KEVIN PAUL DEBIPARSHAD, M.D., AN INDIVIDUAL; KEVIN P. DEBIPARSHAD PLLC, DBA SYNERGY SPINE AND ORTHOPEDICS; DEBIPARSHAD PROFESSIONAL SERVICES, LLC, DBA SYNERGY SPINE AND ORTHOPEDICS; ALLEGIANT INSTITUTE INC., A NEVADA DOMESTIC PROFESSIONAL CORPORATION, DBA ALLEGIANT SPINE INSTITUTE; JASWINDER S. GROVER, M.D., AN INDIVIDUAL; AND JASWINDER S. GROVER, M.D., LTD., DBA NEVADA SPINE CLINIC, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KERRY LOUISE EARLEY, DISTRICT JUDGE, RESPONDENTS, AND JASON GEORGE LANDESS, AKA KAY GEORGE LANDESS, REAL PARTY IN INTEREST.

No. 81596

December 2, 2021 499 P.3d 597

Original petition for a writ of mandamus challenging a trial judge's order that was entered while a motion to disqualify the judge was pending.

Petition granted.

Lewis Brisbois Bisgaard & Smith, LLP, and *Katherine J. Gordon* and *S. Brent Vogel*, Las Vegas; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno, for Petitioners.

The Jimmerson Law Firm, P.C., and *James J. Jimmerson*, Las Vegas; *Howard & Howard Attorneys PLLC* and *Martin A. Little* and *Alexander Villamar*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, HARDESTY, C.J., STIGLICH and SILVER, JJ.

OPINION

By the Court, HARDESTY, C.J.:

In this original writ petition, we are asked to determine the validity of a district court judge's order entered while a motion to disqualify that judge was pending. We conclude that, once a party files a motion to disqualify a judge pursuant to the Nevada Code of Judicial Conduct, that judge can take no further action in the case until the motion to disqualify is resolved. Further, if the motion is granted and the judge is disqualified, any order entered by the judge after the motion to disqualify was filed is void.

FACTS AND PROCEDURAL HISTORY

Real party in interest Jason George Landess (also known as Kay George Landess) asserted medical malpractice claims against petitioners Dr. Kevin Paul Debiparshad and Dr. Jaswinder S. Grover and their respective professional entities (collectively, Debiparshad). During trial, Debiparshad sought to impeach the favorable character testimony presented by Landess's employer, using an email authored by Landess that had been admitted into evidence by stipulation of the parties. Landess thereafter moved for a mistrial due to the introduction of inflammatory statements he made in the email, also seeking attorney fees and costs. Debiparshad filed his opposition to Landess's attorney fees motion and a countermotion for attorney fees. District Judge Rob Bare orally granted the mistrial motion on the next day of trial. Judge Bare postponed his decision on whether to award attorney fees and costs because of the mistrial.

Days later, Debiparshad filed a motion to disqualify Judge Bare under Nevada Code of Judicial Conduct (NCJC) Canon 2, Rule 2.11, based on Judge Bare's laudatory comments about Landess's counsel during trial and particularly during argument over Landess's motion to strike the email. NCJC Rule 2.11(A)(1) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . [including when] [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer." About two weeks after Debiparshad filed the disqualification motion, Judge Bare entered a written order reflecting his oral ruling granting the mistrial. Less than a week later, Judge Weise granted Debiparshad's motion to disqualify Judge Bare, finding that, due to Judge Bare's comments expressing his admiration of Landess's counsel, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge[']s impartiality."

Thereafter, the case was assigned to respondent Judge Kerry Earley, who held a hearing on the parties' motions for attorney fees and costs. Judge Earley, "wholly incorporating" and relying on Judge Bare's written mistrial order, awarded costs to Landess because, under NRS 18.070(2), Debiparshad "purposefully caused the mistrial." Debiparshad subsequently moved for relief from the findings set forth in Judge Bare's mistrial order, which Judge Earley denied. Debiparshad also moved for reconsideration of the order awarding costs, which was also denied. Debiparshad then filed this original petition for a writ of mandamus. In resolving this petition, this court must determine whether a district court judge may enter an order after a party has moved to disqualify that judge under NCJC Rule 2.11.

DISCUSSION

We elect to entertain Debiparshad's petition

Debiparshad argues that this court should entertain this petition because it presents an issue of first impression and of statewide importance—whether a judge may enter orders in a case after a party moves to disqualify that judge under NCJC Rule 2.11. Landess does not dispute that this petition presents an important issue of first impression of statewide importance. Instead, Landess argues that Debiparshad's writ petition is barred by the doctrine of laches because it was not filed until almost a year after Judge Bare entered his written order granting a mistrial.

We conclude that the doctrine of laches does not apply here because Debiparshad promptly pursued legal redress during the one-year period following Judge Bare's written order. *Cf. Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1044 (1997) (concluding that a claim for injunctive relief was barred under the doctrine of laches where the delaying party "did not promptly pursue legal action"). At the time Debiparshad filed the motion to disqualify, Judge Bare had already declared a mistrial and dismissed the jury. Though Debiparshad objected to the proposed written mistrial order, there was no reason to immediately seek further relief once the disqualification order was entered, as the mistrial had already been declared and could not be undone. It was not until Judge Earley relied on the mistrial order in awarding costs to Landess that Debiparshad was harmed by the order. At that point, Debiparshad sought relief from the mistrial order and from the order awarding costs and then filed this petition a short time after both motions were denied. Thus, under these circumstances, we conclude that there was no inexcusable delay. *Id.* Further, Landess fails to demonstrate prejudice from any delay because, as noted by Debiparshad, the case was still pending retrial.[1] *Id.* ("[L]aches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another.").

Having determined that Debiparshad's petition is not barred by the doctrine of laches, we now consider whether to entertain the petition. We may elect to entertain a petition for writ of mandamus "to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station 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) (footnote omitted). Alternatively, we will consider mandamus relief "where a petitioner present[s] legal issues of statewide

[1]We note that the case has since been retried, resulting in a verdict in favor of Debiparshad.

importance requiring clarification, and our decision . . . promote[s] judicial economy and administration by assisting other jurists, parties, and lawyers." *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 683, 476 P.3d 1194, 1198 (2020) (omission in original) (internal quotation marks omitted). Because Debiparshad's petition presents a legal issue of first impression and public importance involving the authority of district court judges who are subject to a disqualification motion under the Judicial Code to continue to act in a case, and because Debiparshad has no other adequate remedy at law,[2] we elect to entertain this petition. *See id.* at 684, 476 P.3d at 1199 ("[A]dvisory mandamus is appropriate only where it will clarify a substantial issue of public policy or precedential value.") (internal quotations omitted); *see also* NRS 34.170 ("[A] writ [of mandamus] shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.").

Judge Bare lacked authority to enter the written mistrial order

Debiparshad argues that Judge Bare's written mistrial order is void because he entered it after the facts giving rise to his disqualification occurred and a motion to disqualify him was filed. He asks us to adopt the same disqualification procedure under NCJC Rule 2.11 as set forth in NRS 1.235(5), meaning that once a party files a motion to disqualify, the judge may not proceed any further with the matter. Landess asserts that Judge Bare orally declared a mistrial weeks before Debiparshad filed the motion to disqualify, and thus, the written order granting the mistrial was merely ministerial in nature and not void. We reject Landess's contention that the oral ruling is enforceable, as an order granting a mistrial is not effective until it is written, signed, and filed. *See Div. of Child & Family Servs., Dep't of Human Res. v. Eighth Judicial Dist. Court (J.M.R.)*, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004) ("[D]ispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective."); *id.* at 451, 92 P.3d at 1243 (stating that "a court's oral pronouncement from the bench . . . [is] ineffective for *any purpose*" (quoting *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (alteration omitted))). Alternatively, Landess argues that the

[2]The interlocutory costs order required immediate payment with no right to postpone that payment until an appeal from the final judgment could be taken to challenge it, although the district court ultimately granted a stay of the costs order upon Debiparshad posting a supersedeas bond. *See* NRCP 62(d); *Carlson v. Locatelli*, 109 Nev. 257, 259, 849 P.2d 313, 314 (1993) (providing that orders granting a mistrial are typically not appealable because they are not final orders).

NCJC has not adopted the disqualification procedure outlined in NRS 1.235(5). Consequently, we must determine at what point a district court judge who is subject to a disqualification motion under NCJC Rule 2.11 may no longer take action in the case.

NRS 1.235(1) requires that a party seeking to disqualify a judge file an affidavit at least 20 days before trial or at least 3 days before any pretrial matter is heard. Thereafter, "the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter" except to transfer the case to another judge. NRS 1.235(5)(a). When, however, the grounds for disqualification are discovered only after the time for filing an affidavit under NRS 1.235(1) has passed, a party may timely file a motion to disqualify pursuant to NCJC Rule 2.11 "as soon as possible after becoming aware of the new information," and the motion must be adjudicated before the trial may continue. *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005).[3]

In *Towbin Dodge*, we noted that NCJC Rule 2.11, which requires a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," does not contain a procedural mechanism for enforcement. *Id*. at 257, 259, 112 P.3d at 1067, 1069. We specified the procedure for moving to disqualify a judge pursuant to NCJC Rule 2.11, explaining that, as with an affidavit filed under NRS 1.235, a motion to disqualify under NCJC Rule 2.11 must include the facts upon which the disqualification is based and must be referred to another judge for decision. *Id*. at 260-61, 112 P.3d at 1069-70; *see also Turner v. State*, 114 Nev. 682, 687, 962 P.2d 1223, 1226 (1998) (applying, without discussion, the NRS 1.235 procedural requirements to a motion to disqualify under both the statute and the NCJC). We did not, however, specifically address the issue before us now—whether a judge who is subject to a pending disqualification motion pursuant to NCJC Rule 2.11 may enter an order *after* the motion to disqualify has been made but before the disqualification motion has been resolved, as occurred here.

We conclude that once a motion to disqualify is filed by a party, the subject judge can take no further action in the case until the motion to disqualify is resolved. The NCJC requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety." NCJC Rule 1.2. When a "judge's impartiality might reasonably be questioned,"

[3]*Towbin Dodge* concerned former NCJC Canon 3E, which is now Canon 2. *See In re the Amendment of the Nev. Code of Judicial Conduct*, ADKT 427 (Order, Dec. 17, 2009). For clarity, we refer to the canon in its current form when discussing our holding in *Towbin Dodge*.

the judge must disqualify himself or herself from the proceeding. NCJC Rule 2.11(A). Any motion for disqualification filed pursuant to NCJC Rule 2.11 after the deadline established by NRS 1.235(1) must be timely under *Towbin Dodge* and based on new information learned or observed after the cutoff date, information which was not otherwise known or ascertainable by the moving party. *Towbin Dodge*, 121 Nev. at 260-61, 112 P.3d at 1069-70. The disqualification motion must be adjudicated before the trial proceedings may continue. Consistent with his or her duties under the NCJC to avoid the appearance of impropriety, a judge should suspend proceedings and refrain from taking further substantive action in the case once a party moves to disqualify the judge.

