LAS VEGAS REVIEW-JOURNAL, Appellant, *v.* CITY OF HENDERSON, Respondent.

No. 81758

December 23, 2021 500 P.3d 1271

Appeal from a district court order denying a motion for attorney fees and costs in a public records matter. Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied February 28, 2022]

McLetchie Law and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Appellant.

Nicholas G. Vaskov, City Attorney, and *Brandon P. Kemble* and *Brian R. Reeve*, Assistant City Attorneys, Henderson; *Bailey Kennedy* and *Dennis L. Kennedy, Sarah E. Harmon*, and *Andrea M. Champion*, Las Vegas, for Respondent.

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

OPINION

By the Court, Stiglich, J.:

The Nevada Public Records Act (NPRA) requires governmental bodies to make nonconfidential public records within their legal custody or control available to the public. Where a governmental body denies a public records request, the requester may apply to the court for an order compelling production. If the requester prevails, the requester may recover costs and reasonable attorney fees.

During the pendency of this dispute, this court adopted the catalyst theory to determine whether a requesting party prevails in such litigation when the governmental body ultimately provides the records without mandate by court order. Under the catalyst theory, the requesting party may be able to recover attorney fees when the defendant changes its behavior because of and as sought by the litigation. Here, appellant Las Vegas Review-Journal (LVRJ) requested records from respondent City of Henderson and filed suit to compel their production, but Henderson eventually produced the records without court mandate before the litigation reached its conclusion. LVRJ requested attorney fees, and the district court applied the catalyst theory in denying the request. The district court, however, misconstrued one of the factors in the catalyst-theory analysis and neglected to conduct more than a summary analysis of several

other factors. Accordingly, we reverse the district court's order and remand for further proceedings consistent with our guidance herein on applying the catalyst theory.

FACTUAL AND PROCEDURAL BACKGROUND

Litigation relating to this dispute has twice before reached this court. LVRJ submitted a public records request to Henderson under the NPRA for documents related to Henderson's use of a public relations firm. *Cf.* NRS 239.001. Henderson performed a search and determined that LVRJ's request encompassed approximately 70,000 pages of documents. Within five business days of LVRJ's request, Henderson responded that its search yielded a large set of documents and that it would need to review the documents for privilege and confidentiality before it could provide copies to LVRJ. Henderson requested a payment from LVRJ to cover the cost of the privilege review and requested a deposit of half of that sum before it would begin the privilege review.

LVRJ sought mandamus relief in district court, arguing that Henderson should be compelled to provide the records without payment of the privilege-review fee. After LVRJ filed the mandamus petition, Henderson reviewed the documents for privilege and permitted LVRJ to inspect the nonprivileged records while they litigated the privilege-review fee. Henderson provided a privilege log and ultimately provided copies of the records to LVRJ, except for those listed in the privilege log. The district court found that Henderson's actions satisfied its requirements under the NPRA, and LVRJ appealed. On appeal, LVRJ argued, among other claims, that the privilege log was insufficient and that it did not make clear whether the withheld documents were protected by the attorney-client, work-product, or deliberative-process privileges. This court disagreed as to the attorney-client- and work-product-protected documents but agreed that the district court should have balanced whether Henderson's interest in nondisclosure clearly outweighed the public's interest in accessing the deliberative-process-privileged documents, and we remanded to the district court to conduct this analysis. *Las Vegas Review-Journal v. City of Henderson*, No. 73287, 2019 WL 2252868 (Nev. May 24, 2019) (Order Affirming in Part, Reversing in Part, and Remanding). Thereafter, before the court addressed the issue on remand, Henderson voluntarily disclosed the 11 documents that it had withheld pursuant to the deliberative-process privilege.

Meanwhile, the district court resolved LVRJ's pending motion for attorney fees, granting it in part after concluding that LVRJ prevailed in accessing records from Henderson. Henderson appealed, and LVRJ cross-appealed, as the district court awarded less than LVRJ had sought. This court observed that LVRJ had not prevailed

as to its request for the records withheld pursuant to the deliberative-process privilege because that issue had been remanded to the district court to resolve. *City of Henderson v. Las Vegas Review-Journal*, No. 75407, 2019 WL 5290874 (Nev. Oct. 17, 2019) (Order of Reversal). We further observed that this court affirmed the district court's denials of LVRJ's other claims and concluded that the district court therefore erred in finding that LVRJ was a prevailing party. *Id.*; *cf. Las Vegas Review-Journal*, 2019 WL 2252868. Accordingly, we reversed the district court's partial award of attorney fees. *City of Henderson*, 2019 WL 5290874.

