute.

Nonetheless, eligible Nevada inmates do have a statutory right to be considered for parole by the Board. When the Board clearly misapplies its own internal guidelines in assessing whether to grant parole, this court cannot say that the inmate received the consideration to which they are statutorily entitled. Therefore, under the limited circumstances presented in this case, we conclude that a new parole hearing is warranted.

FACTS AND PROCEDURAL HISTORY

In 1972, appellant Michael P. Anselmo was convicted of murder and sentenced to life in prison without the possibility of parole. He sustained subsequent convictions for escape in 1976 and 1977, and was sentenced to a consecutive ten years for each conviction.

For the next twenty years, Anselmo largely became a model prisoner. In 2006, the Pardons Board commuted his sentences to life with the possibility of parole after five years, with one concurrent ten-year sentence, and one consecutive ten-year sentence.

Between 2006 and 2012, Anselmo appeared before the Parole Board on three separate occasions. Each time, the Board denied parole, primarily citing to the seriousness of Anselmo's underlying offense and/or the impact of his offense on the victim.

Anselmo appeared before the Parole Board for the hearing at issue on November 17, 2014. Pursuant to the standards promulgated in the Nevada Administrative Code, the Board completed a Parole Risk Assessment, which assigned Anselmo's offense a "severity level" of "[h]ighest," and Anselmo a "[r]isk [s]core" of "[l]ow," indicating that the Board should consider certain aggravating and mitigating factors in determining whether parole was appropriate.

As mitigating factors, the Board noted that Anselmo had not committed a disciplinary infraction since 2007, had community or family support, would be paroled to his pending escape sentence, and had participated in extensive educational programming. As aggravating factors, the Board noted the impact on the victim and/or community, that Anselmo had sustained two convictions for escape while incarcerated, and that the "[n]ature of criminal record is increasingly more serious: Previous offenses are property crimes."

The three hearing members who conducted the parole hearing recommended granting parole. That recommendation was not, however, ratified by a majority of the Board, as the remaining four Board members voted to deny parole. The Board's written decision indicated that the "[n]ature of criminal record is increasingly more serious" and the "[i]mpact on victim(s) and/or community." Anselmo filed a request for reconsideration with the Board, which was denied.

Anselmo now argues that he is entitled to a new parole hearing because (1) the Board's denial of parole based on certain immutable characteristics, such as the seriousness of the underlying offense, violates the Due Process Clause; and (2) the Board failed to follow its own internal guidelines in assessing the applicable aggravating and mitigating factors.

DISCUSSION

Standard of review

"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. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation omitted) (internal quotation marks omitted). "[W]here there is [no] plain, speedy and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

In this case, there is no applicable statutory vehicle through which Anselmo may challenge the Board's actions. Accordingly, we consider whether the actions of the Board were contrary to the established rules of law, warranting the issuance of a writ of mandamus.

The Board may deny parole for any reason authorized by statute

When an inmate becomes eligible for parole, "the [Parole] Board shall consider and may authorize the release of the prisoner on parole." NRS 213.140(1). Despite this guarantee that an eligible inmate will be considered for parole, "the release . . . of a person on parole . . . is an act of grace of the State. No person has a right to parole . . . ." NRS 213.10705.

The United States Supreme Court has determined that an inmate does not have any protectable due process or liberty interest in release on parole, unless that right is created by state statute. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1,

7 (1979). This court has consistently held that given its discretionary language, Nevada's parole statute creates no "protectable liberty interest sufficient to invoke the Due Process Clause." *State, Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 271, 255 P.3d 224, 228 (2011); *see also Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 678 P.2d 1158, 1160 (1984) (holding that because no due process right to parole exists, the Board is not constitutionally required to provide any reason for the denial of parole); *Severance v. Armstrong*, 96 Nev. 836, 839, 620 P.2d 369, 370 (1980).

Despite this firmly settled law, Anselmo urges this court to adopt the California approach taken in *In re Lawrence*, 190 P.3d 535 (Cal. 2008), with respect to the circumstances in which parole may be denied based on the egregiousness of the underlying offense. Under *Lawrence*, parole may be denied based on the egregiousness of the underlying offense only if the parole board also finds that the inmate continues to pose a current threat to public safety. *Id*. at 560. In other words, the court concluded that "[t]he relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current dangerousness*." *Id*. Accordingly, the California court determined that where the record was "devoid of any evidence" indicating that the inmate posed a current threat to public safety, the inmate's "due process and statutory rights were violated by the . . . reliance upon the immutable and unchangeable circumstances of her commitment offense." *Id*. at 564.

There is, however, a significant difference between the parole statutes at issue in *Lawrence* and those in Nevada that is central to the decision in *Lawrence*. Specifically, the California Parole Board "*must* grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction." *Id.* at 547 (internal quotation marks omitted). Based on that language, the California Supreme Court has determined that eligible California inmates have a due process right in the grant of parole, such that a decision to deny parole is subject to judicial review. *See In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002). This fact is central to the conclusion in *Lawrence* that some evidence must support a finding of current dangerousness. *See* 190 P.3d at 560.