We further conclude that any order entered by the judge while a timely motion to disqualify is pending becomes void should the judge later be disqualified. Voiding the orders of a judge whose impartiality has reasonably been questioned promotes confidence in the judiciary. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988) (stating that 28 U.S.C. § 455(a), a statute substantially similar to NCJC Rule 2.11, is designed "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible"). While courts have split on whether orders entered by disqualified judges are void or merely voidable, Debiparshad timely challenged the court's order here, and we conclude that the order, entered after disqualifying acts arose and Debiparshad's motion to disqualify was filed, is properly deemed void. *See Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, 725 (Ct. App. 2006) ("[D]isqualification occurs when the facts creating disqualification arise, not when disqualification is established."); *see also Hoff v. Eighth Judicial Dist. Court*, 79 Nev. 108, 110, 378 P.2d 977, 978 (1963) ("That the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state."); *Frevert v. Swift*, 19 Nev. 363, 11 P. 273 (1886) ("[T]he general effect of the statutory prohibitions . . . [is] to render those acts of a judge involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not voidable merely, but void."). Thus, Judge Bare's written mistrial order became void once the motion to disqualify was granted and should be vacated.

CONCLUSION

Accordingly, we grant Debiparshad's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate Judge Bare's mistrial order as void. Further, because the costs award was based upon the void order's findings, the writ of mandamus must also direct the district court to vacate the costs award and to reconsider the motion as to costs sanctions anew. As

Debiparshad is not challenging the mistrial, nothing in this opinion should be read to disturb the trial proceedings stemming therefrom.[4]

STIGLICH and SILVER, JJ., concur.

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[4]Given our disposition, we do not address Debiparshad's request for this court to interpret the phrase "purposely caused a mistrial" as used in NRS 18.070(2).

JAMES PARSONS, Individually and as Special Administrator of the ESTATE OF CAROLYN LEE PARSONS; and ANN-MARIE PARSONS, Appellants, *v.* COLT'S MANUFACTURING COMPANY LLC; COLT DEFENSE LLC; DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA; NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE & TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS AND AMMO LLC; DF&A HOLDINGS, LLC; MAVERICK INVESTMENTS, LP; SPORTSMAN'S WAREHOUSE; and GUNS AND GUITARS INC., Respondents.

No. 81034

December 2, 2021 499 P.3d 602

Certified questions under NRAP 5 concerning the scope of immunity NRS 41.131 affords firearm manufacturers and distributors and Nevada's negligence per se doctrine; United States District Court for the District of Nevada; Andrew P. Gordon, District Judge.

Questions answered in part.

[Rehearing denied February 24, 2022]

Friedman Rubin PLLC and *Richard H. Friedman*, Bremerton, Washington; *Koskoff, Koskoff & Bieder, PC*, and *Joshua D. Koskoff* and *Alinor C. Sterling*, Bridgeport, Connecticut; *Matthew L. Sharp, Ltd*., and *Matthew L. Sharp*, Reno, for Appellants.

Hejmanowski & McCrea LLC and *Paul R. Hejmanowski*, Las Vegas; *Williams Mullen, PC*, and *Camden R. Webb* and *Robert Van Arnam*, Raleigh, North Carolina; *Williams Mullen, PC*, and *Turner A. Broughton* and *Justin S. Feinman*, Richmond, Virginia; *Spencer Fane LLP* and *John H. Mowbray, Mary E. Bacon*, and *Jessica E. Chong*, Las Vegas, for Respondent FN America.

Snell & Wilmer, L.L.P., and *Kelly H. Dove, Patrick G. Byrne, V.R. Bohman*, and *Gil Kahn*, Las Vegas, for Respondents Daniel Defense Inc. and Sportsman's Warehouse.

Renzulli Law Firm, LLP, and *John F. Renzulli, Christopher Renzulli*, and *Scott C. Allan*, White Plains, New York; *Evans Fears & Schuttert LLP* and *Jay J. Schuttert* and *Alexandria L. Layton*, Las Vegas, for Respondents Colt's Manufacturing Company LLC; Colt Defense LLC; Patriot Ordnance Factory; Christensen Arms; Lewis Machine & Tool Company; and LWRC International LLC.

Pisciotti Malsch and *Anthony Pisciotti, Ryan Erdreich*, and *Danny C. Lallis*, Florham Park, New Jersey; *Lincoln, Gustafson*

& Cercos, LLP, and *Loren S. Young*, Las Vegas, for Respondent Noveske Rifleworks LLC.

The Chiafullo Group, LLC, and *Christopher M. Chiafullo*, New York, New York; *The Amin Law Group, Ltd.*, and *Ismail Amin* and *Jessica S. Guerra*, Las Vegas, for Respondents Discount Firearms and Ammo LLC; DF&A Holdings, LLC; and Maverick Investments, LP.

Hejmanowski & McCrea LLC and *Paul R. Hejmanowski*, Las Vegas, for Respondent Discount Firearms and Ammo LLC.

Swanson, Martin & Bell LLP and *James B. Vogts*, Chicago, Illinois; *Murchison & Cumming, LLP*, and *Michael J. Nunez*, Las Vegas, for Respondent Guns and Guitars Inc.

Fennemore Craig, P.C., and *Therese M. Shanks*, Reno; *Claggett & Sykes Law Firm* and *Micah Echols*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Shook, Hardy & Bacon, L.L.P., and *Victor E. Schwartz*, Washington, D.C.; *Shook, Hardy & Bacon L.L.P.*, and *Jennifer N. Hatcher*, Kansas City, Missouri, for Amicus Curiae National Shooting Sports Foundation.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

NRS 41.131(1) provides that "[n]o person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death." Currently pending in Nevada's federal district court is a suit brought by the parents of a victim of the Route 91 Harvest Festival massacre against the manufacturers and distributors of the AR-15 rifles the gunman used. The federal court has determined that the complaint plausibly alleges that the AR-15s violated state and federal machinegun prohibitions. It now asks this court to decide whether the allegation of illegality allows the parents' wrongful death and negligence per se claims to proceed, despite the immunity NRS 41.131(1) declares. We hold that it does not and that, as written, NRS 41.131 provides the gun manufacturers and distributors immunity from the claims asserted against them under Nevada law in this case.

I.

A.

Carrie Parsons was killed in the October 1, 2017, mass shooting that occurred at the Route 91 Harvest Festival outdoor concert in Las Vegas, Nevada. In the 32nd-floor hotel room from which he fired, the shooter had amassed an arsenal of high-capacity magazines; bump stocks—a tool that replaces the standard stock of an AR-15 rifle and uses the firearm's recoil mechanism to enable continual (i.e., automatic) fire with a single trigger pull—; and 12 AR-15 semi-automatic rifles that respondents (collectively, the gun companies) manufactured and/or sold. The shooter replaced the standard stocks of his AR-15 rifles with those bump stocks and fired 1,049 rounds, in just 10 minutes, into the crowd of country music fans gathered below. The shooter killed 58 people that night, including Carrie, and injured hundreds more, then committed suicide.

James and Ann-Marie Parsons sued the gun companies in Nevada state court, alleging (1) wrongful death caused by the companies' knowing violation of 18 U.S.C. § 922(b)(4) (2019) (prohibiting the sale or delivery of machineguns "except as specifically authorized by the Attorney General consistent with public safety and necessity") and NRS 202.350(1)(b) (similar); (2) negligence per se under the same statutes; and (3) negligent entrustment. The gun companies timely removed the case to federal court, where they filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). The motion argued that the complaint failed to state claims upon which relief could be granted and that the federal Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901-03 (2019), and NRS 41.131 bar the Parsonses' claims as a matter of law.

The federal district court granted the motion to dismiss the negligent entrustment and negligence per se claims, but denied it as to the wrongful death claim based on the so-called "predicate exception" to the PLCAA. Enacted in 2005, the PLCAA's declared purpose is to "prohibit causes of action against manufacturers [and] distributors . . . of firearms . . . for the harm solely caused by the[ir] criminal or unlawful misuse by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (2019); *see also id.* §§ 7902(a)-(b), 7903(5)(A). But the PLCAA's predicate exception permits "action[s] in which a manufacturer or seller . . . knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). Invoking the PLCAA's predicate exception, the Parsonses argued to the district court that the ease with which an AR-15 can be modified to enable full automatic fire brings the rifle within the federal and state definitions of "machinegun," *see* 26 U.S.C. § 5845(b) (2019)

(defining a machinegun as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger"); NRS 202.350(8)(c) (2015) ("'Machine gun' means any weapon which shoots, is designed to shoot or can be readily restored to shoot more than one shot, without manual reloading, by a single function of the trigger.") (recodified as NRS 202.253(6) (2021)), and the associated restrictions on their manufacture and sale. *See* 18 U.S.C. § 922(b)(4); NRS 202.350(1)(b).

After reviewing the Parsonses' complaint, the federal district court provisionally credited their argument. It concluded that the complaint plausibly alleged that the gun companies "knowingly manufactured and sold weapons 'designed to shoot' automatically because they were aware their AR-15s could be easily modified with bump stocks to do so[,]" thereby violating federal and state machinegun prohibitions. *Parsons v. Colt's Mfg. Co., LLC*, No. 2:19-cv-01189-APG-EJY, 2020 WL 1821306, at *5-6 (D. Nev. April 10, 2020) (holding that, "[f]or purposes of a motion to dismiss, this allegation [of easy modifiability to enable automatic fire] supports a plausible claim for relief") (citing 18 U.S.C. § 922(b)(4) and NRS 202.350(1)(b)); *Parsons v. Colt's Mfg. Co., LLC*, No. 2:19-cv-01189-APG-EJY, 2020 WL 4059685, at *4 (D. Nev. July 20, 2020) (denying reconsideration); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding that plaintiff must make sufficient factual allegations to allege a plausible claim for relief to survive a motion to dismiss under FRCP 12(b)(6)). On this basis, the district court held that "[t]he Parsons have alleged a wrongful death claim that is not precluded by the PLCAA." *Parsons*, *supra*, 2020 WL 41821306, at *6; *see generally* Anya Sanko & Dylan Lawter, *Guns in the Sky: Nevada's Firearm Laws, 1 October, and Next Steps*, 5 Nev. L.J.F. 34, 46-59 (2021).

This left the question whether the immunity NRS 41.131 declares is broader than that provided by the PLCAA in this case. The federal district court declined to decide this question of state law in the first instance, instead certifying two questions about NRS 41.131's scope to this court under NRAP 5. The federal court later reconsidered its dismissal of the negligence per se claim and certified an additional question to us about Nevada's negligence per se doctrine. It reserved final ruling on the motion to dismiss the wrongful death and negligence per se claims pending our decision on the certified questions.

B.

The certified questions the federal district court has forwarded are thus three:

1. Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers

knowingly violated federal and state machine gun prohibitions have "a cause of action against the manufacturer or distributor of any firearm . . . merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]" under [NRS 41.131]?

2. Does [NRS 41.131] allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions because the statute is "declaratory and not in derogation of the common law"?
3. [C]an a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?

Rule 5 of the Nevada Rules of Appellate Procedure "gives this court discretionary authority to accept and answer certified questions of Nevada law that 'may be determinative of the cause then pending in the certifying court.'" *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170, 327 P.3d 1061, 1063 (2014) (quoting NRAP 5). In answering certified questions, this court accepts the facts stated by the forwarding court in its certification order. *SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 134 Nev. 483, 489 n.5, 422 P.3d 1248, 1253 n.5 (2018). We also, necessarily, accept the certifying court's determinations with respect to its own substantive and procedural law. *See* Eric C. Surette, Annotation, *Construction and Application of Uniform Certification of Questions of Law Act*, 69 A.L.R. 6th 415, 468 (2011) ("[I]n answering questions posed by a federal court . . . , the parameters of state law claims or defenses identified by the submitted questions may be tested, but it is not the answering court's office to intrude (by its responses) upon the certifying court's decision-making process.").