Subsequently, this court issued *Las Vegas Metropolitan Police Department v. Center for Investigative Reporting, Inc.*, 136 Nev. 122, 460 P.3d 952 (2020) (*CIR*), concluding that whether a party prevails and may recover attorney fees in a public records matter that has not proceeded to final judgment is determined by the catalyst theory. LVRJ amended its request for attorney fees and argued that it was entitled to recovery as the prevailing party under the catalyst theory. The district court found that the law-of-the-case doctrine barred LVRJ from seeking prevailing-party fees on any claims besides those related to the deliberative-process privilege, concluded that LVRJ likewise was not a prevailing party for the 11 documents withheld under the deliberative-process privilege, and denied the motion. This appeal followed.

DISCUSSION

As a preliminary matter, LVRJ argues that the district court erred when it limited the scope of attorney fees that may be recoverable to LVRJ's efforts to obtain the 11 deliberative-process-privilege documents. LVRJ argues that it was entitled to recover its fees relating to its efforts to access the broader set of requested records because its litigation was the catalyst for their disclosure. Henderson argued below that the law of the case precluded LVRJ from seeking recovery for the larger universe of records because this court concluded that LVRJ was not the prevailing party on any of its claims related to those documents. *Cf. City of Henderson*, 2019 WL 5290874. The district court agreed and denied LVRJ's request for attorney fees for these efforts, concluding that the law of the case was dispositive. LVRJ did not challenge application of the law-of-the-case doctrine below or in its opening brief, addressing the issue for the first time in its reply brief. Accordingly, we conclude that LVRJ waived the issue and decline to consider it. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (providing that issues raised for the first time in an appellant's reply brief need not be considered). Accordingly, we affirm the district court's order to the extent that it concluded the law-of-the-case doctrine limited the scope of attorney fees for which LVRJ could seek recovery.

The district court abused its discretion in its catalyst-theory analysis

LVRJ next argues that the district court misapplied the catalyst theory when it denied LVRJ attorney fees and costs. "[A]ttorney fees may not be awarded absent a statute, rule, or contract authorizing such award." *Thomas v. City of North Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). NRS 239.011(2) provides that a prevailing party may recover costs and attorney fees. "A party prevails if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (internal quotation marks omitted). Generally, an action must have proceeded to final judgment for a party to have prevailed. *Dimick v. Dimick*, 112 Nev. 402, 404, 915 P.2d 254, 256 (1996). Whether a party prevails in a public records matter that ultimately is resolved outside the court is determined by application of the catalyst theory. *CIR*, 136 Nev. at 127-28, 460 P.3d at 957. "Under the catalyst theory, a requester prevails when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits." *Id.* at 128, 460 P.3d at 957. In assessing whether a requester prevailed under the catalyst theory, the district court must consider

> (1) when the documents were released, (2) what actually triggered the documents' release, . . . (3) whether [the requester] was entitled to the documents at an earlier time. Additionally, the district court should take into consideration [(4)] whether the litigation was frivolous, unreasonable, or groundless, and [(5)] whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time.

Id. at 128, 460 P.3d at 957-58 (internal quotation marks and citation omitted). We clarify that consideration of these factors is mandatory. *Cf. O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 554, 429 P.3d 664, 668 (Ct. App. 2018) (observing that consideration of the *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), factors is mandatory in considering whether to award fees pursuant to NRCP 68). Whether attorney fees are warranted is a fact-intensive inquiry. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). We review an award of attorney fees for an abuse of discretion. *Thomas*, 122 Nev. at 90, 127 P.3d at 1063. An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or disregards controlling law. *Blackjack Bonding*, 131 Nev. at 89, 343 P.3d at 614. While the failure to enter explicit findings of each factor is not necessarily an

abuse of discretion, specific findings are strongly encouraged, and the record must demonstrate that the district court properly considered each of the required factors. *See Wynn*, 117 Nev. at 13, 16 P.3d at 428-29 (discussing fee awards pursuant to offers of judgment).

We conclude that the district court abused its discretion in its catalyst-theory analysis, as the court misconstrued the fifth *CIR* factor and neglected to show that it appropriately considered several other factors.

