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

CONCLUSION

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

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

Hardesty and Parraguirre, JJ., concur.

YACOV JACK HEFETZ, Appellant, *v.*
CHRISTOPHER BEAVOR, Respondent.

No. 70327

July 6, 2017 397 P.3d 472

Appeal from a district court order granting a motion to dismiss and awarding attorney fees in an action seeking to enforce a guaranty agreement. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed and vacated in part.

Cohen Johnson Parker Edwards and *H. Stan Johnson, Chris Davis*, and *Michael V. Hughes*, Las Vegas, for Appellant.

Dickinson Wright PLLC and *Joel Z. Schwarz, Gabriel A. Blumberg*, and *Taylor Anello*, Las Vegas, for Respondent.

Before the Court En Banc.

OPINION

By the Court, Stiglich, J.:

The one-action rule generally requires a creditor seeking to recover debt secured by real property to proceed against the security first prior to seeking recovery from the debtor personally. This opinion addresses whether the nonwaiver provisions of NRS 40.495(5) preclude a party from waiving the one-action rule by failing to assert it in his responsive pleadings. We hold that the one-action rule must be timely interposed as an affirmative defense in a party's responsive pleadings or it is waived. Because respondent Christopher Beavor failed to raise the one-action rule defense until prior to the commencement of the *second* trial in the case, the district court erred by granting his motion to dismiss based on the one-action rule.

FACTUAL AND PROCEDURAL HISTORY

The Herbert Frey Revocable Family Trust (the trust) loaned Toluca Lake Vintage, LLC (Toluca Lake) $6,000,000, pursuant to a loan agreement dated March 29, 2007. Appellant Yacov Jack Hefetz (Hefetz) entered into a participation agreement with the trust and contributed $2,214,875 toward funding of the loan. The proceeds of the loan were used to purchase property, as well as the funding of engineering, marketing, and architects for a planned development of the commercial property. In relevant part, the loan was secured by the personal residence of respondent Christopher Beavor and his former wife, Samantha.[1] In addition to Beavor's personal residence, the loan was secured by a personal guaranty agreement, wherein Beavor waived his rights under Nevada's one-action rule, found in NRS 40.430. One of the provisions of the loan stated that the loan would default should Toluca Lake file for bankruptcy.

In 2009, Toluca Lake filed for bankruptcy, thereby defaulting on the loan, and Beavor refused to repay the loan under the terms of the personal guaranty agreement. Subsequently, the trust assigned its interest in the loan, promissory note, deeds of trust, and guaranty to Hefetz.

Without foreclosing on the property, Hefetz filed a complaint to recover damages against Beavor for breach of the guaranty agreement.[2]

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[1]Hefetz settled with Samantha Beavor during trial, and she was dismissed from the action. Therefore, any reference in this opinion to "Beavor" solely addresses Christopher, unless otherwise stated.

[2]Hefetz argues that he has not taken any action to foreclose on Beavor's personal residence because he alleges Beavor's home is "underwater by an amount in excess of eight hundred thousand dollars even without considering"

Beavor did not assert the one-action rule in either his answer to the complaint or his counterclaim. The district court scheduling order mandated the parties file motions to amend pleadings or add parties on or before February 21, 2012, and file dispositive motions on or before June 20, 2012. On April 9, 2012, Beavor filed his first amended counterclaim, which did not assert the one-action rule.

On May 29, 2012, a stipulation and order to extend discovery deadlines was entered, extending discovery until July 23, 2012, and the dispositive motion deadline until August 23, 2012. However, the parties expressly stipulated that the "deadline for any party to amend the pleadings has passed" and "[t]he parties do not seek an extension of [the February 21, 2012,] date."

A jury trial was held between February 5, 2013, and March 1, 2013, and the jury entered a verdict in favor of Beavor. Subsequently, Hefetz filed a motion for a new trial, or in the alternative, a motion for judgment notwithstanding the verdict. The district court granted Hefetz's motion for a new trial based on Beavor's failure to oppose the motion on its merits. The new trial was scheduled for a five-week stack, commencing October 12, 2015. The district court ordered that the deadlines remained governed by the May 29, 2012, scheduling order, which had deadlines of July 23, 2012, for discovery, and August 23, 2012, for dispositive motions.

On May 5, 2015, Beavor filed a motion to dismiss Hefetz's complaint based on the one-action rule, raising the one-action rule defense for the first time. After a hearing, the district court granted Beavor's motion to dismiss based on the one-action rule, finding that the one-action rule could not be waived. The district court later granted Beavor attorney fees.

Hefetz now appeals and raises the following issues: (1) whether the district court erred by granting Beavor's motion to dismiss because Beavor waived the one-action rule defense by not timely asserting it, and (2) whether the district court abused its discretion by awarding attorney fees to Beavor.

DISCUSSION

The district court erred by granting Beavor's motion to dismiss

Hefetz argues that the district court erred by granting Beavor's motion to dismiss because NRS 40.435(2) and NRCP 8(c) and 12(b) together provide that the one-action rule must be timely asserted in litigation as an affirmative defense and, here, Beavor did not timely assert the defense because he did not assert it until after the first trial.

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the loan at issue here and the deed of trust held by Hefetz. Thus, Hefetz argues, the deed of trust would be valueless if Hefetz chose to foreclose. On appeal, the parties do not argue, and we do not address at this time, the application of NRS 40.459(3), regarding limitations on the amounts of money judgments where the debt is secured by a personal place of residence.

Beavor argues that NRS 40.435(3) and NRS 40.495(5)(d) prohibit a waiver of the one-action rule prior to the entry of final judgment, his assertion of the rule is thus timely, and the district court properly dismissed Hefetz's action under NRS 40.453(2)(a).

"This court reviews de novo a district court's order granting a motion to dismiss." *Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. 547, 550, 306 P.3d 406, 408 (2013). Such an order is "rigorously reviewed[;] [t]o survive dismissal, a complaint must contain some set of facts, which, if true, would entitle [Hefetz] to relief." *In re Amerco Derivative Litig.*, 127 Nev. 196, 210-11, 252 P.3d 681, 692 (2011) (citation and internal quotation marks omitted). When interpreting statutes, "[i]f the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). When construing statutes and rules together, this court will, if possible, "interpret a rule or statute in harmony with other rules and statutes . . . such that no part of the statute is rendered nugatory or turned to mere surplusage." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *see also Orion Portfolio Servs. 2 LLC v. Cty. of Clark*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe conflicting statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized.").

This court has previously harmonized the statutory provisions of the one-action rule and the NRCP

NRS 40.430 is commonly referred to as Nevada's "one-action rule." *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 725, 263 P.3d 231, 232 (2011). The one-action rule provides that "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate." NRS 40.430. When applicable, the one-action rule thus requires that "a creditor . . . seek to recover on the property through judicial foreclosure before recovering from the debtor personally." *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005). If a creditor fails to comply with the one-action rule and sues a debtor personally without seeking judicial foreclosure, the debtor may assert the one-action rule as a defense and move to dismiss the action. NRS 40.435.

We have previously held, however, that *in litigation* the one-action rule may be waived if it is not timely asserted. *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 513 n.1, 611 P.2d 1079, 1082 n.1 (1980). This holding is contemplated by NRS 40.435(2), which provides that "[i]f the provisions of NRS 40.430 are timely interposed as an affirmative defense . . . ," then the court may, on an appropri-

ate motion, either "[d]ismiss the proceeding" or "[g]rant a continuance" so that the action may be converted into one that complies with the one-action rule. While NRS 40.435(2) does not address what is meant by "timely interpos[ing]" the one-action rule "as an affirmative defense," NRCP 8(b) and 12(c), and our interpretation of them, govern the timely assertion of affirmative defenses, including the one-action rule. *See Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 620, 218 P.3d 1239, 1245 (2009) (holding that a party may waive a statutory affirmative defense if the party fails to timely raise it); *Clark Cty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395 & n.25, 168 P.3d 87, 96 & n.25 (2007) ("Under NRCP 8(c), a defense that is not set forth affirmatively in a pleading is waived."); *Elliot v. Resnick*, 114 Nev. 25, 30, 952 P.2d 961, 964 (1998) ("If affirmative defenses are not pleaded or tried by consent, they are waived.").

The litigation waiver provision in NRS 40.435(2) contrasts with the statutory provisions prohibiting the pre-litigation waiver of the one-action rule by agreement. NRS 40.453(1) provides that a debtor may not waive the provisions of the one-action rule in "any document relating to the sale of real property." We have harmonized these conflicting statutes by holding that, while a debtor may be precluded from waiving the one-action rule in documents "relating to the sale of real property," he may waive the rule, intentionally or not, by failing to timely raise it as an affirmative defense after the commencement of litigation. *See Nev. Wholesale Lumber Co. v. Myers Realty, Inc.*, 92 Nev. 24, 28, 544 P.2d 1204, 1207 (1976) (holding that a debtor may waive the one-action rule in litigation by failing to timely assert it, "even though NRS 40.453 precludes a [debtor] from waiving a right secured by the laws of the state in any document relating to the sale of real property"); *see also Keever*, 96 Nev. at 513 n.1, 611 P.2d at 1082 n.1 (1980) (explaining that the one-action rule may be waived in litigation, but not in documents "relating to the sale of real property" (quoting NRS 40.453(1))).

These statutory provisions governing pre- and intra-litigation waiver dovetail with the sanctions aspect of the one-action rule. As we have explained, the one-action rule "does not provide a complete affirmative defense to a separate personal action on the debt, wherever commenced," because the one-action rule "does not excuse the underlying debt." *Bonicamp v. Vazquez*, 120 Nev. 377, 382-83, 91 P.3d 584, 587 (2004). Instead, the one-action rule prohibits a creditor from "first seeking the personal recovery and then attempting, in an additional suit, to recover against the collateral." *Id.* at 383, 91 P.3d at 587. Thus, when suing a debtor on a secured debt, a creditor may initially elect to proceed against the debtor or the security. If the creditor sues the debtor personally on the debt, the debtor may then either assert the one-action rule, forcing the creditor to pro-

ceed against the security first before seeking a deficiency from the debtor, or decline to assert the one-action rule, accepting a personal judgment and depriving the creditor of its ability to proceed against the security. NRS 40.435(3); *Bonicamp*, 120 Nev. at 383, 91 P.3d at 587; *Nev. Wholesale Lumber Co.*, 92 Nev. at 30, 544 P.2d at 1208; *see also Keever*, 96 Nev. at 513, 611 P.2d at 1082 ("The right to waive the security is the debtor's, not the creditor's.").

NRS 40.495(5) does not alter the previously explained balance in the one-action rule

We have not addressed, however, the effect of NRS 40.495(5) and whether its language stating that the one-action rule "may not be waived" in the enumerated circumstances[3] conflicts with our prior interpretation of the one-action rule.[4] Beavor argues that NRS 40.495(5)(d) prohibits a waiver of the one-action rule before the forced waiver of the rule under NRS 40.435(3) at the entry of final judgment. We disagree.

NRS 40.495(5) is an exception to NRS 40.495(2) ("Except as otherwise provided in subsection 5 . . . ."), which is itself an exception to NRS 40.453 ("Except as otherwise provided in NRS 40.495 . . . ."). Before the enactment of NRS 40.495(2) and (5), NRS 40.453 prohibited the waiver of the one-action rule in all circumstances in "any document relating to the sale of real property." Through NRS 40.495(2), the Legislature has provided for exceptions to NRS 40.453 permitting waiver of the one-action rule and in turn provided in NRS 40.495(5) for exceptions to the exception when the rule may not be waived.