The federal district court's questions all incorporate its determination that the complaint plausibly alleges that the gun companies' manufacture and sale of the AR-15s "violated federal and state machine gun prohibitions." As the answering court, "our role 'is limited to answering the questions of [state] law posed to [us].'" *Progressive Gulf Ins. Co.*, 130 Nev. at 170, 327 P.3d at 1063 (second alteration in original) (quoting *In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955, 267 P.3d 786, 794-95 (2011)). For purposes of this case, we therefore accept, without independently deciding, the federal court's determination that an AR-15 rifle may fit the federal and state definitions of machinegun.[1] Although the

[1]We note but express no opinion on the 2019 amendment to NRS 202.253(6)(c) (recodified as NRS 202.253(8)(c) (2021)), which partially defines a "semiautomatic firearm" as "not a machine gun." *Cf. Staples v. United*

federal district court has deferred final resolution of the machinegun issue to further factual and legal development, this does not make our answers to its certified questions impermissibly advisory. *See Echeverria v. State*, 137 Nev. 486, 489, 495 P.3d 471, 475 (2021) (noting in the context of NRAP 5 that "[t]his court lacks the constitutional power to render advisory opinions"). Depending on the answers we give, Nevada law may resolve the case at the pleading stage, without need of further proceedings. Thus, the questions are sufficiently outcome-determinative to satisfy NRAP 5, and we exercise our discretion in favor of accepting and answering them.

II.

The federal district court's questions ask us to interpret NRS 41.131. The "whole-text" canon requires that, in construing a statute, "[t]he text must be construed as a whole." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012); *Orion Portfolio Servs. 2 LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."). Our analysis therefore begins with the full text of NRS 41.131, which provides:

> 1. No person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death. This subsection is declaratory and not in derogation of the common law.
>
> 2. This section does not affect a cause of action based upon a defect in design or production. The capability of a firearm or ammunition to cause serious injury, damage or death when discharged does not make the product defective in design.

See NRS 0.039 (defining "person" to mean "a natural person, any form of business or social organization and any other nongovernmental legal entity"). NRS 41.131 was enacted in 1985, twenty years before the PLCAA. 1985 Nev. Stat., ch. 480, § 1, at 1469-70. But similar to the PLCAA, *see* 15 U.S.C. § 7901(b)(1), its purpose was to establish that "if someone shoots a firearm and hurts somebody, you can't sue the firearms manufacturer because it shoots." Hearing on S.B. 211 Before the Assemb. Judiciary Comm., 63d Leg.

States, 511 U.S. 600, 602-06 (1994) (discussing semiautomatic nature of AR-15 rifles when determining mens rea requirements under 26 U.S.C. § 5861(d), without deciding whether an AR-15 rifle is a "machinegun"). The federal and Nevada statutes differ in how they spell "machinegun." This opinion uses "machinegun" except where the quoted source writes "machine gun" out as two words.

(Nev., Apr. 17, 1985) (statement of Assemb. Robert Sader, Member, Assemb. Judiciary Comm.); *see also* Hearing on S.B. 211 Before the S. Judiciary Comm., 63d Leg. (Nev. Mar. 13, 1985) (statement of Sen. Robert E. Robinson, Chairman, S. Commerce & Labor Comm.) ("[A] gun in itself is not to be determined as at fault in case of a death or injury . . . . [Rather] the liability would be on the handler of the gun.").

Each side finds in NRS 41.131 language they say unambiguously favors them. The Parsonses argue that the phrase "merely because" instructs that NRS 41.131 is a "no-fault" statute that shields firearm manufacturers and distributors from frivolous lawsuits alleging fault based on only the inherent dangers of firearms, not ones alleging that firearm manufacturers and distributors acted unlawfully in manufacturing or distributing restricted firearms. The gun companies counter that NRS 41.131 broadly immunizes them from all civil actions, with a single exception for products liability actions involving design or production defects that cause the firearm to malfunction—for example, a gun that does not shoot but explodes when the trigger is pulled. But the parties' competing interpretations (and to some extent the district court's phrasing of its questions about NRS 41.131) push the statute's outer bounds and ask that we opine more broadly than is necessary. The answer to the limited dispositive question—does the plausible allegation of illegality take the causes of action asserted here outside the immunity NRS 41.131(1) declares?—lies somewhere in between. *See Progressive Gulf Ins. Co.*, 130 Nev. at 171, 327 P.3d at 1063 (noting that this court may rephrase a certified question in its discretion).

A.

Looking first to its plain language, *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003) (noting that this court starts with the plain language of a statute), NRS 41.131 can be reasonably read to allow the claims at issue here because it uses the phrase "merely because," and the Parsonses' action is arguably premised on fault beyond a firearm's inherent ability to cause harm; that is, the gun companies' manufacture and distribution of illegal machineguns. But NRS 41.131 does not limit the gun companies' immunity to the manufacture and distribution of *legal* firearms. Instead, the Legislature provided that "[n]o person has a cause of action against the manufacturer or distributor of *any firearm* or ammunition" (emphasis added), and "any" conventionally means "all" or "every." *E.g.*, *Legislature v. Settelmeyer*, 137 Nev. 231, 235, 486 P.3d 1276, 1281 (2021) (holding that the term "any" means "any and all," "one out of many," and "indiscriminately of whatever kind") (quoting *Any*, *Black's Law Dictionary* (6th ed. 1990)); *Dimond v. Linnecke*, 87 Nev. 464, 467, 489 P.2d 93, 95 (1971) (construing "any" to mean "all" or "every"). Because

the phrase "any firearm" accordingly means "all firearms," whether legal or illegal—a point that the Parsonses' counsel conceded at oral argument—NRS 41.131 does not require that the firearm manufactured or sold be legal for a gun company to seek shelter from civil liability under it. *See, e.g.*, *Settelmeyer*, 137 Nev. at 235, 486 P.3d at 1281 (reasoning that the term "any" has broad application); *United States v. Cole*, 525 F.3d 656, 659-60 (8th Cir. 2008) (interpreting the phrase "any firearm" broadly).

This court would have to insert the word "legal" or "lawful" between "any" and "firearm" for the Parsonses' allegation of fault to escape NRS 41.131's reach, and this court does not read in implied terms that the Legislature omitted. *See Echeverria*, 137 Nev. at 491, 495 P.3d at 476 ("This court has repeatedly refused to imply provisions not expressly included in the legislative scheme.") (internal quotation omitted). Indeed, unlike NRS 41.131, some states' analogous statutes condition the immunity they provide on the manufacture or sale of a firearm being *legal*, similar to the PLCAA and its predicate exception, 15 U.S.C. §§ 7902(a), 7903(5)(A)(iii). *E.g.*, Alaska Stat. § 09.65.155 (2020) ("A civil action to recover damages . . . may not be brought against a person who manufactures or sells firearms or ammunition if the action is based on the *lawful* sale, manufacture, or design of firearms or ammunition.") (emphasis added); Ariz. Rev. Stat. Ann. § 12-714 (2016) ("Businesses . . . that are engaged in the *lawful sale* to the public of firearms or ammunition are not, and should not be liable for the harm caused by those who unlawfully misuse firearms or ammunition.") (emphasis added); S.D. Codified Laws § 21-58-2 (2004) ("No firearm manufacturer, distributor, or seller who *lawfully* manufactures, distributes, or sells a firearm is liable to any person or entity, or to the estate, successors, or survivors of either, for any injury suffered, including wrongful death and property damage, because of the use of such firearm by another.") (emphasis added); *see also* N.H. Rev. Stat. Ann. § 508:21 (2010) (providing immunity to firearm manufacturers and distributors for the criminal acts of a third party but stating that this immunity does not apply to "an action brought against a manufacturer [or distributor] convicted of a felony under state or federal law, by a party directly harmed by the felonious conduct"); Charles J. Nagy, Jr., *American Law of Products Liability* § 106:4 (3d ed. 2016) (compiling state immunity statutes applicable to manufacturers and distributors of firearms).

More like NRS 41.131 is Indiana code section 34-12-3-3(2) (2021), which provides that "a person may not bring or maintain an action against a firearms or ammunition manufacturer . . . or seller for . . . recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party." And in *KS&E Sports v. Runnels*, the Indiana Supreme Court held that this analogous statute limited gun companies' liability

for harms caused by third parties, even if the gun company acted unlawfully, because the Indiana Legislature purposefully omitted the term "lawful" from the statute's second subsection. 72 N.E.3d 892, 899 (Ind. 2017); *cf.* Ind. Code Ann. § 34-12-3-3(1) (providing immunity from suits related to the "lawful" design, manufacture, marketing, or sale of a firearm or ammunition). Like subsection 2 of Indiana's statute, NRS 41.131 does not expressly "den[y] immunity to firearms sellers that violate the law." *Runnels*, 72 N.E.3d at 899. And because the Nevada Legislature did not reserve the protections of NRS 41.131 to the manufacture and sale of *legal* weapons, the alleged illegality of AR-15 rifles appears to be immaterial.

This interpretation does not render the phrase "merely because" meaningless, as the Parsonses maintain. First, NRS 41.131(2) expressly limits the immunity NRS 41.131(1) declares, providing that, "[t]his section does not affect a cause of action based upon a defect in design or production"—e.g., the mismanufactured firearm that explodes and injures bystanders when the trigger is pulled—allowing actions asserting such fault to proceed. Second, NRS 41.131(1) does not categorically immunize firearm manufacturers and distributors from liability for independent acts of negligence; that is, acts that create an unreasonable risk of harm above and beyond that posed by the firearm's inherent dangerousness. As an example, consider the sporting goods store (a gun distributor) whose clerk leaves a loaded firearm out on the counter that a patron picks up and pulls the trigger on, thinking the chamber was empty, injuring the person next to her. In that case, the cause of action does not arise "merely because" the gun "was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death." NRS 41.131(1). The clerk's negligence in leaving the loaded firearm out on the display case gives rise to the cause of action for direct or vicarious liability, not the firearm's inherent capacity to shoot and, when shot, to injure or kill.

B.

NRS 41.131's history contextually supports this reading. The Nevada Legislature enacted NRS 41.131 in 1985. 1985 Nev. Stat., ch. 480, § 1, at 1469-70. At that time, machineguns were legal to manufacture, sell, transfer, and possess under Nevada law. It was not until 1989 that Nevada defined "machine gun" and prohibited its possession and use, *see* 1989 Nev. Stat., ch. 309, § 1, at 653-54, and not until 2003 that Nevada prohibited the manufacture and sale of machineguns. 2003 Nev. Stat., ch. 256, § 6, at 1351. And although Congress prohibited firearms manufacturers and dealers from selling or delivering machineguns to persons other than those authorized by the Secretary of State in 1968, Gun Control Act of 1968, Pub. L. No. 90-618, §§ 922, 5845, 82 Stat. 1216-17, 1230-31 (1968), it was not until 1986 that Congress prohibited the transfer

or possession of all machineguns other than for official governmental use. Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, § 102, 100 Stat. 451, 452-53 (1986) (providing that "it shall be unlawful for any person to transfer or possess a machinegun").