In its fifth factor, *CIR* requires the district court to consider "whether the requester reasonably attempted to settle," *CIR*, 136 Nev. at 128, 460 P.3d at 957-58, yet the district court found that Henderson "made more efforts" to settle than did the request-receiving party in *CIR*. The district court thus incorrectly examined whether the *government* made an attempt to settle, not whether the *requester* did so, as *CIR* directs. This inverted the analysis that the factor requires and, by not considering requester LVRJ's efforts to settle the dispute, frustrated the purpose of the catalyst-theory analysis. Here, the record reflects that LVRJ did not make a reasonable attempt to settle. LVRJ refused to receive Henderson's calls, return Henderson's messages, or confer with Henderson to refine the search terms for the public-records request. LVRJ's rush to litigation is precisely the type of conduct this court sought to discourage. *CIR*, 136 Nev. at 128, 460 P.3d at 957 (noting that this court adopted the *CIR* factors to "alleviate concerns that the catalyst theory will encourage requesters to litigate their requests in district court unnecessarily"). LVRJ's lack of settlement efforts raises doubts about whether its litigation triggered the release of the 11 deliberative-process-privilege documents and whether the litigation was frivolous (the second and fourth *CIR* factors). Had the district court properly construed this factor, it would have been better able to determine whether LVRJ's litigation was the catalyst for the disclosure of the documents initially withheld pursuant to the deliberative-process privilege.

LVRJ argues that the fifth factor should receive the least weight. LVRJ argues that the foreign authorities *CIR* discusses operate in the context of distinguishable statutory bases. We decline the invitation to reconsider the doctrine that we adopted in *CIR* on this basis. We stated no such limitation when we adopted the catalyst theory in *CIR*, and we decline to modify the standard in this way or direct district courts to apply greater or lesser weight to any of the factors in all instances, regardless of the nuances that specific circumstances may present.

The district court also failed to correctly make adequate findings concerning the second, third, and fourth *CIR* factors, failed to balance them against each other, and thus further misapplied *CIR*. Although the district court stated the second and third factors and

the parties' respective positions, it did not seriously engage with those factors. It ultimately summarily concluded that LVRJ was not a prevailing party because the circumstances were distinguishable from those in *CIR*.[1] Even though the catalyst theory tasked the district court with determining whether there was "a factual causal nexus between" LVRJ's litigation and Henderson providing the 11 documents, *CIR*, 136 Nev. at 127, 460 P.3d at 957 (internal quotation marks omitted), the district court's order carries none of the hallmarks of the fact-intensive inquiry this requires. In not considering specific facts relevant to each factor, the district court's order does not provide any guidance as to whether a given factor supported the conclusion that LVRJ did not prevail. And without considered discussion of these factors, this court is unable to review why the district court concluded, after purporting to balance these factors, that LVRJ was not the prevailing party. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (providing that we do not defer "to findings so conclusory they may mask legal error"); *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994) ("It is difficult at best for this court to review claims of error in the award of such fees where the courts have failed to memorialize, in succinct terms, the justification or rationale for the awards.").

The second *CIR* factor requires a "causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *CIR*, 136 Nev. at 128, 460 P.3d at 957 (quoting *First Amendment Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1128 (9th Cir. 2017)). "[T]hat information sought was not released until after the lawsuit was instituted is insufficient to establish that the requester prevailed." *CIR*, 136 Nev. at 128, 460 P.3d at 957 (internal quotation marks omitted). Accordingly, the district court was obligated to find whether the litigation actually caused the disclosure of the contested 11 documents or whether Henderson would have produced them absent LVRJ's suit.

The third *CIR* factor required the court to determine whether LVRJ was entitled to receive the documents at an earlier time. This required reviewing the merits of Henderson's claim that the documents were protected by the deliberative-process privilege, even though, by that time, the documents had been provided. *See id.* at 129, 460 P.3d at 958.

While the district court made a factual determination for the fourth CIR factor, its reasoning was clearly erroneous. The fourth factor considers whether the requester brought a frivolous suit. *Id.* at 128, 460 P.3d at 957. Here, the district court concluded that LVRJ's

[1]The district court appropriately considered the first factor—when the documents were made available—by finding that Henderson voluntarily released the 11 deliberative-process-privilege documents two years after LVRJ filed its NPRA action.

suit was not frivolous because this court did not deem it so in the previous two appeals to this court. The district court's reliance on this court's silence was misplaced, as we did not consider frivolousness in the earlier appeals. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1092 n.10 (9th Cir. 1986) (concluding the argument that "the Court's silence indicates approval" or disapproval "seriously misapprehends the nature of judicial opinion"), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 482-84 (1995). Thus, the district court failed to enter findings showing that it conducted a searching inquiry of the facts relevant to this factor.