We previously interpreted NRS 40.453 in harmony with NRS 40.435(2), which governs asserting the one-action rule in litigation. We stated that a debtor "may waive the benefits of the statute by failing to call the court's attention to the security on the note, even though NRS 40.453 precludes a mortgagor or trustor from waiving a right secured by the laws of the state in any document relating to the sale of real property." *Nev. Wholesale Lumber Co.*, 92 Nev. at 28, 544 P.2d at 1207; *see also Keever*, 96 Nev. at 513 n.1, 611 P.2d at 1082 n.1. Thus, we gave meaning to both NRS 40.435(2), which is specific to waiver during litigation, and NRS 40.453, which is specific to waiver in documents concerning the sale of real property. NRS 40.495(2) and (5), however, are exceptions to and extensions

[3]Hefetz does not refute that Beavor does, in fact, fall within the enumerated provisions of NRS 40.495(5)(a)-(d). Indeed, it does not appear that this question was a disputed question of fact below.

[4]The Legislature enacted the relevant language of NRS 40.495(5) in 1989, after our opinions in *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 611 P.2d 1079 (1980), and *Nevada Wholesale Lumber Co. v. Myers Realty, Inc.*, 92 Nev. 24, 544 P.2d 1204 (1976).

of NRS 40.453, detailing who, when, and how the one-action rule may be waived in documents concerning the sale of real property. Nothing in NRS 40.495(2) or (5) references waiver during litigation. Thus, as we have previously held, these statutes govern waiver in different circumstances, and based on their plain language, they can be interpreted to work harmoniously together. *See Albios*, 122 Nev. at 418, 132 P.3d at 1028.

Moreover, interpreting NRS 40.495(5) broadly as Beavor suggests would render portions of the one-action rule superfluous. If NRS 40.495(5) permitted waiver at any time during litigation until a final judgment was entered, then NRS 40.435(2), specifying that the one-action rule must be "timely interposed as an affirmative defense," would be meaningless. Accordingly, we conclude that, based on the plain language of the statutory scheme, NRS 40.495(5) does not govern waiver during litigation. *See Beazer Homes Nev.*, 120 Nev. at 579-80, 97 P.3d at 1135.

Beavor's argument also misinterprets NRS 40.435(3), which provides that

> [t]he failure to interpose, before the entry of a final judgment, the provisions of NRS 40.430 as an affirmative defense in such a proceeding waives the defense in that proceeding. Such a failure does not affect the validity of the final judgment, but entry of the final judgment releases and discharges the mortgage or other lien.

Beavor focuses on the first sentence, arguing that he has the right to assert the one-action rule until final judgment, but ignores the import of the second sentence.

First, the language of NRS 40.435(3)'s first sentence does not support Beavor's argument. Beavor argues that the one-action rule "can be interposed at any point prior to entry of a final judgment." But the first sentence actually says that if the one-action rule has not been asserted prior to the entry of final judgment, then the rule is waived. The first sentence does not prohibit waiver of the one-action rule earlier in litigation through other means—if it did, it would again render NRS 40.435(2), requiring the timely assertion of the rule, superfluous.

The NRS 40.435(3) waiver of the one-action rule at final judgment is nevertheless necessary because NRS 40.435(2) does not force a waiver of the rule at any set point during litigation. While NRCP 8(c) generally requires a party to timely assert affirmative defenses in a responsive pleading or waive them, *Clark Cty. Sch. Dist.*, 123 Nev. at 395 & n.25, 168 P.3d at 96 & n.25, this does not categorically prohibit a party from attempting to raise an affirmative defense later in litigation. A party may attempt to revive a defense by moving to amend his or her complaint under NRCP 15. *See State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987-88, 103 P.3d

8, 18-19 (2004) ("NRCP 15(b) allows a party to move to amend its pleadings to conform to the evidence presented at trial."); *Elliot*, 114 Nev. at 30, 952 P.2d at 964 ("If affirmative defenses are not pleaded or tried by consent, they are waived.").

Second, the cutoff of the right to assert the one-action rule after final judgment permits the triggering of the sanctions portion of the rule in the second sentence of NRS 40.435(3). Under this provision, once the rule's protection has been waived, the debtor may prohibit the creditor from proceeding against the security. *Bonicamp*, 120 Nev. at 382, 91 P.3d at 587 (" '[F]ailure to assert NRS 40.430 as an affirmative defense [in a separate action that violates NRS 40.430] does not result in a waiver of all protection under that statute and leaves the debtor or his successor in interest free to invoke the sanction aspect of the "one-action" rule.' " (quoting *Nev. Wholesale Lumber*, 92 Nev. at 30, 544 P.2d at 1208)). Thus, NRS 40.435(3) does not conflict with other rules and statutes by prohibiting the waiver of the one-action rule until final judgment, but triggers a definitive waiver at final judgment so that the sanctions portion of the rule can take effect. Accordingly, we conclude that NRS 40.435(3) does not prohibit a waiver of the one-action rule during litigation prior to final judgment.[5]

Beavor waived the one-action rule defense by failing to timely interpose it

Turning to the facts of this case, Beavor failed to assert the one-action rule as a defense in his answer, counterclaim, amended counterclaim, opposition to Hefetz's motion for partial summary judgment, at the first trial, or in his opposition to Hefetz's motion for a new trial. During this time, the deadlines to amend the pleadings and for dispositive motions passed. Even after the motion for new trial was granted, the district court ordered that those deadlines remained in effect.

Because Beavor did not assert the one-action rule as a defense in his responsive pleadings, he failed to timely interpose the one-action rule defense as required by NRS 40.435(2) and NRCP 8(c). Therefore, the district court erred by granting Beavor's motion to dismiss, and we reverse the district court's order. In doing so, we also va-

[5]We perceive no conflict between the statutory provisions of the one-action rule and the NRCP because the statutes and the rules work harmoniously together. As there is no conflict, we need not consider whether any portions of the one-action rule violate separation of powers. *See State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) ("[T]he legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers . . . ."); *see also Seisinger v. Siebel*, 203 P.3d 483, 489 (Ariz. 2009) ("[A] determination that a statute and court rule cannot be harmonized is but the first step in a separation of powers analysis. If there is a conflict . . . we must then determine whether the challenged statutory provision is substantive or procedural." (citations omitted)).

cate the district court's award of attorney fees and costs to Beavor. *See Schwabacher & Co. v. Zobrist*, 97 Nev. 97, 97-98, 625 P.2d 82, 82 (1981) (reversing award to defendant for attorney fees and costs when the district court erred in granting motion to dismiss "because the basis for the order no longer exists").

CONCLUSION

The district court erred by granting a motion to dismiss in favor of Beavor because Beavor failed to timely interpose the one-action rule defense. Accordingly, we reverse the district court order granting the motion to dismiss and vacate its award of attorney fees to Beavor.

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

MICHAEL JOSEPH JEFFRIES, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 68338

July 6, 2017 397 P.3d 21

Appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Affirmed.

[Rehearing denied September 29, 2017]

[En banc reconsideration denied January 18, 2018]

Gentile Cristalli Miller Armeni Savarese and *Vincent Savarese III*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Binu G. Palal*, Deputy District Attorney, Clark County, for Respondent.

Before Douglas, Gibbons and Pickering, JJ.

OPINION

By the Court, Douglas, J.:

In this appeal, we consider whether the district court abused its discretion in denying appellant's motion for a mistrial based on

prosecutorial misconduct and his motion for a new trial based on juror misconduct, and whether the district court abused its discretion in declining to provide the jury with a supplemental clarifying instruction on malice aforethought. We conclude that appellant failed to establish any prejudicial prosecutorial misconduct and that appellant's trial counsel failed to adequately develop the record to assess whether he was prejudiced by juror misconduct. We further conclude that because the instructions on malice given to the jury were correct and appellant failed to indicate what supplemental clarifying instruction the district court should have provided, appellant fails to demonstrate error. Therefore, we affirm the judgment of conviction.

We take this opportunity to provide guidance on two recent cases. First, we provide guidance on the applicability of *Bowman v. State*, 132 Nev. 757, 387 P.3d 202 (2016), regarding the district court's duty to instruct the jury not to conduct independent research or investigation. Second, we provide guidance on the scope of *Gonzalez v. State*, 131 Nev. 991, 366 P.3d 680 (2015), concerning the district court's duty to provide additional instruction when a jury's questions during deliberations suggest confusion or lack of understanding of applicable law.

FACTS AND PROCEDURAL HISTORY

On October 22, 2011, appellant Michael Jeffries invited a few guests to his house in Las Vegas, including his longtime friend, Eric Gore. Jeffries' then live-in girlfriend Mandy and her 13-year-old daughter Brittany were also present at the house that entire evening. Both Jeffries and Gore were intoxicated when Gore became angry with one of the guests. Jeffries took Gore outside in an effort to calm him down. The two then returned to the house and continued to drink, but Gore was still upset. The other guests left as a result, but Gore refused to leave. An altercation ensued, which prompted Jeffries to retrieve his gun from under the mattress in his bedroom. As Jeffries exited his bedroom, an unarmed Gore approached, and Jeffries fatally shot him once in the heart from a distance of 2 to 3 feet.

The only other eyewitness to the shooting, Brittany, recounted the details of that night in statements to police and testimony at the preliminary hearing. Her statements and testimony discredited the defense theory that Gore ran aggressively toward Jeffries before Jeffries shot him in self-defense. When the State called Brittany as its first witness at trial, she could not remember many of the details she previously recounted. In the State's rebuttal closing argument, the prosecutor suggested that Jeffries might have indirectly influenced Brittany's trial testimony and made statements regarding her credibility. On this basis, Jeffries objected and later moved for a mistrial. The district court denied Jeffries' motion.

During deliberations, the district court received three questions from the jury presented in two notes. The first note indicated that a

juror had conducted outside research, which prompted the district court to reinstruct the jury pursuant to both parties' request. The second note inquired about the jury instructions; however, the district court did not provide a supplemental clarifying instruction.

Ultimately, the jury returned a verdict of guilty of second-degree murder. Jeffries filed a motion for a new trial, which the district court denied. The court then sentenced Jeffries to serve a prison term of 10 years to life for the murder and a consecutive prison term of 1-6 years for the deadly weapon enhancement. Jeffries now appeals from the judgment of conviction.

DISCUSSION

Prosecutorial misconduct

Jeffries argues that the district court erred by denying his motion for a mistrial based on prosecutorial misconduct. Jeffries contends that the prosecutor engaged in misconduct by vouching for Brittany and arguing that Jeffries influenced Brittany's testimony at trial. Conversely, the State argues that Jeffries raises his vouching argument for the first time on appeal and that this claim does not constitute reversible plain error. The State further denies that its argument concerning Jeffries' influence on Brittany's trial testimony amounted to prosecutorial misconduct because its rebuttal closing argument was appropriate based on the evidence and a proper response to Jeffries' closing argument. We agree with both of the State's contentions and therefore conclude that the district court did not abuse its discretion by denying the motion for a mistrial.