These post-1985 criminal prohibitions demonstrate that Congress and the Nevada Legislature recognized the grave danger that machineguns pose in civilian hands. Yet, despite the decision to impose criminal penalties for the manufacture and sale of machineguns unless federally authorized, the Nevada Legislature did not eliminate or amend NRS 41.131 to permit civil actions seeking damages for conduct alleged to violate those prohibitions when it enacted them.[2] For us to hold that the immunity NRS 41.131(1) declares does not reach suits involving machineguns because of the later-enacted statutes criminalizing their distribution, we would have to treat those later statutes as having impliedly repealed a portion of the civil immunity NRS 41.131 originally conferred. "Repeals by implication are disfavored—very much disfavored"—and limited to the rare situation where a new statutory provision "flatly contradicts an earlier-enacted provision." Antonin Scalia & Bryan A. Garner, *supra*, at 327; *cf. Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001) (noting that the practice of implied repeal is "heavily disfavored"). Such flat contradiction does not appear here.

Nor is it the case that in 1985 when the Legislature enacted NRS 41.131 all firearms and types of ammunition were legal, such that its reference to "*any* firearm or ammunition" arguably only contemplated legal firearms and ammunition. On the contrary, in 1977 the Legislature passed a statute making it illegal to manufacture or sell a short-barreled rifle or shotgun, 1977 Nev. Stat., ch. 437, § 3, at 879-80 (now codified as NRS 202.275), and in 1983 it passed a statute making it unlawful to manufacture and sell a "metal-penetrating bullet capable of being fired from a handgun." *See* 1983 Nev. Stat., ch. 327, § 2, at 800 (now codified as NRS 202.273). Yet despite these statutes, which predated NRS 41.131, and despite the series of amendments to NRS Chapter 202 adding, then expanding, criminal prohibitions on machineguns, the Legislature has left NRS 41.131 as originally enacted, with its wording unchanged, from 1985 to the present day.

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[2]The Legislature has further passed statutes in which it "reserves for itself such rights and powers as are necessary to regulate the transfer, sale, purchase, possession, carrying, ownership, transportation, storage, registration and licensing of firearms, firearm accessories and ammunition in Nevada." NRS 268.418(2); NRS 269.222(2); NRS 244.364(2); *see also* NRS 12.107 (providing that "the State of Nevada is the only governmental entity . . . that may commence a lawsuit against a [firearm] manufacturer or distributor" for claims "resulting from or relating to the lawful design or manufacture . . . or the marketing or sale of a firearm or ammunition to the public," except suits by local governments for breach of contract or warranty concerning purchased firearms or ammunition).

C.

The federal district court and the parties next direct us to the second sentence of NRS 41.131(1)—"This subsection is declaratory and not in derogation of the common law." This sentence alludes to two long-standing canons of statutory construction: (1) "Statutes declaratory of the common law are coextensive with the common law and no change in meaning is presumed to have been intended by their enactment," 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 26:5 (7th ed. 2009); *see also State v. Babayan*, 106 Nev. 155, 171, 787 P.2d 805, 816-17 (1990) (noting that a declaratory statute affirms existing law and leaves it more clearly in force); and (2) "Courts narrowly, or strictly, construe statutes in derogation of the common law," 3 Shambie Singer, *Statutes and Statutory Construction* § 61:1 (8th ed. 2020); *see also Gibellini v. Klindt*, 110 Nev. 1201, 1208, 885 P.2d 540, 545 (1994). As such, the second sentence in NRS 41.131(1) serves simply as an interpretive guide, providing that the statute should receive a fair reading, consistent with the common law, not the strict or narrow reading historically given statutes that overturn or derogate from the common law. *See* 3 Singer, *supra*, § 61:4 (collecting and discussing statutory provisions abrogating the canon that statutes that derogate from the common law are strictly or narrowly construed).

NRS 41.131(1) thus directs reference to the common law in interpreting the immunity it declares. It does not evince a "protective" or remedial purpose, as the gun companies contend, requiring us to interpret NRS 41.131 liberally in their favor. But neither does the common law to which NRS 41.131(1) refers establish that the Parsonses have a cause of action against the gun companies for the illegal manufacture and distribution of machineguns, as they maintain.

When the Legislature enacted NRS 41.131 in 1985, Nevada common law did not address whether a firearm manufacturer or distributor could be held liable in tort to a third party for injuries or death caused by the criminal misuse of the firearm. *But cf. Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970) (upholding summary judgment for the defendant owner of a firearm used by a third party to shoot and kill the victim on the grounds that the third party's criminal act was a superseding cause of the victim's death). Authority from outside Nevada had held that there is no common-law basis for imposing a duty on firearm manufacturers and distributors for third-party criminal misuse of firearms. *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985) (holding that a firearm manufacturer does not have a common-law duty to control the distribution of nondefective handguns to the public); *see also Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1981) ("[O]ne who is injured while using a

perfectly made axe or knife would have no right to a strict liability action against the manufacturer because the product that injured him was not defective."). But this authority was nascent and did not address whether a weapon's illegality or restrictions of its distribution changed that rule. And the uncertainty as to this issue persists to this day, as the federal court's certification order attests.

This court confronted a similar interpretive challenge in *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969), and its progeny, *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091, 1093, 844 P.2d 800, 802 (1992); *Yoscovitch v. Wasson*, 98 Nev. 250, 252, 645 P.2d 975, 976 (1982); *Bell v. Alpha Tau Omega Fraternity*, 98 Nev. 109, 111, 642 P.2d 161, 162 (1982); and *Davies v. Butler*, 95 Nev. 763, 777, 602 P.2d 605, 614 (1979). The issue in *Hamm* was "whether the heirs of pedestrians who were killed by [a drunk driver] have a claim for relief for wrongful death against the tavern keeper who unlawfully sold liquor to the offending driver." 85 Nev. at 99, 450 P.2d at 358. Nevada common law did not answer whether liability could be imposed in this instance. *Id.* at 100, 450 P.2d at 359. Cases elsewhere were split, and strong policy arguments existed both for and against imposing liability. *Id.* at 100-01, 450 P.2d at 359. And, while the Nevada Legislature had criminalized providing liquor to minors and drunk adults, it did not provide for civil liability for violation of these prohibitions except, in a limited way, for selling liquor to minors. *See id.* at 102, 450 P.2d at 360. After discussing the law pro and con from elsewhere and the competing policies involved, this court concluded, "In the final analysis the controlling consideration is public policy and whether the court or the legislature should declare it." *Id.* at 100, 450 P.2d at 359. In the end, it decided against judicially imposing common-law liability, holding that "if civil liability is to be imposed [in this setting], it should be accomplished by legislative act after appropriate surveys, hearings, and investigations to ascertain the need for it and the expected consequences to follow." *Id.* at 101, 450 P.2d at 359; *see Hinegardner*, 108 Nev. at 1096, 844 P.2d at 803-04.

NRS 41.131(1)'s reference to the common law as the rule of decision incorporates this line of cases. As in *Hamm*, this case poses profound and competing public policy concerns. The Legislature has passed numerous statutes regulating firearms, but it has not imposed private civil liability for the manufacture and distribution of illegal firearms in violation of federal or state law. Similar to *Hamm*, the decision whether or not to do so is legislative, not judicial.

III.

Our decision with respect to the immunity provided by NRS 41.131 makes it unnecessary to separately address the federal court's third question about Nevada's negligence per se doctrine. On this

issue, the parties provide divergent strands of authority advocating for and against a prerequisite of legislative intent to allow a party's use of negligence per se to establish the standard of care and breach in a negligence action. While that point may warrant clarification in a future case, the immunity provided in NRS 41.131 obviates the need to consider it here. *See Hamm*, 85 Nev. at 101-02, 450 P.2d at 360.

IV.

In response to the questions certified to us by the federal district court, we hold that NRS 41.131 provides the gun companies immunity from the wrongful death and negligence per se claims asserted against them under Nevada law in this case. We in no way underestimate the profound public policy issues presented or the horrific tragedy the Route 91 Harvest Festival mass shooting inflicted. But this is an area the Legislature has occupied extensively. If civil liability is to be imposed against firearm manufacturers and distributors in the position of the gun companies in this case, that decision is for the Legislature, not this court. We urge the Legislature to act if it did not mean to provide immunity in situations like this one. But as written, NRS 41.131 declares a legislative policy that the Parsonses cannot proceed with these claims under Nevada law.

Hardesty, C.J., and Parraguirre, Stiglich, Cadish, Silver, and Herndon, JJ., concur.

NICOLA SPIRTOS, an Individual, Appellant, *v.* ARMEN YEMENIDJIAN, an Individual, Respondent.

No. 80922

December 2, 2021 499 P.3d 611

Appeal from a district court order denying an anti-SLAPP motion to dismiss in a tort action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed.

McNutt Law Firm, P.C., and *Daniel R. McNutt* and *Matthew C. Wolf*, Las Vegas, for Appellant.

Pisanelli Bice PLLC and *Todd L. Bice, Jordan T. Smith*, and *Emily A. Buchwald*, Las Vegas, for Respondent.

Before the Supreme Court, Hardesty, C.J., Stiglich and Cadish, JJ.

OPINION

By the Court, Hardesty, C.J.:

NRS 41.635-.670 are commonly referred to as Nevada's "anti-SLAPP" statutes, which stands for "anti-Strategic Lawsuit Against Public Participation." Generally speaking, the anti-SLAPP statutes provide a two-step procedural mechanism by which a district court, upon a party's special motion to dismiss, can summarily dismiss a meritless lawsuit aimed at chilling speech. *See* NRS 41.660(3)(a)-(b).

Under step one of the anti-SLAPP evaluation, the district court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). The primary issue presented in this case is how a district court at step one of the anti-SLAPP evaluation should proceed when the moving party denies making the alleged communication. Based on the plain language of NRS 41.660(3)(a), we conclude that a moving party's denial has no relevance at step one of the anti-SLAPP evaluation. Consequently, the district court in this case correctly used plaintiff/respondent Armen Yemenidjian's version of the alleged defamatory statement during its step-one analysis.

Nonetheless, defendant/appellant Nicola Spirtos argues on appeal that the district court should have granted his anti-SLAPP motion, as even Yemenidjian's version of Spirtos' statement was entitled

to anti-SLAPP protection. In this, Spirtos asserts that because the alleged statement was made in good faith in furtherance of an issue of public concern, it was covered by anti-SLAPP protections. Alternatively, Spirtos argues that the district court should have granted his motion because Yemenidjian's version of his statement was a nonactionable opinion. While we agree that the district court erroneously determined Spirtos' alleged statement did not fall within the definition of a public interest communication, Spirtos has not attempted to show that the alleged statement was true or made without knowledge of its falsehood. Consequently, he has not established by a preponderance of the evidence that his statement was made in good faith. And, because we disagree with Spirtos' alternative argument that his alleged statement was a nonactionable opinion, we affirm the district court's order denying Spirtos' anti-SLAPP motion.

FACTS AND PROCEDURAL HISTORY

Appellant Nicola Spirtos is a self-described "prominent and highly accomplished gynecologic oncologist." Spirtos is also the former co-owner of D.H. Flamingo, Inc., a Nevada corporation with a medical-marijuana license and a medical-marijuana establishment in Las Vegas. Respondent Armen Yemenidjian is a self-described "executive[ ] in the legal cannabis business" whose companies have successfully applied for 22 medical- and recreational-marijuana licenses in Nevada and California. By all accounts, Spirtos and Yemenidjian's relationship can be described as acrimonious.