Accordingly, we conclude that the district court abused its discretion by failing to show that it appropriately considered and weighed the *CIR* factors in reaching its conclusion. Therefore, the district court's order is reversed, and we remand for the limited purpose of analyzing all of the catalyst-theory factors and making proper findings as to this subset of 11 documents. The district court must then balance the catalyst-theory factors to determine whether LVRJ's litigation properly was "the catalyst" and thus LVRJ is the prevailing party with regard to those documents.

CONCLUSION

Public records requests present a particular context in which attorney fees and costs may be warranted even though the matter never reaches a final judicial disposition. To resolve when such an award may be appropriate, this court adopted the catalyst theory. As in other attorney-fee contexts, this analysis requires closely scrutinizing the facts specific to the circumstances and entering findings showing that the court has duly considered the mandatory factors. The district court's order here contains summary statements of several factors and misstates another. On this basis, our ability to review the soundness of the district court's disposition is severely hindered. Accordingly, we conclude that the district court abused its discretion in applying the catalyst theory. We need not reach LVRJ's claim that the district court improperly limited the scope of the efforts for which it was permitted to seek recovery of attorney fees, which LVRJ raised for the first time in its reply brief. We affirm the district court's order insofar as it denied attorney fees based on obtaining documents other than the 11 subject to the deliberative-process-privilege analysis, reverse the remaining portion of the district court's order concerning fees related to those 11 documents, and remand for further proceedings consistent with this opinion.

Parraguirre and Silver, JJ., concur.

PLATTE RIVER INSURANCE COMPANY, Appellant, *v.* SUSAN JACKSON; and LANCE A. JACKSON, Respondents.

No. 81974

December 23, 2021 500 P.3d 1257

Appeal from a district court order granting claims of exemption from judgment execution. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

Affirmed.

[Rehearing denied January 18, 2022]

[En banc reconsideration denied March 9, 2022]

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

Millward Law, Ltd., and *Michael G. Millward*, Minden, for Respondents.

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Cadish, J.:

In this appeal, we consider whether the district court erred in determining that a judgment debtor may claim what is known as the "wildcard exemption" from execution under NRS 21.090(1)(z) to protect up to $10,000 of her disposable earnings not already exempted by the earnings exemption under NRS 21.090(1)(g). We conclude that the plain language of NRS 21.090(1)(z) permits that provision to apply to the portion of the debtor's earnings not protected from execution by the earnings exemption and, therefore, affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Platte River Insurance Company obtained a judgment against respondents Susan and Lance Jackson.[1] Platte River sought to garnish Susan's earnings. Susan thereafter claimed two exemptions from execution relevant to this appeal: (1) the earnings exemption under NRS 21.090(1)(g), which, based upon the amount of her gross weekly wages, exempts 75 percent of her after-tax earnings; and (2) the wildcard exemption under NRS 21.090(1)(z), which exempts up to $10,000 of "personal property not otherwise exempt."

Platte River objected to Susan's proposed use of the wildcard exemption. After a hearing, the district court agreed with Susan that

[1]Although Platte River obtained a judgment against both Susan and Lance, it did not execute on any of Lance's property.

the wildcard exemption applied to the portions of a debtor's personal property selected by the debtor, where such portions do not qualify as exempt under another exemption. The court also concluded that Susan's earnings were personal property and only partially exempt under the earnings exemption such that she could designate up to $10,000 in remaining nonexempt earnings as personal property protected from execution under the wildcard exemption. Accordingly, the district court permitted Platte River to execute on the attachable portion of Susan's disposable earnings to the extent that those earnings exceeded $10,000 during the 180-day garnishment period. This appeal followed.

DISCUSSION

The language of NRS 21.090(1)(z) unambiguously permits a debtor to use the wildcard exemption on nonexempt earnings

We review issues of statutory interpretation, such as the interpretation of the wildcard exemption, de novo. *Pankopf v. Peterson*, 124 Nev. 43, 46, 175 P.3d 910, 912 (2008). In interpreting a statute, we begin with its plain language. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). We have observed that the purpose of NRS 21.090, the statute exempting certain categories of debtor property from judgment execution, is to fulfill the Nevada constitutional mandate "to secure to the debtor the necessary means of gaining a livelihood, while doing as little injury as possible to the creditor." *Weinstein v. Fox* (*In re Fox*), 129 Nev. 377, 379-80, 302 P.3d 1137, 1139 (2013) (quoting *In re Galvez*, 115 Nev. 417, 419, 990 P.2d 187, 188 (1999), *superseded on other grounds by* NRS 21.090(1)(g) (2005)); *see* Nev. Const. art. 1, § 14 (requiring Nevada laws to recognize a debtor's privilege to "enjoy the necessary comforts of life" by exempting a "reasonable amount" of the debtor's property from seizure or sale). When a statute does not yield "more than one reasonable interpretation," we deem the statute unambiguous and look no further than its plain meaning. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

NRS 21.090(1) provides a list of property "exempt from execution, except as otherwise specifically provided in" the statute. Among those categories of property, the earnings exemption protects a percentage of the debtor's "disposable earnings"[2] each workweek in an amount that varies according to the debtor's gross weekly pay.[3] NRS 21.090(1)(g). A creditor may therefore reach up

[2]"Disposable earnings" refers to the debtor's net "compensation paid or payable for personal services performed by a judgment debtor in the regular course of business." NRS 21.090(1)(g)(1)-(2).