"A defendant's request for a mistrial may be granted . . . where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). This court will not disturb a district court's decision to deny a motion for a mistrial "absent a clear showing of abuse." *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (internal quotation marks omitted).

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." *Butler v. State*, 120 Nev. 879, 896, 102 P.3d 71, 83 (2004) (internal quotation marks omitted). Further, "[a] prosecutor's comments should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (internal quotation marks omitted).

Harmless-error review, however, only applies if the error was preserved. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial . . . ." *Id.* Failure to preserve the error requires this court to apply plain-error review.

Id. Under plain-error review, reversal is not required unless the defendant shows that the plain error caused "actual prejudice or a miscarriage of justice." *Id.* (internal quotation marks omitted).

Whether the State improperly vouched for Brittany

Jeffries contends that the prosecutor inappropriately vouched for Brittany's credibility during the following part of the rebuttal closing argument:

> So we now have three versions of statements from Brittany . . . . And now we're here at trial, and Brittany . . . doesn't remember anything. You know, . . . *I really grew to like Brittany . . . during this whole period that I've had this case*. You know why? You saw it.
>
> Here's a wonderful young lady. She's a wonderful young lady. And think about the influences she has had . . . in her life that would influence her testimony. She . . . has influences now that she didn't have then. In 2011, there wasn't this influence that—you know, the [imminent] marriage of her mother to the man that she watched shoot Eric Gore dead.
>
> That's a huge influence. She hasn't had—back then, *during her reliable statements that she did remember, she didn't have the influence of three-and-a-half years of being worked on by mom and—perhaps indirectly, but certainly being worked on—by Mike Jeffries*.

(Emphases added.) Although Jeffries objected and moved for a mistrial based on the lack of evidence to support the State's argument that Jeffries influenced Brittany's testimony at trial, Jeffries' objection and subsequent motion did not address the alleged improper vouching. Therefore, Jeffries failed to raise the issue of vouching below, and we conclude that he fails to demonstrate that plain error exists to warrant reversal.

Whether the State inappropriately argued that Jeffries influenced Brittany's testimony

Jeffries contends that the prosecutor committed misconduct when he suggested that Jeffries influenced Brittany's testimony at trial because the prosecutor's assertion was not supported by the evidence. "A prosecutor may not argue facts or inferences not supported by the evidence." *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). However, "the prosecutor may argue inferences from the evidence and offer conclusions on contested issues." *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotation marks omitted). Further, "[e]xplaining to the jury *why* [the witness] might be lying is permissible argument." *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990).

Here, the prosecutor's argument that Jeffries might have indirectly influenced Brittany's testimony was an appropriate comment on the evidence presented. Brittany testified that she had not been in contact with Jeffries since he shot Gore to ensure that she would be seen as a reliable witness. Brittany also testified that her mother and Jeffries did not suggest how she should testify at trial. However, testimony also revealed that Brittany's mother and Jeffries became engaged prior to trial, and Brittany admitted that she did not want anything to happen to Jeffries. Based on this testimony, an inference that Brittany's mother and Jeffries indirectly influenced her trial testimony is relevant to explain why Brittany failed to recall many of the details she recounted earlier. Moreover, the prosecutor's rebuttal argument was a proper response to Jeffries' closing argument, which inferred that Brittany's second statement to police was influenced. Accordingly, it was proper for the State to argue that Jeffries could have indirectly influenced her testimony at trial. Because the prosecutor's argument was appropriate, we conclude that the district court did not abuse its discretion by denying Jeffries' motion for a mistrial.

Juror misconduct

Jeffries argues that the district court abused its discretion in denying his motion for a new trial based on juror misconduct.[1] In particular, Jeffries argues that the district court had a sua sponte obligation to investigate whether actual prejudice attached as a result of the juror misconduct. We disagree and take this opportunity to provide guidance on *Bowman v. State*, 132 Nev. 757, 387 P.3d 202 (2016).

In order for a defendant to prevail on a motion for a new trial based on juror misconduct, "the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Meyer v. State*, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003). With regard to the second prong, "[p]rejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Id.* at 564, 80 P.3d at 455. In determining whether prejudice resulted, the district court may consider a nonexhaustive list of factors, such as "how the material was introduced to the jury," "the length of time it was discussed by the jury," "the timing of its introduction," and "whether the information was ambiguous." *Id.* at 566, 80 P.3d at 456. Analysis of the impact that the misconduct

[1]Jeffries alternatively argues that counsel was ineffective for failing to challenge the juror misconduct. However, this claim is inappropriately raised for the first time on direct appeal and therefore eludes judicial review. *See Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001) (stating that such a claim is appropriately raised for the first time in a post-conviction petition). Further, after consideration of Jeffries' additional arguments concerning juror misconduct, we conclude that they lack merit.

had on the verdict must be objective with the relevant inquiry being "whether the average, hypothetical juror would be influenced by the juror misconduct." *Id.*

This court will uphold a district court's decision to deny a motion for a new trial based on juror misconduct absent an abuse of discretion. *Id.* at 561, 80 P.3d at 453. Further, this court will not disturb the district court's factual findings absent clear error. *Id.* "However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." *Id.* at 561-62, 80 P.3d at 453.

The juror misconduct at issue here involved independent research, and we recently addressed independent juror investigations in *Bowman v. State*, 132 Nev. 757, 387 P.3d 202. In *Bowman*, two jurors conducted individual experiments testing the parties' theories before reentering deliberations. *Id.* at 761, 387 P.3d at 204. Following the trial, the two jurors revealed that they relied on their experiments in reaching a verdict. *Id.* at 761, 387 P.3d at 204-05. The defendant moved for a new trial based on this revelation, and the district court subsequently held an evidentiary hearing to investigate the prejudicial effect of the jurors' individual experiments. *Id.* at 761, 387 P.3d at 205. We ultimately concluded that the district court erred in denying the defendant's motion for a new trial. *Id.* at 762, 387 P.3d at 205. In reaching our conclusion, we determined that prejudicial juror misconduct occurred after applying the *Meyer* factors. *Id.* at 761, 387 P.3d at 206. We further concluded that the district court had a sua sponte obligation to give a jury instruction prohibiting jurors from conducting independent research, investigations, and experiments. *Id.* at 764, 387 P.3d at 206.

Here, the district court received the following note from the foreperson during jury deliberations: "One Juror openly stated they looked up the consequence of a guilty plea and was against the penalty. What do we do at this time?" Upon both parties' request, the district court provided curative instructions admonishing the jury not to consider punishment. This is evidenced by the fact that Jeffries' counsel stated: "I just wanted the record to reflect that the Court's supplemental charge to the jury was done after consultation with counsel." The district court further confirmed that "it was the request of . . . both sides that [the district court] tell [the jury] not to discuss punishment and go back and consider their verdict."

We take this opportunity to distinguish this case from *Bowman*. Unlike *Bowman*, the district court provided the relevant jury instructions prohibiting jurors from conducting independent research and from considering the penalty. Further, the juror misconduct was revealed before the jury reached a verdict, and thus, the district court was able to remedy any prejudice by admonishing the jury. Most notably, counsel for both parties agreed upon a curative instruction,

which the district court provided. Therefore, the district court was not required to act sua sponte to investigate whether actual prejudice attached as a result of the juror misconduct. It was upon the defense counsel to make such a request. As a result, the brief discussion that ensued concerning the juror note did not reveal enough facts allowing for an objective consideration of the *Meyer* factors. Because Jeffries' trial counsel did not adequately develop the record to assess any prejudice, we conclude that he fails to demonstrate prejudice that would warrant a new trial.

Supplemental clarifying jury instruction

Jeffries argues that the district court abused its discretion in refusing to provide a supplemental clarifying instruction to the jury after the court received two jury notes expressing confusion regarding an instruction. We disagree and clarify the scope of *Gonzalez v. State*, 131 Nev. 991, 366 P.3d 680 (2015).

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (internal quotation marks omitted). This same standard of review applies when the trial judge refuses to answer jury questions during deliberations. *See Tellis v. State*, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968).

In *Tellis*, we stated that "[i]f [the trial judge] is of the opinion the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, his refusal to answer a question already answered in the instructions is not error." *Id.* Subsequently in *Gonzalez*, we determined that *Tellis* did not go far enough in describing the district court's obligation to answer the jury's questions during deliberations. 131 Nev. at 996, 366 P.3d at 683. Thus, we created an exception to the rule as stated in *Tellis* by holding "that in situations where a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the judge has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion." *Id.* at 994, 366 P.3d at 682. This holds true even when the jury is originally given correct, complete, and clear instructions. *See id.* at 996, 366 P.3d at 684. In *Gonzalez*, the jury presented two questions to the trial judge. *Id.* at 995, 366 P.3d at 683. Although both parties agreed to an answer addressing both of the jury's questions, the district court refused to answer either of the questions. *Id.* Because the first jury question concerned conspiracy, which went to the very heart of the offense at issue, we held that the district court abused its discretion when it refused to clarify the jury's confusion by providing an answer. *Id.* at 997, 366 P.3d at 684.

Here, the jury asked the following three questions presented in two notes during deliberations:

> May we have more clarity/explanation on malice aforethought.
>
> Can we also get further understanding between 2nd degree vs. manslaughter.
>
> Does a conscious intent to cause death or great harm BEFORE committing the crime fall into the criteria of malice?

(Emphasis in original.) In response to these juror notes, the district court informed the jury that the instructions in question are statutorily provided. The court clarified that it could only give the jury the law, which the jury must apply to the facts in order to reach a verdict.

The jury's questions suggested confusion concerning malice, which is a significant element of murder.[2] *See* NRS 200.010. Unlike in *Gonzalez*, however, neither Jeffries nor the State proffered any supplemental instructions aimed at answering the jury's questions. Even on appeal, Jeffries does not indicate what further instruction the district court should have provided. We conclude that this distinction is significant and clarify *Gonzalez* to the extent that a district court does not abuse its discretion when it refuses to answer a jury question after giving correct instructions if neither party provides the court with a proffered instruction that would clarify the jury's doubt or confusion. Accordingly, this case would fall outside of the scope of *Gonzalez*, leaving only the correct jury instruction on malice to review for error. Therefore, Jeffries fails to demonstrate that the district court abused its discretion.[3]

Having considered Jeffries' arguments and concluded that no relief is warranted, we affirm the judgment of conviction.

Gibbons and Pickering, JJ., concur.

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[2]It is undisputed that the submitted jury instructions adequately and correctly stated the law.

[3]Lastly, Jeffries argues that cumulative error warrants reversal. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015), *cert. denied*, 136 S. Ct. 1466 (2016) (internal quotation marks omitted). Because there are no errors to cumulate, we conclude that Jeffries is not entitled to relief based upon this claim.

KUSUM DESAI, as Personal Representative for DIPAK KANTILAL DESAI, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 64591

July 27, 2017 398 P.3d 889

Appeal from a judgment and amended judgment of conviction, pursuant to a jury verdict, of nine counts of insurance fraud, seven counts of performance of an act in reckless disregard of persons or property resulting in substantial bodily harm, seven counts of criminal neglect of patients resulting in substantial bodily harm, theft, two counts of obtaining money under false pretenses, and second-degree murder. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed in part and reversed in part.

Franny A. Forsman, Las Vegas; *Wright, Stanish & Winckler* and *Richard A. Wright*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Michael V. Staudaher* and *Ryan J. MacDonald*, Deputy District Attorneys, Clark County, for Respondent.