In 2018, D.H. Flamingo submitted three applications for recreational-marijuana licenses to the Nevada Department of Taxation. The Department denied D.H. Flamingo's applications. Following the Department's denial, D.H. Flamingo and several other unsuccessful applicants sued the Department and many of the successful applicants, including some of Yemenidjian's former companies. They alleged, among other things, that the licensing process "was corrupted and certain application[s] were favored over others." Two weeks after the suit was filed, Spirtos attended Governor Steve Sisolak's inaugural gala on behalf of D.H. Flamingo. While at the gala, Spirtos spoke with John Oceguera, a former Nevada Assemblyperson and then-lobbyist for certain Nevada marijuana companies, including Yemenidjian's former companies. The specifics of Spirtos' conversation with Oceguera are disputed, but it is undisputed that Spirtos conveyed his belief (as D.H. Flamingo had alleged in its lawsuit against Yemenidjian's former companies) that the Department's licensing process was corrupt. It is likewise disputed whether Spirtos specifically mentioned Yemenidjian during the conversation, but it is undisputed that following the conversation, Oceguera relayed the contents of the conversation to Yemenidjian.

Nine months after the conversation between Spirtos and Oceguera, Yemenidjian sued Spirtos for slander and conspiracy, alleging that Spirtos had accused him of criminal activity in Spirtos' conversation with Oceguera. In particular, Yemenidjian's complaint alleged that "Spirtos proceeded to slander Mr. Yemenidjian, claiming to Oceguera that Mr. Yemenidjian had engaged in outright corruption in order to secure licenses. This statement falsely accused Mr. Yemenidjian of criminal activity, just as Spirtos had intended it."

Spirtos filed an anti-SLAPP motion to dismiss, in which he denied mentioning Yemenidjian by name in his conversation with Oceguera and alleged that he instead had commented that the marijuana-licensing process in general had been corrupted. Spirtos contended that his version of his statement could not form the basis for liability because it 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" and thus protected by the anti-SLAPP statutes. *See* NRS 41.660(3). In particular, Spirtos contended that his statement satisfied NRS 41.637(4)'s definition of the type of "good faith communication" protected under NRS 41.660(3), namely, one "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."[1] NRS 41.637(4). Spirtos attached a declaration to his motion wherein he listed several reasons why he believed the licensing process had been corrupted, and he reiterated that he never mentioned Yemenidjian by name in his conversation with Oceguera.

Yemenidjian opposed Spirtos' motion, arguing that Spirtos could not deny making a statement about Yemenidjian in his conversation with Mr. Oceguera while simultaneously contending that any such statement was truthful or made without knowledge of its falsity. Relatedly, Yemenidjian also observed that Spirtos' declaration failed to explain how any such statement about Yemenidjian could have been truthful or made without knowledge of its falsity. Additionally, Yemenidjian attached a declaration from Oceguera, wherein he attested that

> [d]uring our conversation, Dr. Spirtos stated that *Armen Yemenidjian was knee deep in the corruption* at the center of the licensing process for recreational cannabis licenses that the State of Nevada had awarded in early December 2018. I was taken aback about the allegation that Mr. Yemenidjian had supposedly corrupted the process. I was sufficiently startled by Dr. Spirtos' statements that insinuated a crime that I subsequently spoke with Mr. Yemenidjian about Dr. Spirtos' accusation.

[1]Spirtos also argued that his statement satisfied NRS 41.637(3)'s definition of a protected good faith communication. In light of our resolution of this appeal, we need not decide whether Spirtos' statement satisfied NRS 41.637(3).

(Emphasis added.) Yemenidjian's opposition additionally argued that Spirtos' statement could not satisfy NRS 41.637(4)'s definition because Yemenidjian's alleged corruption was not a matter of public interest and because Spirtos' private conversation with Oceguera was not a public forum.

In reply, Spirtos contended that even if Yemenidjian's version of Spirtos' conversation with Oceguera were accurate, that version would constitute a nonactionable opinion because no reasonable person would believe that Spirtos' statement was a factual statement. *Cf. Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020) ("Because there is no such thing as a false idea, statements of opinion are statements made without knowledge of their falsehood under Nevada's anti-SLAPP statutes." (citation omitted) (internal quotation marks omitted)).

Following a hearing, the district court denied Spirtos' motion to dismiss. In so doing, the district court accepted as accurate Yemenidjian's version of Spirtos' statement to Oceguera and found that the statement did not satisfy NRS 41.637(4)'s definition because Spirtos' allegation that his competitor was corrupt was a personal matter and was made in a private conversation. The district court did not consider Spirtos' argument that his statement was a nonactionable opinion. Spirtos now appeals.

DISCUSSION

We review de novo a district court's denial of an anti-SLAPP motion to dismiss. *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019). In so doing, "[w]e exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based." *Id.* (quoting *Park v. Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905, 911 (Cal. 2017)).

Spirtos' denial that he made the alleged statement is irrelevant to step one of the anti-SLAPP analysis

As indicated, evaluation of an anti-SLAPP motion to dismiss involves a two-step analysis. *See* NRS 41.660(3)(a)-(b). At step one, the court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If successful, the court advances to step two, wherein the court must "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). If the defendant fails to satisfy step one, the court need not evaluate step two. *Coker*, 135 Nev. at 12, 432 P.3d at 749.

Spirtos' primary argument on appeal in support of reversal is that he did not mention Yemenidjian by name in his conversation with Oceguera and that, consequently, he could not have slandered Yemenidjian. For support, he relies on his own declaration wherein he acknowledged saying that *the Department's licensing process* had been corrupted but reiterated that he did not mention Yemenidjian by name, much less insinuate that Yemenidjian was corrupt.

We conclude that the district court correctly disregarded Spirtos' declaration at step one of its analysis. This conclusion is based on the plain language of NRS 41.660(3)(a), which, again, requires the district court to "[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." (Emphasis added.) *See City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it."). By hinging the step-one analysis on "the claim," NRS 41.660(3)(a) unambiguously provides that the district court should evaluate the statement forming the basis of the plaintiff's complaint, which, in this case, was the version of the statement that Yemenidjian alleged Spirtos made. *See Hersh v. Tatum*, 526 S.W.3d 462, 466-67 (Tex. 2017) (holding that under Texas's analog to NRS 41.660(3)(a), the relevant step-one inquiry is to consider the statement as alleged in the plaintiff's pleadings). Additionally, NRS 41.660(3)(a) unambiguously requires that the statement be a "good faith communication," which NRS 41.637 defines as a communication that "is truthful or is made without knowledge of its falsehood." In other words, when pursuing an anti-SLAPP special motion to dismiss, Spirtos cannot deny accusing Yemenidjian of corruption in his conversation with Oceguera while simultaneously contending that this (non)accusation was truthful or made without Spirtos' knowledge of its falsehood. *Cf. Shapiro v. Welt*, 133 Nev. 35, 40, 389 P.3d 262, 268 (2017) ("[N]o communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.'" (quoting NRS 41.637)).

Accordingly, we conclude that at step one of the anti-SLAPP analysis, a district court and this court must evaluate the communication as it is alleged in the plaintiff's complaint and in any of the plaintiff's clarifying declarations. *Rosen v. Tarkanian*, 135 Nev. 436, 441, 453 P.3d 1220, 1224 (2019) (observing that at step one of the anti-SLAPP analysis, a court should evaluate whether the "gist or sting" of the at-issue statement is a protected communication). Therefore, Spirtos' denial that he mentioned Yemenidjian in his conversation with Oceguera does not provide a basis for reversing

the district court's order. *Cf. Freeman v. Schack*, 64 Cal. Rptr. 3d 867, 877-78 (Ct. App. 2007) (noting that a defendant's denial of the plaintiff's allegations is a merits-based defense and that "merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity [under California's analog to NRS 41.660(3)(a)]," because where the defendant "cannot meet his threshold showing, the fact he might be able to otherwise prevail on the merits under the probability step is irrelevant" (internal quotation marks omitted)).

Spirtos' alleged statement was made in direct connection with an issue of public interest in a place open to the public or in a public forum, but he has not shown that the alleged statement was made in good faith

Spirtos next contends that reversal is warranted because the district court erroneously determined his statement, as alleged by Yemenidjian, was not "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). He contends that under NRS 41.637(4)'s definition of that requirement, the district court erroneously determined that his statement did not fall within NRS 41.660(3)(a)'s protection by finding that Spirtos' statement involved a personal grudge (with Yemenidjian) and was made in a private conversation (with Oceguera).

We agree with Spirtos that his statement, as alleged by Yemenidjian, was "made in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637(4). In *Shapiro v. Welt*, this court adopted the California courts' following five-factor framework for evaluating whether a statement falls within NRS 41.637(4)'s definition:

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

133 Nev. at 39-40, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)).

Here, we acknowledge the district court's undisputed finding that Spirtos made his alleged statement to only one person (Oceguera). However, this finding has relevance, arguably, to only the fourth factor.[2] On the other hand, under the first and second factors, it cannot reasonably be disputed that alleged corruption in a public agency is of concern to a substantial number of people, including the thousands of Nevada taxpayers who fund the Department. *See, e.g.*, *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988) ("The public is legitimately interested in all matters of corruption . . . ."); *see also Healthsmart Pac., Inc. v. Kabateck*, 212 Cal. Rptr. 3d 589, 599 (Ct. App. 2016) (holding that "assertions of a widespread illegal physician kickback scheme raise issues concerning the integrity of the health care system, which is a matter of widespread public concern"). And under the third factor, there was some degree of closeness between Spirtos' statement and the asserted public interest of public corruption, as Oceguera's declaration attested that Spirtos said that "Yemenidjian was knee deep in the corruption at the center of the licensing process for recreational cannabis licenses that the State of Nevada had awarded" and "had supposedly corrupted the process," which is directly related to the specifics of the alleged corruption. Finally, returning to the fourth factor, it is apparent from Oceguera's declaration—wherein he attested that "I was sufficiently startled by Dr. Spirtos' statements that insinuated a crime that I subsequently spoke with Mr. Yemenidjian about Dr. Spirtos' accusation"—that *Oceguera* interpreted Spirtos' statement as something more than "a mere effort to gather ammunition for another round of private controversy." *Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (internal quotation marks

[2]Yemenidjian contends that "[a] plain reading of NRS 41.637(4) should exclude private conversations like the one between Spirtos and Oceguera." While it may be intuitively appealing to exclude private conversations from the anti-SLAPP statutes' purview, a "plain reading" of NRS 41.637(4) requires that the communication simply be made "in a place open to the public or in a public forum," such as the inaugural gala in this case. Beyond Yemenidjian's "plain reading" argument, he has not provided any authority to support the proposition that a private communication cannot be subject to anti-SLAPP protection. And our own research of California caselaw suggests a split in holdings as to the protections afforded private conversations. *See, e.g.*, *Macias v. Hartwell*, 64 Cal. Rptr. 2d 222, 225 (Ct. App. 1997) (recognizing that private conversations are afforded anti-SLAPP protection); *see also Bikkina v. Mahadevan*, 193 Cal. Rptr. 3d 499, 507-08 (Ct. App. 2015) (recognizing that a statement's entitlement to anti-SLAPP protection "depends on whether the means of communicating the statement permits open debate" (internal quotation marks omitted)). Thus, we conclude that this particular case is ill suited to consider adopting such a rule. *Cf. Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (observing that it is a party's responsibility to provide salient authorities in support of an argument).

omitted). Accordingly, we conclude that Spirtos' alleged statement *was* "made in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637(4).