[3]If the debtor makes more than $770 in gross weekly pay, as Susan does, the statute exempts 75 percent of her disposable earnings from execution. If the debtor makes less than $770 in gross weekly pay, the statute exempts 82 percent of those disposable earnings. NRS 21.090(1)(g).

to 25 percent of the debtor's net compensation each workweek to satisfy a judgment. *Id.*; *see also* NRS 31.295(2)(a)-(b) (designating maximum amount of earnings subject to garnishment). Meanwhile, the wildcard exemption protects from execution other nonexempt personal property of the debtor's choice, as follows:

> [a]ny personal property *not otherwise exempt* . . . pursuant to this subsection belonging to the judgment debtor, including, without limitation, the judgment debtor's equity in any property, money, stocks, bonds or other funds on deposit with a financial institution, not to exceed $10,000 in total value, to be selected by the judgment debtor.

NRS 21.090(1)(z) (emphasis added). We have not yet addressed whether a debtor can use the wildcard exemption in subsection (1)(z) to supplement another enumerated exemption to the extent that the enumerated exemption does not completely exempt a category of property.

The phrase "not otherwise exempt" refers to attachable, rather than enumerated, property

Platte River argues that a plain reading of the wildcard exemption reveals that it does not apply to any category of enumerated property. We disagree. The wildcard exemption refers to exempt and nonexempt personal property, as opposed to enumerated and unenumerated personal property, in describing its application. *See* NRS 21.090(1)(z) (applying to "any personal property not otherwise exempt from execution"). Nonexempt property signifies to the creditor that the property is attachable or available to satisfy a judgment. NRS 21.080(1). However, a property's designation as "exempt" or "nonexempt" in NRS 21.090 does not depend solely on whether the statute enumerates such property because some types of property receive only partial-exemption status. *Compare, e.g.*, NRS 21.090(1)(a) (exempting "[p]rivate libraries, works of art, musical instruments and jewelry not to exceed $5,000 in value"), *with* NRS 21.090(1)(x) (exempting "[p]ayments received as restitution for a criminal act" without capping the value of those payments). The exemption statute enumerates earnings as a category of exempted property, but it does not provide a debtor with a complete exemption of those earnings because up to 25 percent of the debtor's weekly earnings remains subject to execution. NRS 21.090(1)(g).

Importantly, Platte River's interpretation requires this court to treat all earnings as exempt for purposes of one subsection (the wildcard exemption), yet simultaneously treat only some earnings as exempt for purposes of another subsection (the earnings exemption). Such a construction departs from the statutory language of both the earnings exemption, which applies to only a portion of a debtor's income, and the wildcard exemption, which may apply

to any personal property not otherwise exempt up to $10,000. The wildcard exemption, however, applies to property "not otherwise exempt," and thus, its application is not limited in the way Platte River suggests. It exempts a limited amount of otherwise attachable property and, therefore, may apply to the attachable portion of enumerated property under NRS 21.090(1) when the categories of property identified therein do not receive complete exemption. Thus, the plain language of the wildcard exemption precludes its application only to the portion of earnings otherwise protected from attachment by the statute.

Platte River points to *Becker v. Becker*, 131 Nev. 857, 362 P.3d 641 (2015), to support its interpretation that the phrase "not otherwise exempt" excludes all enumerated property. In *Becker*, however, we never addressed whether a debtor could stack the wildcard exemption on another statutory exemption to exempt a greater portion of otherwise partially exempted property. Instead, we considered whether a debtor could exempt "his entire interest" in two corporations under NRS 21.090(1)(bb)'s stock exemption. *Id.* at 858-59, 362 P.3d at 642. Although we held that the stock exemption "does not provide for a complete exemption of stock in small corporations," we interpreted that exemption to protect the entirety of the debtor's "noneconomic interest" in small corporations regardless of the value. *Id.* at 863, 362 P.3d at 644 (emphasis omitted). We explained that the debtor's "economic interest[ ]" in a small corporation remained subject to execution. *Id.* (emphasis omitted). We then suggested in dicta that a debtor could apply the wildcard exemption to protect a nonexempt portion of stock, i.e., the economic interest, from attachment by the creditor.[4] *Id.* at 863, 362 P.3d at 645.