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, J.:

A jury convicted appellant Dipak Kantilal Desai of, among other things, seven counts of performance of an act in reckless disregard of persons or property resulting in substantial bodily harm pursuant to NRS 202.595(2), and seven counts of criminal neglect of patients resulting in substantial bodily harm pursuant to NRS 200.495(1), collectively characterized in this opinion as the endangerment crimes. In this appeal, we are asked to determine whether a defendant can aid and abet a negligent or reckless crime, such as the endangerment crimes at issue here. We conclude that a defendant can be convicted of aiding and abetting a negligent or reckless crime upon sufficient proof that the aider and abettor possessed the necessary intent to aid in the act that caused the harm. Because the State presented sufficient evidence to show that Desai acted with

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

awareness of the reckless or negligent conduct and with the intent to promote or further that conduct in the endangerment crimes for which he was convicted, we affirm his convictions for those crimes.

Desai also challenges the sufficiency of the evidence to convict him of second-degree murder. Because there were intervening causes between Desai's actions and the victim's death, we conclude that the State presented insufficient evidence to convict Desai of second-degree murder. Accordingly, we reverse Desai's second-degree murder conviction.[2]

FACTS AND PROCEDURAL HISTORY

Desai was the original founding member and managing partner of the Endoscopy Center of Southern Nevada and other ambulatory surgical centers (collectively, the clinic) in Las Vegas. Desai made all decisions regarding the clinic, including the ordering and use of supplies and scheduling of patients. He was also in charge of the certified registered nurse anesthetists.

On July 25, 2007, the clinic's first patient of the day informed Desai that he had hepatitis C before his procedure began. Later that day, Michael Washington had a procedure performed at the clinic. Washington was later diagnosed with hepatitis C. On September 21, 2007, the clinic's first patient of the day informed a nurse that he had hepatitis C before his procedure began. Later that day, Sonia Orellana Rivera, Gwendolyn Martin, Patty Aspinwall, Stacy Hutchinson, and Rodolfo Meana had procedures performed at the clinic. All five patients were later diagnosed with hepatitis C. Meana received some treatment following his diagnosis, but failed to adequately complete any treatment and eventually died as a result of the disease.

After learning that multiple patients contracted hepatitis C at the clinic, the Southern Nevada Health District initiated an investigation. Blood samples of the infected patients were sent to the Centers for Disease Control and Prevention (CDC). The CDC determined that the sources for the strains of hepatitis C contracted by Washington, Orellana Rivera, Martin, Aspinwall, Hutchinson, and Meana were the patient seen first at the clinic on July 25, 2007, and the patient seen first at the clinic on September 21, 2007. The CDC also

[2]Desai also challenges his convictions on several other grounds: (1) his right to confrontation was violated because he was precluded from adequately cross-examining victim Rodolfo Meana prior to his death, a surrogate testified regarding Meana's autopsy report, and Meana's death certificate was improperly admitted; (2) the State committed prosecutorial misconduct; (3) the district court was required to order another competency evaluation and hold another hearing after Desai suffered a new series of strokes; and (4) his convictions for reckless disregard of persons and criminal neglect of patients must be reversed because they are lesser-included offenses of second-degree felony murder. After careful consideration, we determine that these arguments are without merit and do not warrant discussion.

concluded that the outbreak was the result of the clinic's nurse anesthetists reentering vials of propofol after injecting a patient and then reusing those vials of propofol on a subsequent patient.

Desai, along with Ronald Lakeman and Keith Mathahs, who were both nurse anesthetists at the clinic, were indicted. Desai and Lakeman were charged with ten counts of insurance fraud, seven counts of performance of an act in reckless disregard of persons or property resulting in substantial bodily harm, seven counts of criminal neglect of patients resulting in substantial bodily harm, theft, two counts of obtaining money under false pretenses, and second-degree murder. Mathahs agreed to testify against Desai and Lakeman after pleading guilty to criminal neglect of patients resulting in death, criminal neglect of patients resulting in substantial bodily harm, obtaining money under false pretenses, insurance fraud, and conspiracy. A jury found Desai guilty of all counts except one omitted count of insurance fraud. Desai now appeals.[3]

DISCUSSION

There was sufficient evidence to convict Desai of the endangerment crimes

On appeal, Desai argues that there is insufficient evidence to convict him of the endangerment crimes because he did not have the required intent for aiding and abetting. To resolve this issue, we must first determine whether one can aid and abet a negligent or reckless crime.

Aiding and abetting a negligent or reckless crime

Desai argues that there was insufficient evidence to convict him of the endangerment crimes because he did not possess the intent required to prove that he aided and abetted Lakeman and Mathahs. We disagree.[4] When reviewing a challenge to the sufficiency of the

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[3]We note that appellant Dipak Kantilal Desai passed away on April 10, 2017. On June 6, 2017, Kusum Desai filed a motion to substitute as the personal representative for appellant Desai, deceased, pursuant to NRAP 43(a)(1), arguing that this court should resolve the appeal because it raises important issues of first impression, some of which are constitutional in nature. The State did not oppose the motion, and on June 14, 2017, this court granted the motion to substitute. *See Brass v. State*, 129 Nev. 527, 530, 306 P.3d 393, 395 (2013) ("[W]hen a criminal defendant dies after a notice of appeal has been filed, a personal representative must be substituted for the decedent within 90 days of his death being suggested upon the record . . . .").

[4]The indictment charged Desai with committing the endangerment crimes under three theories of liability: Desai directly committed the act, aided and abetted the principal in committing the act, or conspired with the principal in committing the act. Indictments are allowed to present "alternat[ive] theories of liability as long as there is evidence in support of those theories." *Walker v. State*, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000); *see also* NRS 173.075(2).

evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The criminal offenses at issue here are set forth in NRS 202.595 and NRS 200.495. NRS 202.595 prohibits a person from "perform[ing] any act or neglect[ing] any duty imposed by law in willful or wanton disregard of the safety of persons or property." NRS 200.495(1) punishes "[a] professional caretaker who fails to provide such service, care or supervision as is reasonable and necessary to maintain the health or safety of a patient." And NRS 195.020 provides that a person who aids and abets in the commission of a crime shall be punished as a principal. However, we have not previously determined whether one can aid and abet a reckless or negligent crime.

Some jurisdictions have determined that a defendant cannot be convicted of aiding and abetting a reckless or negligent crime because "it is logically impossible to intend to aid" another in acting recklessly or negligently.[5] Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 Loy. L.A. L. Rev. 1351, 1383 (1998). These jurisdictions opine that "[a]pplying accomplice liability [to reckless or negligent crimes] raises troubling questions about whether the complicity doctrine is being stretched beyond its proper limits merely to find a means of punishing the [secondary actor]." *Id*. at 1353.

It appears, however, that courts are moving away from this rule, *see id*. at 1352 (explaining that "a growing number of courts have

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Because we conclude that there was sufficient evidence to convict Desai under an aiding and abetting theory of liability, we do not discuss the other two theories of liability. *See State v. Kirkpatrick*, 94 Nev. 628, 630, 584 P.2d 670, 671-72 (1978) ("Where . . . a single offense may be committed by one or more specified means, and those means are charged alternatively, the state need only prove one of the alternative means in order to sustain a conviction.").

[5]*See, e.g.*, *Fight v. State*, 863 S.W.2d 800, 805 (Ark. 1993) (agreeing with the New Hampshire Supreme Court "that an accomplice's liability ought not to extend beyond the criminal purposes that he or she shares" (quoting *State v. Etzweiler*, 480 A.2d 870, 874 (N.H. 1984), *superseded by statute on other grounds as stated in State v. Anthony*, 861 A.2d 773, 775-76 (N.H. 2004))); *People v. Marshall*, 106 N.W.2d 842, 844 (Mich. 1961) (determining that an owner of a vehicle who gave his keys to an intoxicated individual who killed another could not be found guilty of manslaughter because "the killing of [the victim] was not counselled by him, accomplished by another acting jointly with him, nor did it occur in the attempted achievement of some common enterprise"); *Etzweiler*, 480 A.2d at 874-75 (holding that the aider and abettor "could [not] intentionally aid [the principal] in a crime that [the principal] was unaware that he was committing").

found secondary actors responsible for another individual's unintentional crime"), because "giving assistance or encouragement to one it is known will thereby engage in conduct dangerous to life should suffice for accomplice liability." Wayne R. LaFave, *Criminal Law* § 13.2(e) (5th ed. 2010). We are persuaded by the rationale for this approach and thus decline to completely excuse an aider and abettor of a reckless or negligent crime from liability. Although NRS 195.020 provides that an aider and abettor shall be punished as a principal, the statute "does not specify what mental state is required to be convicted as an aider or abettor." *Sharma v. State*, 118 Nev. 648, 653, 56 P.3d 868, 870 (2002). Thus, we must determine what mental state is required to convict an aider and abettor of a reckless or negligent crime.

In *Sharma*, the appellant challenged his conviction for aiding and abetting attempted murder, arguing that the jury was improperly instructed on the necessary elements of the crime. *Id*. at 650, 56 P.3d at 869. This court held "that in order for a person to be held accountable for the *specific intent crime* of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." *Id*. at 655, 56 P.3d at 872 (emphasis added). The mental state articulated in *Sharma* for specific intent crimes leaves open the question as to the mental state required for reckless or negligent crimes. Consistent, however, with our reasoning in *Sharma*, we conclude that an aider and abettor must act with awareness of the reckless or negligent conduct and with the intent to promote or further that conduct.

This holding is consistent with how other jurisdictions have held. *See, e.g.*, *People v. Wheeler*, 772 P.2d 101, 105 (Colo. 1989) ("[T]he complicitor must be *aware* that the principal is engaging in [negligent] conduct." (emphasis added)); *State v. Foster*, 522 A.2d 277, 284 (Conn. 1987) ("[A] person may be held liable as an accessory to a criminally negligent act if he . . . intentionally aids another in the crime."); *Commonwealth v. Bridges*, 381 A.2d 125, 128 (Pa. 1977) ("[A]n accomplice's conduct must, with the intent to promote or facilitate, aid one whose conduct does causally result in the criminal offense."); *State v. McVay*, 132 A. 436, 439 (R.I. 1926) (determining that the defendant could be charged as an aider and abettor because he "recklessly and willfully advised, counseled, and commanded [the principals] to take a chance by negligent action or failure to act").

Having concluded that Desai can be charged as an aider and abettor in a negligent or reckless crime, we must now determine whether there was sufficient evidence presented to show that Desai possessed the necessary intent to aid and abet in the endangerment crimes for which he was convicted.

There was sufficient evidence to show that Desai intended to aid and abet in the endangerment crimes

Desai argues that the State did not sufficiently prove that he had knowledge that Mathahs' and Lakeman's injection practices violated a standard of patient care or that he intended for them to violate a standard of patient care. Desai also argues that the State failed to prove that he had knowledge of the lack of availability and reuse of supplies at the clinic.

According to a CDC medical officer, unsafe injection practices result when a nurse anesthetist administers to a patient one dose of propofol using a needle and syringe and places that same syringe back into a vial of propofol—even if the needle is changed—which is then later used on a second patient. There is a risk that any blood in the syringe from the first patient will be transferred to the propofol vial that is later used on a second patient.