Nonetheless, this conclusion does not provide a viable basis to reverse the district court's order because, as discussed previously, as part of the district court's analysis during the first step, the district court must also find Spirtos' statement was a "good faith communication." NRS 41.660(3)(a). A "good faith communication" is a communication that "is truthful or is made without knowledge of its falsehood." NRS 41.637. In his declaration that he attached to his anti-SLAPP motion, Spirtos listed several factual bases in support of his belief that *the Department's* licensing process was corrupted. However, as mentioned above, Spirtos' declaration contained no factual bases for why he believed *Yemenidjian* was involved in the corruption and instead denied mentioning Yemenidjian by name. Absent a factual basis for why Spirtos believed his alleged statement regarding Yemenidjian's involvement in corruption was true, Spirtos necessarily failed to establish by a preponderance of the evidence that his statement, as alleged by Yemenidjian, was "truthful or [was] made without knowledge of its falsehood." NRS 41.637. He therefore failed to establish by a preponderance of the evidence that his alleged statement was a "good faith communication," even if the alleged statement was "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). *Cf. Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020) (holding that under NRS 41.660(3)(a)'s preponderance-of-the-evidence standard, "an affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record").

Spirtos' alleged statement did not constitute a nonactionable opinion

Spirtos' final argument in support of reversal is that his statement, as alleged in Yemenidjian's complaint and clarified in Oceguera's declaration, was simply Spirtos' "opinion" that was not capable of being untrue or being made with knowledge of its falsehood. *Cf. Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020) ("Because there is no such thing as a false idea, statements of opinion are statements made without knowledge of their falsehood under Nevada's anti-SLAPP statutes." (citation omitted) (internal quotation marks omitted)). In support of this argument, Spirtos relies primarily on the U.S. Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, which held that a statement of opinion on a matter of public concern "which does not contain a provably false factual connotation" constitutes a nonactionable opinion, 497 U.S. 1, 20 (1990), and recognized that "loose, figurative, or hyperbolic

language [tends to] negate the impression that the [speaker] was seriously maintaining that [the defamed party] committed [a] crime," *id.* at 21. Under *Milkovich*, Spirtos contends that his alleged statement that Yemenidjian "was knee deep in the corruption at the center of the licensing process" is "too vague and generalized" to have any provably false factual connotation and that the phrase "knee deep" is the type of hyperbolic language that negates any impression that Spirtos was seriously accusing Yemenidjian of committing a crime.

We disagree.[3] To be sure, the accusation that Yemenidjian was "knee deep" in corruption arguably is the sort of hyperbolic and factually unprovable language that would negate the impression that Spirtos was seriously alleging that Yemenidjian was corrupt. *Cf. 600 West 115th St. Corp. v. Von Gutfeld*, 603 N.E.2d 930, 937-38 (N.Y. 1992) (holding that an accusation that a landlord's lease was "as fraudulent as you can get and it smells of bribery and corruption" was an opinion because of the colloquial language, the absence of specific allegations, and because it was delivered as part of a "rambling, table-slapping monologue" at a community board meeting (internal quotation marks omitted)). However, "[a]ccusing a public official of corruption is ordinarily defamatory *per se*,"[4] *Bentley v. Bunton*, 94 S.W.3d 561, 582 (Tex. 2002) (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 112, at 791-92 (5th ed. 1984)), and "expressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist which will be sufficient to render the message defamatory if false," *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993) (citing *Milkovich*, 497 U.S. at 22), *receded from on other grounds by Pope v. Motel 6*, 121 Nev. 307, 316, 114 P.3d 277, 283 (2005). Here, we believe it is disingenuous for Spirtos to pass himself off as simply an uninformed member of the general public who is incapable of having factual support for his allegations of corruption when he has previously described himself in this case as "a prominent and highly accomplished gynecologic oncologist" who "spearheaded" the marijuana license applications that D.H. Flamingo presented to the Department.

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[3]In passing, Spirtos cites *Miller v. Jones*, 114 Nev. 1291, 1296, 970 P.2d 571, 575 (1998), for the proposition that "where a statement is susceptible of multiple interpretations, one of which is defamatory, the resolution of this ambiguity is left to the finder of fact." As indicated, the district court did not address Spirtos' argument that his statement constituted a nonactionable opinion, and Spirtos does not coherently argue on appeal that a remand to the district court for resolution of any potential ambiguity is appropriate at step one of the anti-SLAPP analysis. We therefore exercise our independent judgment in concluding that his alleged statement constituted an actionable factual statement.

[4]We recognize that Yemenidjian may not be a public "official." Nonetheless, Spirtos contended in district court that Yemenidjian should be deemed a limited-purpose public "figure."

Moreover, in determining whether a statement is an opinion or a fact, this court considers "whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Lubin v. Kunin*, 117 Nev. 107, 112, 17 P.3d 422, 426 (2001) (internal quotation marks omitted). Here, Oceguera, the sole person to whom Spirtos allegedly made the accusation, stated in his affidavit that "I was sufficiently startled by Dr. Spirtos' statements . . . that I subsequently spoke with Mr. Yemenidjian about [them]." Thus, if we accept the undisputed proposition that Oceguera is a "reasonable person" who happens to have a relationship with both Spirtos and Yemenidjian, it is apparent that Oceguera inferred that Spirtos made the accusation with knowledge of factual support for the accusation. Accordingly, we conclude that Spirtos' alleged statement *was not* nonactionable opinion and that Spirtos' argument in this respect does not provide a basis for reversing the district court's order.

CONCLUSION

Step one of the anti-SLAPP analysis requires a district court to "[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). Based on NRS 41.660(3)(a)'s plain language, we conclude that a moving party's denial that he or she made the alleged statements has no relevance at step one of the anti-SLAPP evaluation. Consequently, the district court correctly assumed the accuracy of Yemenidjian's version of Spirtos' alleged defamatory statement for purposes of conducting the step-one evaluation. Although the district court erroneously concluded that the alleged version of Spirtos' statement was not "made in direct connection with an issue of public interest in a place open to the public or in a public forum," NRS 41.637(4), Spirtos failed to demonstrate that the alleged version of his statement was "a good faith communication," NRS 41.660(3)(a). Accordingly, the district court correctly denied Spirtos' anti-SLAPP motion to dismiss. Further, because we disagree with Spirtos' alternative argument that his alleged statement was a nonactionable opinion, we affirm the district court's order denying his motion. We decline to consider Spirtos' remaining arguments, as they are beyond the scope of the step-one anti-SLAPP analysis.

Stiglich and Cadish, JJ., concur.

GUSTAVO RAMOS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 79781

December 9, 2021 499 P.3d 1178

Appeal from a judgment of conviction, pursuant to a verdict following a bench trial, of two counts of murder with the use of a deadly weapon and one count of sexual assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Affirmed.

Resch Law, PLLC, dba Conviction Solutions, and *Jamie J. Resch*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Karen L. Mishler*, Deputy District Attorney, Clark County, for Respondent.

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

OPINION

By the Court, Silver, J.:

Appellant Gustavo Ramos was arrested and charged in 2010 for the sexual assault and murder of a woman 12 years earlier. When the offenses were committed, the statute of limitations for the sexual assault charge was 4 years unless the victim or a person authorized to act on the victim's behalf filed a written report of the assault with law enforcement, in which case NRS 171.083(1) removed the statute of limitations. In this appeal, we consider the applicability of the statutory exception in NRS 171.083(1) when the victim is both sexually assaulted and murdered. We conclude that under the facts here—where the persons who discovered the victim's body notified the police and law enforcement filed a written report concerning the sexual assault within the limitations period—the requirements of NRS 171.083(1) were satisfied. Thus, there was no statutory time limit in which the State was required to file the sexual assault charge, and the district court did not err in denying Ramos's motion to dismiss. Because the other issues raised on appeal also do not warrant relief, we affirm the judgment of conviction.

I.

In May 1998, two elderly victims were murdered in their apartments at a retirement facility. One of the victims was found

bludgeoned to death in his apartment, and the other victim's body was discovered the next day in her apartment by her friend and her son, who immediately called the police. The police responded to the scene and collected evidence from the apartments, including a newspaper with a bloody palm print on it and a blood-stained t-shirt, but they were unable to identify a suspect. A month later, a detective filed a written report detailing the female victim's autopsy results and stating that she had been sexually assaulted and stabbed to death.

Approximately 11 years later, the State retested the evidence using more technologically advanced DNA testing and obtained a DNA profile from the t-shirt. The DNA profile was submitted into the national Combined DNA Index System (CODIS), which returned a match for Ramos. The palm print on the newspaper matched Ramos's as well. Subsequently, in 2010, the State charged Ramos with murdering both victims and sexually assaulting the female victim.

Ramos moved to dismiss the sexual assault charge, arguing that because the statute of limitations when the sexual assault took place was 4 years, the State's prosecution was time-barred. The district court denied Ramos's motion, finding that there was no limitations period for the offense pursuant to NRS 171.083 because the victim's friend and son, who had discovered the victim's body and reported her death to the police, were authorized to act on the dead victim's behalf and provided information to the police that was incorporated into various written reports setting forth the murder and sexual assault offenses. Following a bench trial, Ramos was found guilty of all three charges and was sentenced to an aggregate sentence of life without the possibility of parole. This appeal followed.

II.

Ramos argues that the district court erred by denying his motion to dismiss the sexual assault charge because the charge was filed after the statute of limitations had expired and the exception to the statute of limitations in NRS 171.083(1) did not apply. We disagree.

The district court's application of NRS 171.083(1) presents an issue of statutory interpretation that we review de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); *see also Bailey v. State*, 120 Nev. 406, 407, 91 P.3d 596, 597 (2004). Our primary goal in construing a statute is to give effect to the Legislature's intent in enacting it. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Thus, we first look to the statute's plain language to determine its meaning, and we will enforce it as written if the language is clear and unambiguous. *Id.* We will look beyond the statute's language only if that language is ambiguous or its plain meaning was clearly not intended or would lead to an absurd or unreasonable result. *Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 603-04 (2015); *Sheriff, Clark Cty. v. Burcham*, 124 Nev. 1247,

1253, 198 P.3d 326, 329 (2008). In interpreting an ambiguous statute, "we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy." *Lucero*, 127 Nev. at 95, 249 P.3d at 1228.

NRS 171.083(1) provided that if the "victim of a sexual assault or a person authorized to act on behalf of a victim of a sexual assault files with a law enforcement officer a written report concerning the sexual assault" within the applicable limitations period,[1] then there is no statutory time limit for commencing prosecution of the sexual assault. 1997 Nev. Stat., ch. 248, § 1, at 891.

Ramos argues that because neither the victim's friend nor her son was a person "authorized to act on behalf of [the] victim," and neither the friend nor the son filed a "written report concerning the sexual assault," the district court erred in finding that NRS 171.083 applied. According to Ramos, because the victim died before the sexual assault was discovered, she could not have given anyone authority to file a police report on her behalf. And neither the victim's son nor her friend, who were unaware when they discovered the victim's body that she had been sexually assaulted, filed "a written report *concerning the sexual assault*," as required by the plain language of NRS 171.083. (Emphasis added.) Thus, under Ramos's interpretation of the statute, the limitations period is removed only when a person who has been expressly authorized by the victim writes and files a report containing allegations of the sexual assault. Conversely, the State argues that the district court properly applied the statute because the deceased victim's son and friend were authorized to act on her behalf in reporting her death to the police and there was a written report prepared by law enforcement. The State further contends that Ramos's proposed interpretation would have the absurd result of allowing the statutory exception to apply only to surviving victims of sexual assault and not to victims who are murdered.