In contrast, as discussed above, the Nevada statutory scheme does not provide any due process right in the grant of parole. Therefore, unlike the California courts, this court generally will not review the evidence supporting a decision of the Board. *See Morrow*, 127 Nev. at 271-72, 255 P.3d at 228 (reiterating that no cause of action exists when parole is denied). Both NRS 213.1099(2)(c) and NRS 213.10885(2)(a) clearly provide that the Board "shall" consider the seriousness of the underlying offense in determining whether

to grant or deny parole. Given that Nevada law clearly allows for the denial of parole based on the severity of the crime committed, it cannot be said that the Board acted contrary to established law in considering the seriousness of the underlying offense. As such, the Board's actions in this respect would not warrant relief in mandamus. *See Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780 (explaining that writ of mandamus may issue upon a showing that a state agency acted "contrary to the . . . established rules of law" (internal quotation marks omitted)).

The Board must follow its internal guidelines

Anselmo also argues that he is entitled to a new parole hearing because the Board failed to follow its internal guidelines when it noted as a reason for denial that the "[n]ature of criminal record is increasingly more serious." This court agrees.

Pursuant to NRS 213.1099(2) and NRS 213.10885(1), the Board must promulgate detailed standards to determine whether the release of an inmate on parole is appropriate. These standards are codified in the Nevada Administrative Code. Under NAC 213.512(1), the Board must first assign "a severity level" to the crime for which parole is being considered. The Board must then assign "a risk level" "using a combination of risk factors that predict recidivism." NAC 213.514(1)-(2). Based on these scores, NAC 213.516 provides an assessment regarding whether to grant parole, deny parole, or consider the other aggravating and mitigating factors set forth in NAC 213.518.

In this case, the severity level of Anselmo's crime was rated "[h]ighest," while his risk level was considered "[l]ow." In these circumstances, NAC 213.516 indicates that the Board should consider aggravating and mitigating factors. The Board noted multiple mitigating factors in Anselmo's favor, including his favorable disciplinary record, his participating in programming, family support, and the fact that he would be paroled to a consecutive sentence. *See* NAC 213.518(3)(a), (c), (g), and (i). As aggravating factors, the Board noted the severe impact of the crime on the victim, as provided by NAC 213.518(2)(g), and also noted that the "[n]ature of criminal record is increasingly more serious," as provided by NAC 213.518(2)(k).

With respect to the aggravating factor under NAC 213.518(2)(k), the internal guidelines for the Board of Parole Commissioners state:

> **Nature of criminal record is increasingly more serious.**
>
> Indicate this factor if criminal conduct of the person has escalated over time to include violence toward victims or others, or the scale of criminal activity has increased over time. If the person is now serving a sentence of life, or Murder/Sexual Assault, don't use this as the person has already committed

> the most serious of crimes. This factor is used as a possible indicator of more serious activity in the future.

Nevada Parole Guidelines Aggravating and Mitigating Factors Definitions, http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Aggravating_and_Mitigating_Factors_Definitions.pdf (last visited March 21, 2017). Based on the plain language of the internal guidelines, this aggravator should not have been applied to Anselmo.

This court will not review the ultimate decision of the Board to grant or deny parole, as Anselmo has no liberty interest in release on parole. *Morrow*, 127 Nev. at 271-72, 255 P.3d at 228. Nonetheless, NRS 213.140(1) clearly provides that "the Board shall consider" eligible inmates for parole. Therefore, while Anselmo has no due process right in the grant of parole itself, Nevada law clearly confers a right to be "consider[ed]" for parole.

In evaluating whether the Board's error impacted Anselmo's right to be considered for parole, we find the South Carolina case of *Cooper v. South Carolina Department of Probation, Parole & Pardon Services*, 661 S.E.2d 106 (S.C. 2008), to be instructive. In *Cooper*, the South Carolina Supreme Court examined a case in which an inmate argued that the South Carolina Parole Board's failure to consider all statutorily mandated criteria constituted an impermissible infringement on the inmate's statutory right to be reviewed by the Board. *Id*. at 110.[1]

While noting that it appeared the Board had denied parole for entirely permissible reasons, the court observed:

> If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest.
>
> Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.

Id. at 111. Accordingly, the court determined the inmate was entitled to relief in the form of a new parole hearing. *Id*. at 112.

While not factually identical, *Cooper* indicates that while the decision to grant or deny parole is not generally reviewable, the Board

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[1]As in Nevada, parole in South Carolina is a privilege, not a right. *Cooper*, 661 S.E.2d at 110. However, inmates who are eligible for parole are entitled by statute to a yearly review by the parole board. S.C. Code Ann. § 24-21-620 (2007).

is still obligated to act within established parameters. Notably, the error in this case is not related to the weight or sufficiency of the evidence underlying any of the criteria relevant to the decision to deny parole. Rather, the Board's internal guidelines clearly indicated that the aggravator set forth in NAC 213.518(2)(k) should not be used in those cases where the inmate is serving a life sentence for murder. Notably, the decision of the Board was extremely close, with the three members voting to grant parole. Under these limited circumstances, we conclude that the Board's consideration of the inapplicable aggravator in NAC 213.518(2)(k) infringed upon Anselmo's statutory right to receive proper consideration for parole. Given the Board's clear error, we conclude that extraordinary relief is necessary in this instance.

CONCLUSION

Parole is an act of grace in Nevada, and this court will not disturb a decision to deny parole for any reason authorized by statute. Nonetheless, eligible Nevada inmates have a statutory right to be considered for parole by the Board. This court cannot say that an inmate receives proper consideration when the Board's decision is based in part on an inapplicable aggravating factor.

Therefore, we grant Anselmo's petition for extraordinary relief, and direct the clerk of this court to issue a writ of mandamus instructing the Board to vacate its November 17, 2014, denial of parole and conduct a new parole hearing in which NAC 213.518(2)(k) is not applied.

HARDESTY and PARRAGUIRRE, JJ., concur.