When the State questioned Mathahs about reentering a propofol vial in order to redose a patient, Mathahs testified that he would replace the needle before reentering the vial. Mathahs further testified on direct examination as follows:

> [STATE]: Are you aware that there is at least a risk of potential contamination even changing out the needle in that situation?
>
> [MATHAHS]: Yes, there is.
>
> [STATE]: Did you ever express your concerns about doing this to Dr. Desai?
>
> [MATHAHS]: Yes.
>
> [STATE]: What was his response?
>
> [MATHAHS]: It's to save money, just go ahead and do it.
>
> [STATE]: So he instructed you to do it even though you made him aware of the risk?
>
> [MATHAHS]: Yes.

This line of questioning occurred again on redirect examination:

> [STATE]: Did you not testify on direct examination that when Desai told you to do this, reuse stuff that you had never done before, that you expressed the risk to him and that he told you to do it anyway?
>
> [MATHAHS]: I don't remember the exact conversation but, yes, I'm sure it was had, yes.
>
> [STATE]: So you expressed—just so we're clear, in whatever words, you expressed that there was a risk in doing that to Dr. Desai and he ordered you to do it anyway and you did it.
>
> [MATHAHS]: Yes.

Further, Gayle Langley, a CDC medical officer, testified that she observed Mathahs reenter a vial of propofol with the same syringe.

Mathahs testified that Desai checked the disposal containers and, if he found any unused propofol remaining in the syringes or vials of propofol, he would yell at the responsible nurse anesthetist for being wasteful. Mathahs "guess[ed]" that Desai wanted any unused propofol to be used on a subsequent patient and testified that he would likely be fired if Desai found a discarded vial still containing propofol.

The State also called Nancy Sampson, an analyst with the Las Vegas Metropolitan Police Department (LVMPD), to testify regarding charts she prepared that summarized patient records from the clinic. Sampson testified that the clinic's 2007 records indicated that it did not have adequate supplies to use a new vial of propofol on each patient and a new syringe for each injection.

Clinic employees testified that Desai complained that the nurse anesthetists used too many supplies, told employees that supplies should not be wasted, told a nurse anesthetist that he used too much propofol, and promised the nurse anesthetists a bonus if they brought the cost of propofol down. There was further testimony that Desai admonished other doctors if they changed their used gown after a procedure, Desai yelled if a nurse put a sheet on a patient, and materials were cut in half. Jeffrey Krueger, a nurse at the clinic, testified that a technician informed him that Desai had instructed her to reuse disposable forceps. When Krueger explained to Desai that they had "gone over this [issue], that we have plenty of them, there is no need to reprocess, they're single use, we know the risks of it," Desai said, "I know, I know, okay, okay."

Finally, Ralph McDowell, a nurse anesthetist at the clinic, testified that Desai told him to pretend that he did not know what a multiuse vial was if he was asked. And an LVMPD detective testified that a nurse anesthetist told him that Desai told her to inject patients "the way [Lakeman] did it."[6]

"Intention is manifested by the circumstances connected with the perpetration of the offense," NRS 193.200, and the jury is tasked with determining intent, *see State v. McNeil*, 53 Nev. 428, 435, 4 P.2d 889, 890 (1931) (stating that the "question of intent . . . must be left to the jury"). The State presented evidence that the clinic lacked adequate supplies to safely inject patients with propofol and Desai was more concerned with curbing waste of supplies than with patient comfort or safety. Additionally, Mathahs testified that he was aware of the risks of reusing the same needle and expressed his concerns to Desai, and that Desai encouraged the nurse anesthetists to reuse propofol vials if there was any remaining propofol following

[6]Another CDC medical officer testified that Lakeman told her that reentering a vial of propofol with the same syringe "was not the safest practice, but that he would keep pressure on the plunger to . . . try to prevent backflow of anything into the syringe from the patient."

a procedure. The evidence further demonstrated that Desai was not concerned when nurse anesthetists failed to follow proper procedures, and Desai requested that nurse anesthetists conceal unsafe injection practices.

Viewing the evidence adduced at trial in a light most favorable to the prosecution, we conclude that any rational trier of fact could have found beyond a reasonable doubt that Desai was guilty of the endangerment crimes. While there was conflicting testimony and other evidence regarding clinic injection practices, the availability of supplies, and Desai's knowledge of supply reuse at the clinic, it was the jury's duty to weigh the evidence and assess the credibility of the witnesses. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.").

Thus, we conclude that the State presented sufficient evidence for the jury to find that Desai possessed the necessary intent to aid and abet in the endangerment crimes, and we thus affirm Desai's convictions for these crimes.

There was insufficient evidence to convict Desai of second-degree murder

Desai challenges the sufficiency of the evidence to convict him of second-degree murder. According to the instructions given to the jury, there were two theories of liability under which the jury could convict Desai of second-degree murder: second-degree felony murder or murder in the second degree. The verdict form listed "Count 28 – MURDER (SECOND DEGREE) (Rodolfo Meana)" and had two boxes below the count titled "Guilty of Second Degree Murder" and "Not Guilty." There is no way to tell whether the jury found Desai guilty of second-degree felony murder or murder in the second-degree. Thus, we discuss both theories of liability.

Second-degree felony murder

Second-degree felony murder requires an inherently dangerous felony and "an immediate and direct causal relationship between the" defendant's actions and victim's death. *Sheriff v. Morris*, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983). "[I]mmediate" is defined as "without the intervention of some other source or agency." *Ramirez v. State*, 126 Nev. 203, 206, 235 P.3d 619, 622 (2010) (internal quotation marks omitted).

Meana contracted hepatitis C on September 21, 2007, from the unsafe injection practice of a nurse anesthetist at the clinic. Meana died from the hepatitis C infection over four years later on April 27, 2012. During those four years, Meana was told to seek medical treatment by at least two doctors. Although both doctors told Meana

that treatment could cure his hepatitis C infection, Meana voluntarily declined full treatment.

We conclude that the link between Desai's reckless and negligent conduct of encouraging unsafe injection techniques is sufficiently attenuated from Meana's death. Meana did not die as an immediate and direct consequence of Desai's actions. Rather, his failure to pursue treatment broke any such direct causal connection. Moreover, the improper act did not have an immediate relationship to Meana's death because over four years passed between the two occurrences, and Meana refused any medical treatment that may have cured the disease that caused his death. *See Morris*, 99 Nev. at 118, 659 P.2d at 859 (expressing specific limitations to the rule's application to attenuate the "potential for untoward prosecutions"). We conclude that any rational trier of fact could not have found beyond a reasonable doubt the essential elements of second-degree felony murder. *See McNair*, 108 Nev. at 56, 825 P.2d at 573.

Murder in the second degree

First-degree murder is a "willful, deliberate and premeditated killing." NRS 200.030(1)(a). Second-degree murder "is all other kinds of murder," NRS 200.030(2), and requires a finding of implied malice without premeditation and deliberation, *see Labastida v. State*, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999). Implied malice is demonstrated when the defendant "commit[s] an[ ] affirmative act that harm[s] [the victim]." *Id*.; *see also* NRS 193.190 (requiring unity of act and intent to constitute the crime charged); NRS 200.020(2) ("Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.").

While Desai aided and abetted the nurse anesthetists to act recklessly and negligently when injecting patients, the nurse anesthetist who improperly injected Meana "commit[ted] [the] affirmative act that harmed" Meana. *Labastida*, 115 Nev. at 307, 986 P.2d at 449. Because Desai's conduct was a step removed from the act that caused the harm, we conclude that any rational trier of fact could not have found beyond a reasonable doubt the essential elements of murder in the second degree. *See McNair*, 108 Nev. at 56, 825 P.2d at 573; *Labastida*, 115 Nev. at 307-08, 986 P.2d at 449.

Although it is unclear under which theory of liability Desai was found guilty, we conclude that there was insufficient evidence to convict him under either theory, and we thus reverse Desai's conviction for second-degree murder.[7]

[7]Desai also argues that the third element of second-degree felony murder was omitted from the jury instructions, the trial court failed to instruct the jury on the merger doctrine, and this court should abrogate the second-degree felony-murder rule. Because we reverse Desai's second-degree murder conviction due to insufficient evidence, we need not address these other arguments.

Accordingly, for the reasons set forth above, we affirm the district court's judgment of conviction except for Desai's second-degree murder conviction, which we reverse.

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

SOUTHERN CALIFORNIA EDISON, Appellant, *v.* THE STATE OF NEVADA DEPARTMENT OF TAXATION, Respondent.

No. 67497

July 27, 2017 398 P.3d 896

Appeal from a final judgment in an action to recover previously paid use taxes. First Judicial District Court, Carson City; James Todd Russell, Judge.

Affirmed.

Norman J. Azevedo, Carson City; *Jones Day* and *Charles C. Read*, Los Angeles, California, for Appellant.

Adam Paul Laxalt, Attorney General, *Lawrence J.C. VanDyke*, Solicitor General, and *Andrea Nichols*, Senior Deputy Attorney General, Carson City, for Respondent.

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, J.:

In *Sierra Pacific Power Co. v. State Department of Taxation*, we recognized that "[v]iolations of the dormant Commerce Clause are remedied by compensating for the negative impact to the claimant as measured by the unfair advantage provided to the claimant's competitors." 130 Nev. 940, 943, 338 P.3d 1244, 1246 (2014). We concluded there that, as no competitor was favored by any unfair tax advantage, no tax refund was due. *Id.* Here, faced with a similar dormant Commerce Clause issue, we consider whether appellant Southern California Edison (Edison) is due a refund of use tax paid to Nevada because it made the requisite showing of favored competitors. We also consider whether Edison alternatively is owed a tax credit in an amount equal to the transaction privilege tax (TPT) levied by Arizona. We conclude that Edison is not owed a refund because Edison has not demonstrated the existence of substantially

[1]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

similar entities that gained a competitive advantage because of the unconstitutional tax. We also conclude that Edison is not due a credit because the TPT does not qualify as a sales tax paid by Edison within the meaning of NAC 372.055.

FACTS AND PROCEDURAL HISTORY

Edison is an electrical utility company serving approximately 14 million customers. During all times relevant to this litigation, it owned a majority interest in Mohave Generation Station (Mohave),[2] a coal-fired power plant in Clark County. Mohave bought coal exclusively from Peabody Western Coal Company (Peabody), which extracted the coal in Arizona. The coal was ground up, turned into a slurry mixture, and transported across state lines to Mohave through a 273-mile pipeline.

Respondent State of Nevada Department of Taxation (the Department) levied a use tax on the coal Edison purchased from Peabody, pursuant to NRS 372.185. Edison paid $23,896,668 in use tax for transactions with Peabody between March 1998 and December 2000. During this time, the state of Arizona levied a TPT on Peabody for the coal's production in Arizona totaling $9,703,087.52, which was included in the overall price Edison paid to Peabody.

Pursuant to NRS 372.270, proceeds of minerals mined in Nevada are exempt from the use tax but subject to a net proceeds tax under NRS Chapter 362. Alleging that exempting minerals mined in Nevada from the use tax while imposing the use tax on minerals mined outside the state unconstitutionally discriminates against interstate commerce and violates the dormant Commerce Clause, Edison filed a claim with the Department for a refund of the use tax it paid between March 1998 and December 2000.[3] The Department denied the claim, and Edison filed an appeal with the Nevada Tax Commission. The Commission also denied the requested refund.[4]

Edison then filed an independent action in the district court and sought a trial de novo seeking a refund of the taxes it paid.[5] Edison did not seek prospective relief from its future obligation to pay use

[2]Mohave closed in 2005.