If anything, *Becker*, although not dispositive on the issue, supports the plain-language interpretation we reach here. Indeed, the distinction we drew between exempt (noneconomic) and nonexempt (economic) interests in small corporations is analogous to the distinction here between the exempt and nonexempt portions of earnings. Applying the same reasoning we adopted in *Becker*, the wildcard exemption is available here to exempt up to $10,000 of the portion of earnings not exempted by the earnings exemption.

The statutory definition of personal property includes earnings

Platte River contends that the Legislature's failure to include earnings within the list of examples of personal property to which the wildcard exemption may be applied shows that the Legislature intended to exclude earnings from the wildcard exemption. We

[4]At the time, the wildcard exemption permitted a debtor to exempt $1,000 in personal property not otherwise exempt. 2007 Nev. Stat., ch. 512, § 2, at 3021. The Legislature increased the wildcard exemption from $1,000 to $10,000 in 2017. 2017 Nev. Stat., ch. 311, § 1, at 1664.

disagree. The wildcard exemption broadly applies to "[*a*]*ny* personal property" that is not otherwise exempt, "*including, without limitation*, the judgment debtor's equity in any property, money, stocks, bonds or other funds on deposit with a financial institution." NRS 21.090(1)(z) (emphases added). While this list does not specifically include "earnings," the exemption's use of inclusive language forecloses Platte River's interpretation. *See Christensen v. Pack* (*In re Christensen*), 122 Nev. 1309, 1320, 149 P.3d 40, 47-48 (2006) (noting that the Legislature's "retention of the modifier 'any' in [a 2005 amendment to the earnings exemption] does not reflect an intent to restrict the scope of the exemption" and interpreting that provision to protect "the proceeds of any deposits of earnings," rather than only a single week of earnings).

Although a canon of statutory interpretation provides that a legislature's omission of language included elsewhere in the statute signifies an intent to exclude such language, *see, e.g.*, *Rural Tel. Co. v. Pub. Utils. Comm'n*, 133 Nev. 387, 389, 398 P.3d 909, 911 (2017), courts do not apply that canon when drafters use inclusive language to imply enlargement rather than limitation, *see generally* 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:25 (7th ed. 2021 update) ("When a statute utilizes 'include,' it is generally improper to conclude that entities not specifically enumerated are excluded."). Here, the Legislature listed certain personal-property items "without limitation." NRS 21.090(1)(z). Hence, the omission of earnings from the nonexclusive list does not signify an intent to exclude earnings from the wildcard exemption's ambit. To the contrary, the inclusive language signifies an intent for the wildcard exemption to encompass any type of nonexempt property that fits within the definition of personal property. Earnings fit within that definition.

The general civil-practice definition of personal property is "money, goods, chattels, things in action and evidences of debt." NRS 10.045. As noted, the nonexhaustive examples of personal property to which the wildcard exemption can apply include money or other funds deposited with a financial institution. *See* NRS 21.090(1)(z). Meanwhile, the earnings exemption defines earnings as "compensation paid or payable for personal services performed by a judgment debtor in the regular course of business." NRS 21.090(1)(g)(2). Earnings include "compensation held in accounts maintained in a bank or any other financial institution . . . ." *Id.* Earnings also include "compensation that is due [to] the judgment debtor." *Id.* Neither NRS Title 2, governing civil practice, nor NRS Chapter 21, governing judgment enforcement, includes definitions for "money." *See* NRS 10.010 et seq.; NRS 21.005 et seq. The legal definition of money, however, includes "[f]unds" or "[a]ssets that can be easily converted to cash." *Money*, *Black's Law Dictionary* (11th ed. 2019).

A cohesive reading of these definitions shows that earnings include money or funds on deposit intended by an employer to compensate an employee for personal services rendered in the regular course of business. Accordingly, earnings fall within the meaning of personal property for purposes of the wildcard exemption. Because earnings qualify as personal property, the plain language of the wildcard exemption permits a debtor to shield from execution up to $10,000 of earnings not otherwise exempted.