We agree with the State that Ramos's proposed interpretation of the statute is unreasonable. First, as to NRS 171.083(1)'s phrase "a person authorized to act on behalf of [the] victim," the plain language contains no requirement that the victim give the person express authorization. Moreover, such a requirement would have the perverse effect of allowing the exception in NRS 171.083(1) to apply only when the victim survives and is able to disclose the sexual assault, and not when the victim is murdered during or immediately after the sexual assault. This would mean that a perpetrator who sexually assaults and murders a victim could escape prosecution for the

[1]The statute of limitations for sexual assault was 4 years at the relevant time. 1997 Nev. Stat., ch. 248, § 1, at 891 (NRS 171.085). In 2015, the Legislature extended the statute of limitations to 20 years, but the amendment did not apply here because the 4-year period had expired in 2002. *See* 2015 Nev. Stat., ch. 150, §§ 3, 5, at 583-84 (providing that the 20-year limitations period applies retroactively only if the applicable limitations period had commenced but not yet expired on October 1, 2015).

sexual assault if the perpetrator's identity is not discovered within the applicable limitations period even when the sexual assault is the subject of a written report filed with law enforcement within the limitations period. Ramos's proposed interpretation would not only produce this absurd result but would also hinder the statute's purpose, which, as expressed in its text, is to remove time limitations when the sexual assault is promptly reported to and documented by law enforcement. *See Houtz v. State*, 111 Nev. 457, 461, 893 P.2d 355, 358 (1995) ("The interpretation of a statute should be reasonable and should avoid absurd results."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."). Thus, we decline to read into the statute a requirement that an "authorized" person have express permission from the victim to act on the victim's behalf. Instead we agree with the district court that when the victim has been murdered, a person who discovers the victim's body is "authorized" within the meaning of NRS 171.083(1) to report the crime on the victim's behalf.[2] This interpretation both comports with the plain language of the statute and avoids unreasonable results.

Next, as to NRS 171.083(1)'s phrase "files with a law enforcement officer a written report concerning the sexual assault," we conclude that the language is ambiguous. It can be interpreted as either requiring the authorized person to create a written report alleging sexual assault and file it with the police, or as requiring the authorized person to assist the police in writing and filing a report concerning the sexual assault. The former interpretation, which is proposed by Ramos, would require the authorized person to have knowledge of a sexual assault and report it in writing to law enforcement. Under this interpretation, if the victim is found murdered and it is not readily apparent to the person who finds the victim's body that he or she has been sexually assaulted, NRS 171.083(1) would not apply even if a law enforcement officer promptly files a written report about the sexual assault. We conclude that this interpretation fails to effectuate the Legislature's intent in enacting the statute. The legislative history indicates that the statute was intended to encourage the memorialization of sexual assault allegations as soon after the offense as practical so that an efficient and timely prosecution could occur and frivolous, vindictive, or false allegations could be avoided or deterred. *See* Hearing on A.B. 97 Before the S. Judiciary Comm., 69th Leg. (Nev., Apr. 22, 1997) (recognizing that one concern behind the statute of limitations is the difficulty in

[2]The parties' arguments on appeal regarding the meaning of "authorized" focus only on whether the victim's son and friend were "authorized" persons. We do not address whether the investigating officer who wrote the police report concerning the sexual assault, or the coroner who wrote the autopsy report, were "authorized" within the meaning of NRS 171.083(1), as the district court did not make such a finding and the parties provide no argument on it.

obtaining witnesses and prosecuting an offense after a certain time period, and thus the statutory exception was intended to "encourage authorities and victims to come forward" and promptly report a sexual assault so that it could be better prosecuted); Hearing on A.B. 97 Before the S. Judiciary Comm., 69th Leg. (Nev., May 19, 1997) ("Under the proposed amendment . . . the statute of limitations is tolled indefinitely as long as the complaint is reported within a certain time frame.").

It is clear to us that the Legislature intended the statutory time limitation on sexual assault to be removed as long as there was a written report of the allegations. Thus, construing the statute consistent with reason and public policy, we interpret it as allowing for the authorized person to assist the police in causing a written report to be filed. Here, the victim's son and friend both reported her murder to the police, with the friend submitting a written statement. Though neither the son nor the friend knew of or reported the sexual assault, an investigating police officer filed a written report several weeks later entitled "Murder with Deadly Weapon/Sexual Assault," detailing the autopsy results and the medical examiner's opinion that the victim had been sexually assaulted. We conclude that this written report documenting the sexual assault satisfies NRS 171.083's written report requirement. Therefore, the district court correctly found that NRS 171.083 applied and did not err by denying Ramos's motion to dismiss.[3]

III.

We conclude that, under the circumstances here—where a victim was sexually assaulted and murdered, the individuals who discovered the victim's body notified the police, and law enforcement filed a written report detailing the sexual assault within the applicable limitations period—the requirements of NRS 171.083(1) were satisfied such that no statutory time limit on commencing prosecution applied to the sexual assault charge. Accordingly, we affirm the judgment of conviction.

Parraguirre and Stiglich, JJ., concur.

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[3]Ramos also argues that (1) the district court erred in allowing the State to amend the information to include the sexual assault charge, (2) there was insufficient evidence to support the convictions, (3) his statements to the police should have been suppressed, (4) the district court erred in admitting testimony and a report from an unavailable witness, (5) the district court erred in denying his motion to dismiss for failure to collect evidence, (6) the district court erred in denying his motion to strike a sentence of life without the possibility of parole, and (7) cumulative error requires reversal. We have considered each of these arguments and conclude that none warrants relief.

PETSMART, INC., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE TIMOTHY C. WILLIAMS, District Judge, Respondents, and JAMES TODD; and RAPHAELA TODD, Real Parties in Interest.

No. 82454

December 9, 2021 499 P.3d 1182

Original petition for a writ of mandamus challenging a district court order denying summary judgment in a tort action.

Petition granted.

Law Offices of Lane S. Kay and *Lane S. Kay*, Las Vegas; *Amaro Baldwin, LLP*, and *Michael L. Amaro*, Long Beach, California, for Petitioner.

Claggett & Sykes Law Firm and *Thomas W. Askeroth*, Las Vegas, for Real Parties in Interest.

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

OPINION

By the Court, Silver, J.:

James Todd was sitting in his living room when his dog, Chip, suddenly attacked and bit James's arm, tearing it open. James's wife, Raphaela, had adopted Chip two days before from an independent pet-rescue organization holding an adoption event at a PetSmart store. The Todds later learned that Chip had previously been adopted and returned several times because of his aggressive behaviors and violent history, and they subsequently sued the rescue organization, PetSmart, and others. PetSmart filed a motion for summary judgment, asserting that there was no basis to hold it liable. The district court denied the motion. PetSmart now challenges that ruling by way of an original petition for a writ of mandamus.

To resolve this writ petition, we must decide a question of first impression for this court—namely, whether a pet store may be held liable under tort law where a dog adopted at the store through an adoption event conducted by an independent charitable organization later attacks and injures an individual. We hold that, as a pet store typically owes no duty to the individual in such circumstances, the store can be held liable only if it assumes a duty of care or has an agency relationship with the charitable organization that conducted

the adoption event. Applying these principles, we conclude that PetSmart cannot be held liable because it did not assume a duty of care or have an agency relationship with the charitable organization. Accordingly, because the district court erroneously denied PetSmart's motion for summary judgment, we grant the petition.

FACTS AND PROCEDURAL HISTORY

PetSmart, through its PetSmart Charities adoption program (collectively PetSmart), contracts with independent animal welfare organizations, called "agency partners," to find homes for homeless pets and thereby help end euthanasia as a population control method.[1] PetSmart's agency partners' vetting and prequalification process includes confirming the charity's 501(c)(3) status and liability insurance, a site visit, and an internet search of the organization by a PetSmart associate. After the vetting process, PetSmart provides the agency partner with a manual, which outlines policies and procedures for operating adoption events in the store, such as the cleaning and dress guidelines, but which does not control how the agency partner runs its adoption program.

PetSmart's agency-partner agreement clarifies that the agency partner is "fully responsible" for its adoptable pets, must conduct adoptions in designated areas, and must "use its own shelter adoption policies and procedures . . . [and] make the final decision in the placement of a pet." It also warns that the public might view agency partner volunteers as PetSmart employees when in fact they are not and prohibits the agency partner from interfering with PetSmart's business, taking PetSmart inventory, disparaging PetSmart, or selling products or competitive services while in a PetSmart store. The agreement also sets guidelines for how the agency partner must operate inside of PetSmart. For example, the agreement requires the area to be kept clean and the animals to be vaccinated and healthy, and it requires the agency partner to remove from the store any animal that shows signs of aggression. The agency partner must require adopters to sign a PetSmart adoption release form and inform PetSmart of the adoption. Finally, the agreement states that it does not create "a legal partnership, joint venture, landlord-tenant or employee-employer relationship" between the agency partner and PetSmart and that the agency partner "is an Independent entity responsible for itself."

When an adoption occurs, the adopter has the option of signing up for PetSmart's Pet Perks membership, and the adopter may choose to provide PetSmart with their email and phone number in return for PetSmart store benefits. PetSmart also pays a sum to the agency partner for every adoption completed at a PetSmart store,

[1]In 2019, approximately 650,000 animals were adopted in North America through PetSmart's adoption program.

and this sum increases when the agency partner reaches a certain threshold of adoptions. If a pet is returned to the organization, that organization may put the pet up for a subsequent adoption, and PetSmart has no measures in place to prevent agency partners from claiming an award for subsequent adoptions. PetSmart keeps copies of the adoption release forms, but it does not cross-reference those forms to determine whether the pet was previously adopted.

A Home 4 Spot (AH4S) acquired Chip, a large mixed-breed dog, from The Animal Foundation (TAF). TAF had adopted Chip out twice before, but both adopters returned Chip due to his aggressive behavior toward humans and other animals. TAF therefore determined that Chip was not adoptable. For reasons unexplained by the record, AH4S took Chip from TAF and placed him up for adoption at an adoption day event held at PetSmart. A family adopted Chip but returned him to AH4S less than a week later, reporting that Chip had growled at the children and chased the father around the house. AH4S again placed Chip up for adoption at an event conducted at PetSmart, where another family adopted him. But that family also returned Chip to AH4S, reporting that he unexpectedly attacked the daughter, knocking her to the ground, biting her arm, and severely injuring her thumb.

AH4S then put Chip up for adoption again through an adoption day event held in the loading dock area of a PetSmart store. Raphaela Todd decided to adopt Chip because he acted very friendly toward Raphaela and her small dog. Raphaela worked with an AH4S associate who characterized Chip as "a gentle giant" and explained that Chip had previously been adopted and returned following a minor incident where Chip nipped a person who was teasing him. Raphaela signed a form that explained PetSmart was not affiliated with AH4S, wherein she released PetSmart and PetSmart Charities of liability related to Chip's adoption. Upon adopting Chip, Raphaela received a goody bag with PetSmart coupons and a PetSmart adoption kit.