[3]Edison also filed claims for refunds of the use tax paid for the periods January 2001 through September 2003 and October 2003 through December 2005. This appeal only involves Edison's claim for a refund for the period of March 1998 and December 2000. But the parties have agreed that the final judgment in this proceeding will be conclusive as to the other two claims.

[4]The Commission originally granted the request in a closed meeting, and the district court affirmed the Commission's decision. This court reversed based on a violation of Nevada's Open Meeting Law. *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 244, 181 P.3d 675, 683 (2008).

[5]After Edison filed its complaint, the Department moved for dismissal, arguing that the proper method for challenging the Commission's denial was through a petition for judicial review. The district court agreed and dismissed

tax. After conducting a bench trial but before entering its final decision, the district court stayed the matter pending this court's ruling in *Sierra Pacific* because the cases presented many of the same legal and factual issues. Two weeks after this court published its opinion in *Sierra Pacific*, the district court issued its decision in which it found that, while the negative implications of the dormant Commerce Clause rendered NRS 372.270 unconstitutional,[6] Edison was not entitled to a refund because it did not have favored competitors that benefited from the discriminatory taxation scheme. The district court also denied Edison's other claims. Edison now appeals.

DISCUSSION

Edison's primary arguments on appeal are: (1) NRS 372.185 (use tax) and NRS 372.270 (use tax exemption) can be harmonized to bring NRS 372.270 within constitutional parameters, and, under its proposed construction, Edison is entitled to a refund because the use tax does not apply to its coal purchases; (2) if this court does not accept Edison's proposed construction, NRS 372.270 is impermissibly discriminatory under the dormant Commerce Clause and Edison made a showing of advantaged competitors caused by NRS 372.270, so it is entitled to a refund pursuant to *Sierra Pacific*; and (3) if this court decides that Edison is not owed a refund, Edison is entitled to a tax credit for the TPT Arizona levied on the coal's production.

NRS 372.270 cannot be harmonized with NRS 372.185 to bring it within constitutional parameters

Edison argues that NRS 372.270 is constitutional if it is interpreted in harmony with NRS 372.185. Edison further argues that, under its suggested interpretation, Edison's coal purchases from Peabody qualify for the exemption in NRS 372.270. Although we examined

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Edison's complaint. Edison then petitioned this court for a writ of mandamus, which we granted after determining that the Department was "judicially estopped from asserting that a petition for judicial review is the sole remedy because it specifically told Edison that trial de novo would be available if Edison was unhappy with the Commission's decision." *S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. 276, 279, 255 P.3d 231, 233 (2011).

[6]The district court determined that NRS 372.270 was unconstitutional under the dormant Commerce Clause based on its interpretation of our *Sierra Pacific* decision. However, we did not speak to the constitutionality of NRS 372.270 in that decision. *Sierra Pac.*, 130 Nev. at 943, at 338 P.3d at 1245-46. Rather, we accepted the district court's determination that the statute was unconstitutional because no party contested the court's decision on appeal. *Id*. Although the district court erroneously determined NRS 372.270 violates the dormant Commerce Clause based on *Sierra Pacific*, we nevertheless uphold the district court's decision denying Edison's request for a tax refund. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

NRS 372.270 in *Sierra Pacific*, we did not consider the constitutionality of the statute because the parties did not challenge that determination by the district court. 130 Nev. at 943, 338 P.3d at 1245. While Edison also does not take issue with the district court's determination that NRS 372.270, if interpreted as applying to it, violates the dormant Commerce Clause, Edison asserts that NRS 372.270 does not apply to its use of Arizona coal here. This court reviews questions of statutory construction de novo. *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013).

Nevada's use and sales tax statutory scheme is structured as follows:

> Under Nevada law, sales and use taxes are complementary, yet mutually exclusive. Sales tax applies to the sale of tangible personal property within the state. NRS 372.105. Conversely, use tax applies to the use, storage, and consumption of tangible personal property within the state. NRS 372.185. . . . The use tax complements the sales tax so that all tangible personal property sold or utilized in Nevada is subject to taxation. Use taxation is also a way for Nevada to tax transactions outside the state that would otherwise escape sales taxation. The incidence of Nevada's use tax falls *directly* upon the party that makes the out-of-state purchase and uses the property within the state.

State, Dep't of Taxation v. Kelly-Ryan, Inc., 110 Nev. 276, 280, 871 P.2d 331, 334-35 (1994).

Thus, NRS 372.185 imposes a use tax "on the storage, use or other consumption in this State of tangible personal property purchased from any retailer" in an out-of-state transaction "that would have been a taxable sale if it had occurred within [Nevada]." NRS 372.270 exempts from the sales and use tax "the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS." NRS Chapter 362 provides for a distinct net proceeds tax on all mining operations within the state. *See, e.g.*, NRS 362.140.

One of Edison's expert witnesses explained at trial that the net proceeds tax has an effective rate of about one percent, whereas the use tax has an effective rate of six or seven percent. Thus, according to this testimony, NRS 372.270's effect is to favor in-state mines over out-of-state mines.

However, Edison contends that NRS 372.185 and NRS 372.270 can be read in a way that avoids interstate discrimination.[7] "[W]hen the language of a statute admits of two constructions, one of which

[7]The Nevada Constitution states:

> The legislature shall provide by law for a tax upon the net proceeds of all minerals, including oil, gas and other hydrocarbons, extracted in this state,

would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute." *Ford v. State*, 127 Nev. 608, 619, 262 P.3d 1123, 1130 (2011) (quoting *Va. & Truckee R.R. Co. v. Henry*, 8 Nev. 165, 174 (1873)).

To harmonize the provisions, Edison points out that use tax is levied on all property that is "acquired out of state in a transaction that would have been a taxable sale" if it occurred in Nevada. NRS 372.185(2). Edison argues that if the coal mine in Arizona was located in Nevada, the transaction would be exempt from sales tax pursuant to NRS 372.270 and thus not a "taxable sale." Under this reading, NRS 372.185 would not be implicated, and the use tax would not apply to minerals mined outside of Nevada. Such a reading of these statutes, Edison asserts, would treat out-of-state mines and minerals exactly the same as in-state mines and minerals for the purposes of NRS 372.270—all would be exempt from use and sales taxes.

However, the reading confuses the location of the mine with the location of the sale—Nevada-based sales of Arizona-mined coal are taxable in Nevada. Further, Edison's harmonization would also avoid net proceeds tax on its transactions with Peabody. Because Peabody mines in Arizona, the net proceeds tax does not apply. *See* NRS 362.110(1)(a) (providing that "[e]very person extracting any mineral in this State" must file an annual statement with the Department in order to determine the net proceeds tax owed). In *Sierra Pacific*, this court noted that "it is apparent that the Legislature originally enacted [NRS 372.270] to avoid taxing the proceeds of mines already subject to the net proceeds tax." 130 Nev. at 946, 338 P.3d at 1248. The Legislature did not intend for companies using mine proceeds to entirely avoid use, sales, *and* net proceeds taxation, however. Thus, Edison's construction causes an absurd result, and we decline to adopt its proposed construction. *See City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) ("When interpreting a statute, this court . . . seek[s] to avoid an interpretation that leads to an absurd result.").

> at a rate not to exceed 5 percent of the net proceeds. No other tax may be imposed upon a mineral or its proceeds until the identity of the proceeds as such is lost.

Nev. Const. art. 10, § 5(1). Edison argues that the second sentence of this provision is not limited to minerals extracted in this state, so the imposition of the use tax on Edison is unconstitutional. We conclude that this argument is without merit because the second sentence must be read in harmony with the first sentence—no other tax may be imposed on minerals that are extracted in Nevada. *See Sierra Pac.*, 130 Nev. at 946, 338 P.3d at 1247 ("Article 10, Section 5 of the Nevada Constitution prevents the Department from imposing any additional taxes on minerals that are subject to NRS Chapter 362's net proceeds tax (minerals that are mined in Nevada) . . . .").

Edison does not have substantially similar favored competitors that benefited from the discriminatory taxation scheme

Edison argues, alternatively, that if NRS 372.270 is not harmonized with NRS 372.185 consistent with its proposed construction, the district court's conclusion that NRS 372.270's tax exemption is unconstitutional under the dormant Commerce Clause should stand. Similarly, the Department does not dispute the district court's determination that NRS 372.270's tax exemption violates the dormant Commerce Clause. Thus, as in *Sierra Pacific*, "we . . . do not consider the lawfulness of the statute as a whole." *Sierra Pac.*, 130 Nev. at 943, 338 P.3d at 1245. Rather, we review the district court's decision in terms of the relief Edison sought at trial and seeks on appeal. The only remedy Edison requests is retrospective relief in the form of a full refund of the taxes it paid on the coal purchase.

Edison argues that it presented the district court with adequate evidence of favored competitors to entitle it to a full refund under *Sierra Pacific*.[8] The district court concluded that "[t]here are no facts in the record to support a finding that [Edison], by paying use tax on its purchase of the coal slurry, is being discriminated against in comparison to a similarly situated taxpayer" and that "[Edison] did not pay any higher tax than did its competitors." "Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 377, 283 P.3d 250, 254 (2012) (internal quotations omitted).

"State courts have the duty of determining the appropriate relief for Commerce Clause violations, and, to satisfy due process require-

[8]Edison also argues that *Sierra Pacific* should be overturned because it misconstrues *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation of Florida*, 496 U.S. 18 (1990). Edison contends that *McKesson* uses the term "competitors" noneconomically (i.e., broadly as a synonym for an entity that gained an advantage under the unconstitutional tax plan regardless of economic competition), and that United States Supreme Court jurisprudence does not require actual discrimination to receive a remedy. We are not persuaded by Edison's argument.

We recognize that the Supreme Court of Alabama's decision in *Ex parte Surtees*, 6 So. 3d 1157, 1163 (Ala. 2008) (holding that a "favored competitor" need not be the "mirror image" of the taxpayer seeking a refund for dormant Commerce Clause violations), may be, but is not necessarily, inconsistent with our approach in *Sierra Pacific*. We nevertheless believe that *McKesson* and other dormant Commerce Clause remedy cases contemplate true economic competition. *See McKesson*, 496 U.S. at 48 (noting that the unconstitutional tax "placed petitioner at a relative disadvantage in the marketplace vis-à-vis competitors distributing preferred local products"); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 279 (1997) (stating that if "the entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed, eliminating the burden would not serve the dormant Commerce Clause's fundamental objective").

ments, courts must provide 'meaningful backward-looking relief' to correct taxes paid pursuant to an unconstitutional scheme." *Sierra Pac.*, 130 Nev. at 946-47, 338 P.3d at 1248 (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 31 (1990)). Importantly, the injured party must demonstrate the existence of favored competitors—i.e., "competitor[s] who benefited from the discriminatory tax scheme"—for a monetary remedy to attach. *Id*. at 948, 338 P.3d at 1249. Despite an assertion by the injured party that a favored competitor exists,

> we would have to answer the threshold question of whether the competitor is a "substantially similar entit[y]" before determining whether [the injured party] was entitled to a monetary remedy as a result of a dormant Commerce Clause violation. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). For a dormant Commerce Clause violation to exist, the claimed discrimination must create a competitive advantage between the "substantially similar entities." *Id*. However, competitive markets are generally narrowly drawn. *See Gen. Motors*, 519 U.S. at 301-03 (concluding that natural gas marketers did not serve the same market as local distribution companies, even though similarly situated geographically); *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961) (drawing a distinction between salmon caught and frozen in Alaska but canned somewhere else, and salmon freshly canned in Alaska).