The use of the wildcard exemption on nonexempt earnings does not produce absurd results

Platte River asserts that several absurd results follow from the use of the wildcard exemption on nonexempt earnings. Specifically, it contends that the plain-meaning interpretation we adopt today imposes administrative burdens on the courts and litigants, complicates wage-garnishment calculations, results in accrual costs to the debtor that potentially exceed the amount of the wildcard exemption, and makes the execution of judgments less than $10,000 impossible, or at the very least, more difficult and protracted. We strive to the extent possible to interpret a statute in a matter that avoids "unreasonable or absurd result[s]" unintended by the Legislature. *Great Basin Water Network*, 126 Nev. at 196, 234 P.3d at 918 (quoting *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009)); *see Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 588, 473 P.3d 1034, 1037 (2020) (equating an absurd result with one not intended by the Legislature). Nevertheless, we may not adopt an interpretation contrary to a statute's plain meaning merely because we "disagree[ ] with the wisdom of" the Legislature's policy determinations. *See Anthony v. State*, 94 Nev. 338, 341, 580 P.2d 939, 941 (1978); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 239 (2012) ("The doctrine of absurdity is meant to correct obviously *unintended* dispositions, not to revise purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense.").

We conclude that the plain-meaning interpretation here does not implicate the absurd-results canon because the Legislature's inclusion of a wildcard exemption to protect an additional, limited amount of otherwise attachable personal property was not absurd, regardless of whether we disagree with the resulting effects. The fact that the debtor's use of the wildcard exemption on a portion of earnings up to $10,000 may secondarily result in more judicial involvement and delay in the judgment-execution process does not conflict with the Legislature's intent to preserve a reasonable amount of the debtor's property for her livelihood and does not jettison creditors' rights and interests. *See* NRS 21.080(1) (subjecting a debtor's property to judgment execution except as otherwise exempt by law);

In re Fox, 129 Nev. at 380, 302 P.3d at 1139 (observing that NRS 21.090 protects the debtor's privilege to enjoy the necessary comforts of life, "while doing as little injury as possible to the creditor" (internal marks omitted) (quoting *In re Galvez*, 115 Nev. at 419, 990 P.2d at 188)). The use of the wildcard exemption on up to $10,000 of nonexempt earnings does not prevent the creditor's ultimate ability to execute on a judgment, and the creditor continues to accrue interest on its judgment until complete satisfaction. By contrast, Platte River's interpretation effectively bars lower-income debtors with no significant personal property except their earnings from the benefit of the wildcard exemption. The plain-meaning interpretation we adopt today allows the phrase "not otherwise exempt" in the wildcard exemption to maintain its function as protection for "wild" property not already removed from the legal process by other subsections in the exemption statute.

CONCLUSION

A plain reading of the wildcard exemption in NRS 21.090(1)(z) permits a debtor to exempt a portion of earnings up to $10,000 that does not already receive exempt status under the earnings exemption in NRS 21.090(1)(g). The wildcard exemption permits a debtor to apply the exemption towards any personal property, the definition of which includes earnings, that remains subject to execution. Because the earnings exemption designates a portion of earnings as subject to execution, the debtor can apply the wildcard provision to exempt up to $10,000 of the portion of her earnings not protected by the earnings exemption. We also conclude that the plain language of the statute does not produce absurd results unintended by the Legislature. Thus, the district court correctly permitted cumulative use of the wildcard exemption and the earnings exemption on Susan's disposable earnings. We therefore affirm the district court's order granting Susan's claims of exemption.

Pickering and Herndon, JJ., concur.

JAMES MONTELL CHAPPELL, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 77002

December 30, 2021 501 P.3d 935

Appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

[Rehearing denied March 24, 2022]

Rene L. Valladares, Federal Public Defender, and *Bradley D. Levenson, Ellesse Henderson*, and *Scott Wisniewski*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Cadish, J.:

Several mandatory procedural bars apply to postconviction habeas petitions under NRS Chapter 34. To overcome those mandatory procedural bars and avoid dismissal of a postconviction habeas petition, a petitioner must demonstrate good cause and prejudice unless certain narrow exceptions apply. A petitioner must raise a claim of good cause within a reasonable time after it becomes available.