Two days after adopting Chip, Raphaela and her husband, James Todd, were sitting in their living room when Chip, who was lying on the floor in front of James's chair, started growling at James. Before Raphaela could even call Chip's name, Chip suddenly lunged and bit James on his right forearm, trying to pull James to the ground and tearing deep, gaping wounds in James's arm. Raphaela tried to pry Chip's jaws open, receiving puncture wounds in the process. After Raphaela freed James, James ran into the backyard and Raphaela maneuvered herself and Chip into the garage. Chip continued trying to get back into the house to attack James. Animal Control later took the dog away.

The Todds filed a complaint for negligence, negligent infliction of emotional distress, and respondeat superior against PetSmart, AH4S, TAF, and others. Pertinent here, PetSmart moved for summary judgment, arguing it could not be held liable because it did

not own or control Chip and was not involved with Chip's adoption. The district court conducted a hearing and issued an order denying PetSmart's motion for summary judgment. The court found that PetSmart owed a duty to the Todds under *Wright v. Schum*, 105 Nev. 611, 781 P.2d 1142 (1989). The district court further found that there were genuine issues of material fact concerning a possible agency relationship between PetSmart and AH4S, the Todds' waiver, and PetSmart's vetting and prequalification procedures. PetSmart now petitions this court for writ relief, arguing that it did not owe the Todds a duty of care as a matter of law and had no agency relationship with AH4S.

DISCUSSION

We exercise our discretion to entertain the writ petition

"A writ of mandamus is available to compel the performance of an act which the law . . . [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks and footnote omitted) (alterations in original). Mandamus is an extraordinary remedy, available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see also Cote H.*, 124 Nev. at 39, 175 P.3d at 908.

The decision to entertain a petition for a writ of mandamus is within our sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, we do not consider writ petitions challenging a district court order denying summary judgment. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). However, we may consider such a petition where doing so is in the interests of judicial economy and either there is no factual dispute and summary judgment is required pursuant to clear authority, *id*., or the petition presents a matter of first impression that may be dispositive in the case, *see Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 547, 376 P.3d 167, 170 (2016).

Here, the essential facts are not in dispute, and PetSmart's petition raises an important legal issue of first impression—whether a pet store may be liable to a dog-bite victim who purchased the dog from an independent organization temporarily operating on the pet store's premises. Establishing a clear answer to this matter will serve judicial economy. We therefore elect to consider the writ petition.

Standard of review

We review a district court's denial of summary judgment de novo, without deference to the findings of the lower court. *State, Dep't of*

Transp. v. Eighth Judicial Dist. Court, 133 Nev. 549, 553, 402 P.3d 677, 681-82 (2017). Summary judgment is appropriate when there is no genuine issue as to any material fact and "the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*

Whether a defendant owes the plaintiff a duty of care is a question of law. *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996); *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991). And although the existence of an agency relationship is a question of fact, whether there is sufficient evidence of such a relationship so as to preclude summary judgment is a question of law. *See Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 47, 910 P.2d 271, 274 (1996).

Whether PetSmart owed a duty of care

PetSmart contends that it cannot be held liable on a theory of negligence because it did not owe any duty of care, emphasizing that it did not own or control Chip and was not involved in the adoption process. PetSmart distinguishes *Wright*, arguing the landlord there owed a duty of care only after affirmatively promising to remedy the dangerous condition, whereas here there is no evidence that PetSmart knew of Chip's aggressive tendencies. The Todds counter that *Wright* imposes a duty of care here because PetSmart controlled and supervised AH4S during the adoption process, was in the position to protect the public from dangerous dogs, and took affirmative action to protect the public by regulating aspects of the adoption process.[2]

"An indispensable predicate to tort liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured." *Mangeris v. Gordon*, 94 Nev. 400, 402, 580 P.2d 481, 483 (1978). The common law generally does not impose a duty of care to control the dangerous conduct of another or to warn others of the dangerous conduct. *Id.*; *see also Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011) ("Generally, no duty is owed to control the dangerous conduct of another." (internal quotations omitted)).

However, in *Wright* we recognized a narrow exception to the general rule when a defendant assumes a duty of care owed by another to protect a third party. *See* 105 Nev. at 615-16, 781 P.2d at 1144-45.

[2]To the extent the Todds argue that a genuine issue of material fact exists concerning the reasonableness of PetSmart's vetting processes, we need not reach the issue because, as set forth herein, the facts do not establish a duty of care.

In particular, we held that a landlord could be found liable under general tort principles where the landlord assumed a duty to protect others against a tenant's dangerous dog. 105 Nev. at 612-15, 781 P.2d at 1142-44. The dog there, a pitbull, killed a neighbor's dog and tried to attack the neighbors. *Id.* at 614-15, 781 P.2d at 1143-44. Following these attacks, the landlord promised he would order his tenants to get rid of the pitbull or move. *Id.* at 615, 781 P.2d at 1144. Instead, the landlord required the tenants to keep the dog inside or on a chain. *Id.* The tenants failed to confine the pitbull, which escaped and attacked another dog and, later, a child. *Id.* at 618-19, 781 P.2d at 1146-47. We concluded that the landlord initially had no duty to protect others from the dog, but once he learned of the danger posed by the dog, used "his power of eviction to force compliance," and voluntarily took action to secure the neighborhood from harm, he was no longer "non-negligent as a matter of law." *Id.* at 618, 781 P.2d at 1146.

The present case is dissimilar from *Wright*. Nothing in the record suggests that PetSmart knew about Chip's aggressive tendencies, much less undertook affirmative steps to prevent the type of harm that ensued. PetSmart did not vet the individual dogs, watch for dogs that are repeatedly placed for adoption, or investigate the animals prior to adoption.[3] Far from undertaking to share AH4S's duty, PetSmart expressly affirmed in its agreement with AH4S that the agency partner alone had control of which pets to present for adoption and was fully responsible for those animals. Indeed, the record shows that PetSmart only provides the premises for the adoption event and is not in charge of the animals placed for adoption by any agency partners. And although PetSmart took steps to ensure the safety of its store patrons by requiring AH4S to follow guidelines during its adoption fairs, those ordinary safety precautions do not suggest that PetSmart assumed the role of an insurer of adopters' safety after they left the store.

We note, too, that other jurisdictions generally do not hold a store owner liable for a dog-bite injury where the store owner was unaware that the dog may be dangerous. In *Claps v. Animal Haven, Inc.*, for example, the plaintiff sustained injuries when she was attacked by a dog being shown for adoption by an animal adoption organization on the sidewalk in front of a Petco store. 34 A.D.3d 715, 715-16 (N.Y. App. Div. 2006). The dog had been shown around 30 times

[3]Although the district court found that PetSmart kept an "adoptable pet log," the record reflects instead that the charitable organization kept that log, which a PetSmart employee could review. Even assuming, *arguendo*, that PetSmart kept a log, it does not follow that PetSmart was on notice of Chip's aggressive tendencies, especially given that each year hundreds of thousands of rescue animals are put up for adoption at PetSmart stores by charitable organizations and PetSmart does not check to see if any of those animals are later put back up for adoption.

before the incident and had acted very friendly. *Id.* at 716. Because the plaintiff failed to show that the defendants knew about the dog's dangerous propensities, the court concluded the plaintiff failed to raise a triable issue of fact and therefore could not recover on an action sounding in common-law negligence against the store. *Id.*

Similarly, in *Christian v. Petco Animal Supplies Stores, Inc.*, a dog that was at a pet store with its owner bit the plaintiff, who then filed a personal liability action against the owners of the dog and the store. 863 N.Y.S.2d 756, 756-57 (N.Y. App. Div. 2008). But because the evidence showed the defendants were unaware of the dog's dangerous propensities, they were entitled to judgment as a matter of law. *Id.* at 757. In *Mosholder v. Lowe's Home Centers, LLC*, an Ohio federal court similarly concluded a home improvement store was not liable when one customer's dog bit another customer where no evidence showed the store knew the dog posed a danger. 444 F. Supp. 3d 823, 829-30 (N.D. Ohio 2020). And in *Braese v. Stinker Stores, Inc.*, the Idaho Supreme Court concluded a convenience store did not owe a duty of care where no evidence showed the store manager or employee knew or should have known the dog may be dangerous. 337 P.3d 602, 604-05 (Idaho 2014). The above cases show that even where a dog bite occurs on the store's premises, the store generally owes no duty of care where it is unaware of the dog's dangerous propensities. It follows that where the dog bite occurs off the store's premises at an attenuated time and location, and the evidence does not show the store was aware of the dog's dangerous propensities, there is no basis to impose a duty of care. Therefore, under the facts in the record, we conclude that PetSmart did not owe a duty of care to the Todds.[4]

AH4S was not PetSmart's agent

The district court additionally found that there was a genuine issue of material fact regarding whether PetSmart could be held liable under an agency theory. PetSmart argues that a claim of

[4]We are not persuaded by the Todds' additional argument that PetSmart owed a duty of care pursuant to a special relationship, as Chip's attack is attenuated from any relationship PetSmart had with the Todds. *Cf. Lee v. GNLV Corp.*, 117 Nev. 291, 296, 22 P.3d 209, 212 (2001) (deciding that a restaurant owed a duty to come to the aid of its patrons); *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 969, 921 P.2d 928, 931 (1996) (concluding that a construction company owed a duty of care to a tenant who was assaulted by someone hiding in an unlocked apartment, where the company was in charge of locking up the apartment); *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 519-22, 815 P.2d 151, 153-55 (1991) (concluding an employer owned a duty of care to employees to make safe a hazardous machine in the workplace), *overruled on other grounds by Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 951 P.2d 1027 (1997). *See also Wiley v. Redd*, 110 Nev. 1310, 1312-16, 885 P.2d 592, 593-96 (1994) (explaining a "germ of a relationship" was insufficient to impose a duty of care upon an alarm company to warn police officers of dangerous dogs on a homeowner's property).

agency fails because Raphaela signed a form specifically acknowledging PetSmart was not in any way involved in the adoption and that AH4S was not affiliated with PetSmart. The Todds contend that PetSmart's conduct made Raphaela view AH4S as its apparent agent.

An essential element of an agency relationship "is a fiduciary obligation on the part of the alleged agents to act primarily for the benefit of [the principal] in matters connected with [their] undertaking." *Hunter Mining Labs., Inc. v. Mgmt. Assistance, Inc.*, 104 Nev. 568, 571, 763 P.2d 350, 352 (1988) (quotation marks omitted). A party claiming an agency relationship based on apparent authority "must prove (1) that he subjectively believed that the agent had authority to act for the principal and (2) that his subjective belief in the agent's authority was objectively reasonable." *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997). Reliance will not be reasonable if the party claiming apparent agency "closed [her] eyes to warnings or inconsistent circumstances." *Id.* (internal quotation marks omitted).

Here, the agreement between PetSmart and AH4S expressly disclaimed any agency relationship between them. And the facts do not support apparent agency, as Raphaela signed an adoption release form that plainly stated AH4S is not affiliated with PetSmart or PetSmart Charities in any way. Notably, Raphaela admitted that, based on the language of the adoption release form, she understood, prior to adopting Chip, that AH4S was not affiliated with PetSmart or PetSmart Charities. Accordingly, we conclude that there is no genuine issue of fact for the jury as to whether an agency relationship existed between PetSmart and AH4S.

CONCLUSION

The district court erroneously denied summary judgment, as PetSmart did not owe a duty of care to the Todds as a matter of law. In addition, there is no genuine issue of fact regarding any alleged agency relationship between PetSmart and AH4S. Therefore, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to grant PetSmart's motion for summary judgment.

Parraguirre and Stiglich, JJ., concur.