Sierra Pac., 130 Nev. at 948 n.7, 338 P.3d at 1249 n.7 (first alteration in original).

Based on this analysis, this court determined in *Sierra Pacific* that the appellants did not have substantially similar advantaged competitors because Nevada mines do not produce commercially viable qualities or quantities of coal, and thus, its competitors also had to purchase these products out of state and were subject to the use tax. *Id*. at 948 & n.6, 338 P.3d at 1249 & n.6. Therefore, because no coal-using competitor was favored under NRS 372.270, "the tax scheme did not actually discriminate against interstate commerce, [and] a refund—or any other remedy—[was] not necessary to satisfy due process." *Id*. at 948-49, 338 P.3d at 1249.

Here, like in *Sierra Pacific*, the district court found, and the record reflects, that Edison does not compete against power companies that use coal mined in-state because there are not large enough coal deposits in Nevada to justify commercial operations. Edison does not dispute this finding and instead argues that geothermal, oil, and natural gas resources were mined in Nevada, that energy producers using these materials were favored under NRS 372.270, and that these competitors are substantially similar to coal energy producers. According to Edison, geothermal, oil, and natural gas power plants provide the same homogeneous commoditized output as coal

power plants—electrical energy. Thus, it argues that in the electrical industry, all energy producers compete against each other regardless of the fuel source used.

However, we believe that determining the market based on outputs would lead to an overbroad market where competitors are not similar. Drawing the market in such a way would group coal electrical producers with natural gas, nuclear, wind, hydroelectric, solar, and geothermal. These production methods are not similar for the purposes of this dormant Commerce Clause analysis because they require varying inputs. Notably, the dormant Commerce Clause is only implicated in this case because of *the different tax rate that inputs are subject to*. The controversy here has nothing to do with the way that Nevada is taxing electrical energy; it has to do with the effective tax rate of mined coal.

Because Edison failed to demonstrate the existence of substantially similar advantaged competitors, and a violation of the dormant Commerce Clause requires that there be "a competitor who benefited from the discriminatory tax scheme for the injured party to merit a monetary remedy," we conclude that Edison is not entitled to any refund of use tax paid. *Sierra Pac.*, 130 Nev. at 948, 338 P.3d at 1249.[9]

Edison is not entitled to a tax credit based on the TPT paid to Arizona

Edison argues that even if a refund is not warranted, it is entitled to a $9,703,087.52 tax credit because it paid the TPT in Arizona. Edison contends that the TPT is, in substance, a sales tax regardless of its name. The Nevada Administrative Code dictates when a tax credit should be awarded:

> In determining the amount of use tax that is due from a taxpayer, the Department will allow a credit toward the amount due to this State in an amount equal to sales tax legitimately paid for the same purchase of tangible personal property to a state or local government outside of Nevada, upon proof of payment deemed satisfactory to the Department.

NAC 372.055. Thus, for Edison to be entitled to a tax credit, the TPT must be a sales tax.

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[9]Edison also argues that it is entitled to a refund pursuant to NRS 372.630 and NRS 372.690. NRS 372.630(1) states that if a tax has been "erroneously or illegally collected" it must "be refunded to the person." NRS 372.690 states that any judgment received by an injured taxpayer plaintiff "must first be credited" on the applicable sales or use tax due from the plaintiff, and then "[t]he balance of the judgment must be refunded to the plaintiff." We conclude that Edison's argument is without merit because these statutes would only be applicable here if Edison could demonstrate that there is a substantially similar favored competitor.

Whether the TPT is a sales tax is a question of law that we review de novo. *See Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 872 (2013). "Sales taxes are imposed on the purchaser rather than on the seller. A sales tax is a distinct and separate charge which the retail seller is required to collect as a pass through entity for the benefit of the state." 85 C.J.S. *Taxation* § 2143 (2010) (footnote omitted).

The Arizona TPT is generally provided for by statute:

> There is levied . . . by the department, . . . privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income.

Ariz. Rev. Stat. Ann. § 42-5008(A) (2013). The TPT is broken into 15 different classifications. *See* Ariz. Rev. Stat. Ann. §§ 42-5061 through 42-5075. "The mining classification is comprised of the business of mining, quarrying or producing for sale, profit or commercial use any nonmetalliferous mineral product that has been mined, quarried or otherwise extracted within the boundaries of this state." Ariz. Rev. Stat. Ann. § 42-5072(A) (2013). "The tax base for the mining classification is the gross proceeds of sales or gross income derived from the business." Ariz. Rev. Stat. Ann. § 42-5072(B) (2013).

The Supreme Court of Arizona has stated that the mining TPT

> is not a tax upon sales. It is purely an excise tax upon the privilege or right to engage in business in Arizona measured by the gross volume of business conducted within the state. The legal incidence of the tax falls on the seller. The taxable event is the engaging in the business of mining in Arizona.

Indus. Uranium Co. v. State Tax Comm'n, 387 P.2d 1013, 1014 (Ariz. 1963) (citation omitted); *see also Ariz. Dep't of Revenue v. Robinson's Hardware*, 721 P.2d 137, 141 n.2 (Ariz. Ct. App. 1986) ("Appellant continuously refers to the transaction privilege tax at issue here as a 'sales' tax. In doing so, it confuses two dissimilar types of taxes, since we have repeatedly held that a transaction privilege tax is not a 'sales' tax."); *City of Phoenix v. West Publ'g Co.*, 712 P.2d 944, 946-47 (Ariz. Ct. App. 1985) ("Th[e TPT] is to be distinguished from a sales tax, which is generally added to the selling price and is borne by the consumer, with the vendor being made an agent of the taxing authority for purposes of collection."). Additionally, the Arizona Department of Revenue website provides an overview of the TPT that describes it as follows:

> The Arizona transaction privilege tax is commonly referred to as a sales tax; however, the tax is on the privilege of doing business in Arizona and is not a true sales tax. Although the

> transaction privilege tax is usually passed on to the consumer, it is actually a tax on the vendor.

Transaction Privilege Tax, State of Arizona Department of Revenue, https://www.azdor.gov/business/transactionprivilegetax.aspx (last visited June 6, 2017).

Here, the district court found that Edison "did not pay any sales tax to the [s]tate of Arizona on its purchase of the coal slurry. Any tax was paid by Peabody to the state of Arizona." The district court then concluded that "[i]n the contract between the parties[, Edison] agreed to reimburse Peabody as part of the sale price the taxes that Peabody paid to Arizona. This reimbursement was a part of the purchase price [Edison] paid to Peabody for the coal slurry."

If the TPT was a sales tax, it would be borne by Edison, and Peabody would simply be an agent of collection. However, the district court concluded, and we agree, that Edison did not bear the cost of the tax, and Peabody was not an agent that collected the tax; rather, it was Peabody, as the seller, that was responsible for the tax—it simply passed on the cost to Edison. In a pretrial pleading, Edison admitted that it "reimbursed Peabody for Arizona transaction privilege tax," and the contract between the parties clearly demonstrates that Edison would reimburse Peabody for all taxes Peabody paid for the coal slurry delivered to Edison.

Although Edison argues that the mining TPT functions as a sales tax because it is levied on gross proceeds of sales, that alone does not render it a sales tax. *Homestake Mining Co. v. Johnson*, 374 N.W.2d 357, 362 (S.D. 1985) ("Merely because the measure of the tax is gross receipts, does not mean the nature of the tax is a sales tax."). "The sale cannot occur until there has been a severance from the earth in the first instance. Thereafter, a sale merely determines the metal's value and thus provides a measure for the tax and a time for collection." *Id*. The mining TPT, as a tax levied for the privilege of conducting nonmetalliferous mining business in Arizona, simply uses gross proceeds of sales to determine the value of the tax owed upon severance from the ground.

Further, Edison contends that the TPT has an exemption "for sales for resale," which is consistent with any true sales tax. We agree that such a provision is an essential component of a sales tax. *See* 67B Am. Jur. 2d *Sales and Use Taxes* § 173 (2010). The purpose of this exemption is to "avoid[ ] multiple taxation of the same property as it passes through the chain of commerce from producer to wholesaler to distributor to retailer." *Id*. Edison cites to two sections of Arizona's administrative code in support of its argument, *see* Ariz. Admin. Code §§ R15-5-101 and R15-5-122, but these administratively promulgated provisions only apply to the *retail classification*, not the mining classification. And the administrative code applica-

ble to the mining classification—Ariz. Admin. Code §§ R15-5-901 through 15-909—does not provide for a resale exemption.

Accordingly, because the mining TPT is not a sales tax within the meaning of NAC 372.055, we hold that the district court did not err in concluding that Edison was not entitled to a tax credit.

CONCLUSION

We conclude that NRS 372.270 cannot be harmonized with NRS 372.185 to provide Edison a refund. Edison also has not demonstrated the existence of substantially similar competitors that were advantaged by the unconstitutional tax. Furthermore, Edison is also not entitled to a tax credit because the TPT is not a sales tax within the meaning of NAC 372.055. Accordingly, we affirm the district court's final judgment.

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

KENNETH RENFROE, Appellant, *v.*
LAKEVIEW LOAN SERVICING, LLC, Respondent.

No. 68907

July 27, 2017 398 P.3d 904

Appeal from a district court order dismissing an action to quiet title. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Reversed and remanded.

Noggle Law, PLLC, and *Robert B. Noggle*, Las Vegas, for Appellant.

Akerman, LLP, and *Darren T. Brenner* and *Natalie L. Winslow*, Las Vegas, for Respondent.

Before the Court En Banc.

OPINION

By the Court, Stiglich, J.:

NRS 116.3116 provides homeowners' associations (HOAs) a superpriority lien on up to nine months of unpaid HOA dues. In *SFR Investments Pool 1 v. U.S. Bank*, this court concluded that a lien pursuant to NRS 116.3116 is "a true priority lien such that its fore-

closure extinguishes a first deed of trust on the property." 130 Nev. 742, 743, 334 P.3d 408, 409 (2014). The primary issue presented in this case is whether the provisions of NRS 116.3116 are preempted by federal law when the first deed of trust on the property is insured through the Federal Housing Administration (FHA). We conclude that because the FHA insurance program specifically contemplates that lenders may be subject to superpriority liens such as those provided in NRS 116.3116, the preemption doctrine does not apply in these circumstances.

BACKGROUND

Homeowners Brian and Jennifer Ferguson bought a home in Las Vegas in 2008 using a mortgage insured through the FHA insurance program. The promissory note and deed of trust were eventually assigned to respondent Lakeview Loan Servicing, LLC (Lakeview).

In 2013, the Fergusons' HOA initiated foreclosure proceedings pursuant to NRS 116.3116. Appellant Kenneth Renfroe purchased the property at a foreclosure sale on April 18, 2014. Renfroe subsequently filed suit to quiet title to the property.

Lakeview filed a motion to dismiss, arguing that the NRS Chapter 116 foreclosure sale of federally insured property was void under the Supremacy Clause of the United States Constitution. The district court granted the motion. Renfroe appeals.

DISCUSSION

Preemption doctrine

The preemption doctrine stems from the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Therefore, "state laws that conflict with federal law[s] are without effect." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotations omitted). "Whether state law is preempted by a federal statute or regulation is a question of law, subject to our de novo review." *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (internal footnote omitted).

Courts have identified two types of preemption: express and implied. *Id.* at 371, 168 P.3d at 79. "Congress expressly preempts state law when it explicitly states that intent [to do so] in a statute's language." *Id*.

When a law does not state explicit intent to preempt state law, preemption may be implied under the doctrines of field preemption or conflict preemption. *Id*. "[U]nder field preemption, preemption is implied when congressional enactments so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively leaves no room for states to regulate conduct in that field." *Id*. Conflict preemption applies when a direct conflict exists between federal and state law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988). This court has explained that:

> Conflict preemption analysis examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives.

Nanopierce, 123 Nev. at 371-72, 168 P.3d at 80; *see also Munoz v. Branch Banking & Tr. Co., Inc.*, 131 Nev. 185, 188-89, 348 P.3d 689, 692-93 (2015).

In the instant case, Renfroe and Lakeview agree that neither express preemption nor field preemption apply. Accordingly, this court must determine whether a direct conflict exists between the provisions of the FHA insurance program and NRS 116.3116.

NRS 116.3116

NRS 116.3116(2) gives HOAs a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. NRS 116.31162 through NRS 116.31168 further provide a statutory scheme through which a Nevada HOA may initiate and pursue foreclosure. In *SFR Investments*, this court concluded that a lien pursuant to NRS 116.3116 "is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property" and it can be foreclosed nonjudicially. 130 Nev. at 743, 334 P.3d at 409.

The FHA insurance program

The Single Family Mortgage Insurance Program, commonly referred to as "FHA insurance," allows the Department of Housing and Urban Development (HUD) "to insure home loans extended by private lenders to enable low to moderate income buyers to purchase a home." *Sec'y of Hous. & Urban Dev. v. Sky Meadow Ass'n*, 117 F. Supp. 2d 970, 980 (C.D. Cal. 2000). The FHA insurance program implements "the National Housing Act's strong policy in favor of encouraging private investment in housing." *Angleton v. Pierce*, 574 F. Supp. 719, 736 n.22 (D.N.J. 1983).

Through the FHA insurance program, if a HUD-insured mortgage goes into default, a private lender has two options. First, the lend-

er may "assign the first-position mortgage interest to HUD before foreclosure and make a claim for the remaining principal amount," or second, the lender may "initiate foreclosure and make a claim for the deficiency." *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 200 F. Supp. 3d 1141, 1166 (D. Nev. 2016) (citing 24 C.F.R. §§ 203.350, 203.351, 203.401 (2016)). However, any insurance through HUD is terminated where "[t]he property is bid in and acquired at foreclosure by a party other than the mortgagee." 24 C.F.R. § 203.315(a)(2)(i) (2015); *see also* 24 C.F.R. § 203.315(b)(2) (2015); 24 C.F.R. § 203.366(b) (requiring a lender to provide marketable title to HUD to be reimbursed under the terms of the insurance program).

When HUD acquires property pursuant to these guidelines, federal regulations require it "to dispose of properties in a manner that expands homeownership opportunities, strengthens neighborhoods and communities, and ensures a maximum return to the mortgage insurance funds." 24 C.F.R. § 291.1(a)(2) (2015). However, the FHA has repeatedly indicated that its goal remains to "help[ ] borrowers retain homeownership while protecting the FHA Insurance Fund from unnecessary losses." Office of the Assistant Sec'y for Hous., U.S. Dep't of Hous. and Urban Dev., Mortgagee Letter 2010-04, *Loss Mitigation for Imminent Default*, at *1 (Jan. 22, 2010). Therefore, when a borrower defaults, a lender insured by HUD is required to pursue nonforeclosure options, such as deeds in lieu of foreclosure, preforeclosure sales, partial claim, assumptions, special forbearance, or mortgage modification. 24 C.F.R. § 203.501 (2015).

On September 22, 2002, HUD issued Mortgagee Letter 2002-19, specifically addressing the issue of the responsibility of a HUD-insured mortgagee to pay HOA fees. The letter stated:

> At this time, condominium and homeowners' association (HOA) fees are not required escrow items for FHA-insured single-family mortgages. Therefore, payment of condo/HOA fees as they become due is the mortgagor's responsibility. When the mortgagor defaults and foreclosure action becomes necessary, lenders must name and properly serve HOAs and condominium associations in the foreclosure proceedings in order to eliminate or reduce HUD's responsibility for unpaid condominium/HOA fees. *Further, lenders must take any action necessary to protect HUD's interest in the property against foreclosure actions brought by a condominium/HOA.*
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> . . . .
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> *Condominium/HOA fees paid by the lender are 100 percent reimbursable to the lender in accordance with 24 CFR 203.402(j).* Lenders may also claim reimbursement for penalties, interest, and/or late fees incurred by the former mortgagor and paid by the lender.

Assistant Sec'y for Hous., U.S. Dep't of Hous. and Urban Dev., Mortgagee Letter 2002-19, *Clarification Regarding Title Approval Issues, Property Condition at Conveyance, Administrative Offsets and New Process for Lender Appeal of Conveyance Issues*, at *2-3 (Sept. 20, 2002) (emphases added).

On May 31, 2013, HUD issued Mortgagee Letter 2013-18, which clarified the responsibility of mortgagees to pay HOA assessments, and superseded some of the administrative requirements of Mortgagee Letter 2002-19. Office of the Assistant Sec'y for Hous., U.S. Dep't of Hous. and Urban Dev., Mortgagee Letter 2013-18, *Updated Clarification Regarding Title Approval at Conveyance*, 2013 WL 2448985, at 2-3 (May 31, 2013). The letter primarily clarifies the procedure for mortgagees to negotiate and pay any delinquent HOA assessments prior to conveying the property at issue to HUD. *Id.* Mortgagee Letter 2013-18 clearly anticipates that mortgagees retain their responsibility under Mortgagee Letter 2002-19 to protect the title of the insured property. *Id.* (noting that "mortgagees are responsible for ensuring that properties conveyed to HUD have clear title"). With respect to states allowing superpriority status to an HOA, the letter reiterates that HUD will reimburse mortgagees for payment of HOA assessments between the date of the homeowner's default and the date of the conveyance of the property to HUD. *Id.*; *see also* 24 C.F.R. § 203.402(j) (2015) (allowing reimbursement of HOA fees paid by mortgagees of HUD-insured properties).

As discussed above, if a mortgagee fails to protect its interest and loses title to the property at issue, any contract of insurance between HUD and the mortgagee automatically terminates. *See* 24 C.F.R. § 203.315 (2015).

NRS 116.3116 is not preempted by the FHA insurance program

Given the broad purposes of the FHA insurance program to expand and retain homeownership, Renfroe argues that the district court erred in finding that NRS 116.3116 is in direct conflict with the purposes of the FHA insurance regulatory scheme. We agree.

In two unpublished orders decided shortly after *SFR Investments*, the United States District Court for the District of Nevada appeared to embrace a broad interpretation of FHA regulation as it related to NRS 116.3116. *See Washington & Sandhill Homeowners Ass'n v. Bank of Am., N.A.*, No. 2:13-cv-01845-GMN, GWF, 2014 WL 4798565, at *7 (D. Nev. 2014) (finding NRS 116.3116 to be preempted in instances where the first mortgage is insured by the FHA); *Saticoy Bay LLC v. SRMOF II 2012-1 Tr.*, No. 2:13-CV-1199 JCM (VCF), 2015 WL 1990076, at *4 (D. Nev. 2015) (finding that application of NRS 116.3116 would "hinder[ ] HUD's ability to recoup funds from insured properties"). However, two later, published opinions in the federal district court clearly reject the argument that NRS 116.3116 and the FHA insurance program are in direct conflict.

In *Freedom Mortgage*, the court observed that "[n]othing prevents a lender from simultaneously complying with HUD's program and Nevada's HOA-foreclosure laws. . . . The lender gets itself into this predicament only by ignoring HUD's directives." 106 F. Supp. 3d at 1184. The court noted that under HUD's guidelines, a lender is clearly required to protect its (and HUD's) interest in a property by paying any delinquent HOA assessments. *Id.* These expenses are 100 percent reimbursable under HUD's guidelines. *Id*. at 1185. When a lender fails to follow this directive, and the property is sold at an HOA foreclosure sale, any insurance contract with HUD terminates. *Id*. at 1184. Therefore, because the FHA regulatory scheme clearly contemplates a state statutory scheme such as NRS 116.3116, the court concluded that the doctrine of conflict preemption did not apply. *Id*. at 1186. Extensively citing the analysis of *Freedom Mortgage*, the United States District Court for the District of Nevada recently reiterated this conclusion in *JPMorgan Chase Bank v. SFR Investments Pool 1, LLC*, 200 F. Supp. 3d at 1166.

We agree with the holdings in *Freedom Mortgage* and *JPMorgan Chase* that no direct conflict exists between NRS 116.3116 and the regulatory provisions of the FHA insurance program. First, as observed by the federal district court, NRS 116.3116 poses no risk of any direct loss to HUD because any contract of insurance with HUD terminates upon the lender's inability to convey marketable title. Second, to the extent Lakeview argues that NRS 116.3116 would have a deterrent effect on the willingness of banks to extend loans to the lower income buyers who participate in the FHA insurance program, HUD's guidelines specifically indicate that a bank will be completely reimbursed for the payment of any delinquent HOA assessments. Accordingly, there is no additional risk of loss to banks participating in the FHA insurance program, provided that those banks comply with HUD's directives.

Finally, Lakeview contends that NRS 116.3116 impairs a third interest: the goal of HUD and the FHA insurance program in maintaining homeownership and allowing homeowners the opportunity to participate in various foreclosure avoidance programs. Despite Lakeview's arguments, we do not find the provisions of NRS 116.3116 to conflict with this goal. As discussed above, HUD regulations clearly direct banks to make HOA assessment payments on behalf of delinquent homeowners from the time they first default. *See* Mortgagee Letter 2013-18, *Updated Clarification Regarding Title Approval at Conveyance*, at *2-3. Given this directive, as well as the fact that HUD will reimburse these expenses in the event the bank is required to pay them to prevent an HOA's foreclosure, NRS 116.3116 does not affect the ability of a lender and borrower to engage in foreclosure avoidance negotiations.

Because the HUD guidelines for the FHA insurance program clearly contemplate and anticipate state statutory schemes such as

NRS 116.3116, the doctrine of conflict preemption does not apply in this case.

CONCLUSION

HUD/FHA internal regulations anticipate and provide for a state statutory framework conferring superpriority status on HOA liens and expect a mortgagee to protect its interest accordingly. Consequently, the district court erred in concluding that the provisions of NRS 116.3116 were preempted when a homeowner's first mortgage was insured through the FHA insurance program. Therefore, we reverse the decision of the district court granting Lakeview's motion to dismiss and remand for further proceedings consistent with this opinion.

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