In this case, appellant James Chappell asserted the ineffective assistance of his first postconviction counsel as good cause and prejudice to raise procedurally barred grounds for relief from the guilt phase of his trial. But he did not do so until after the penalty phase retrial he obtained in the first postconviction proceeding, the direct appeal from the judgment entered after the penalty phase retrial, and the remittitur issued on appeal from the district court order denying his second postconviction habeas petition. We conclude that his delay based on those circumstances was not reasonable and therefore he could not rely on the alleged ineffective assistance of first postconviction counsel as good cause and prejudice to raise grounds for relief from the guilt phase of his trial. He did, however,

[1]The Honorable Abbi Silver, Justice, and The Honorable Douglas W. Herndon, Justice, did not participate in the decision of this matter.

timely assert the alleged ineffective assistance of second postconviction counsel, who was appointed pursuant to a statutory mandate for purposes of Chappell's first opportunity to assert collateral challenges to the death sentence imposed in the penalty phase retrial, as good cause and prejudice to raise procedurally barred grounds for relief from the death sentence. We conclude those ineffective-assistance claims lack merit and therefore the district court did not err in dismissing the petition as procedurally barred. Because we also conclude that Chappell did not show that the failure to consider his claims would result in a fundamental miscarriage of justice sufficient to excuse the procedural bars, we affirm the district court order dismissing Chappell's third postconviction petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

Almost three decades ago, appellant James Chappell was serving time for domestic battery in a Las Vegas jail when he was mistakenly released from custody. Upon his release, Chappell went to the mobile home park where his ex-girlfriend lived, climbed through a window into her residence, had sexual intercourse with her, and stabbed her to death with a kitchen knife before fleeing in her car. A jury found Chappell guilty of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary and sentenced him to death for the murder. We affirmed the judgment of conviction and sentence on direct appeal. *Chappell v. State* (*Chappell I*), 114 Nev. 1403, 972 P.2d 838 (1998).

Chappell filed a timely postconviction petition for a writ of habeas corpus. David Schieck was appointed to represent Chappell in that proceeding. Although the district court rejected Chappell's claims related to the guilt phase, it found that Chappell received ineffective assistance during the penalty phase and ordered a new penalty hearing as to the murder conviction. We affirmed the district court's order partially granting and partially denying the petition. *Chappell v. State* (*Chappell II*), Docket No. 43493 (Order of Affirmance, Apr. 7, 2006). At the penalty phase retrial, Schieck and another attorney represented Chappell. The jury returned a death sentence, and this court affirmed the sentence on appeal. *Chappell v. State* (*Chappell III*), No. 49478, 2009 WL 3571279 (Nev. Oct. 20, 2009) (Order of Affirmance).

Following the appeal from the judgment entered after the penalty phase retrial, Chappell filed his second postconviction petition for a writ of habeas corpus. The claims in that petition focused on challenges to the death sentence imposed at the penalty phase retrial. Christopher Oram represented Chappell in the second postconviction proceeding. The district court denied the petition, and this court affirmed. *Chappell v. State* (*Chappell IV*), No. 61967, 2015 WL 3849122 (Nev. June 18, 2015) (Order of Affirmance).

Chappell filed a third postconviction petition for a writ of habeas corpus on November 16, 2016. The district court conducted a limited evidentiary hearing on one of Chappell's claims but ultimately dismissed the petition as procedurally barred. This appeal followed.

DISCUSSION

The district court did not err in dismissing the petition as untimely, successive, and an abuse of the writ

Chappell's third postconviction habeas petition was untimely, given that he filed it more than 17 years after the remittitur issued in his direct appeal from the original judgment of conviction and more than 6 years after the remittitur issued in his direct appeal from the judgment of conviction entered after the penalty phase retrial. *See* NRS 34.726(1) ("[A] petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court . . . issues its remittitur."). The petition included many grounds for relief that Chappell had waived because he could have raised them on direct appeal or in the previous postconviction petitions. NRS 34.810(1)(b)(2). The petition was also successive to the extent it alleged grounds for relief that had been considered on the merits in a prior proceeding, and it constituted an abuse of the writ because it included new and different grounds for relief (i.e., grounds that had not been raised in the prior postconviction petitions). NRS 34.810(2). Therefore, Chappell's third petition was subject to multiple, mandatory procedural bars. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.").

To avoid dismissal based on those procedural bars, Chappell had to demonstrate good cause and prejudice, save for certain narrow exceptions addressed below at 802-03. *See* NRS 34.726(1); NRS 34.810(1)(b), (3). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable." *Id*. (internal quotation marks omitted). "To establish prejudice, a petitioner must show not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage . . . ." *State v. Powell*, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006) (internal quotation marks omitted).

Chappell claims he demonstrated good cause and prejudice based on ineffective assistance of postconviction counsel, referring to both first postconviction counsel (Schieck) and second postconviction counsel (Oram). Ineffective assistance of postconviction counsel can constitute good cause for an untimely and successive petition where postconviction counsel was appointed as a matter of right, if the postconviction-counsel claim is not itself untimely and therefore procedurally barred. *See generally Rippo v. State*, 134 Nev. 411, 423 P.3d 1084 (2018) (discussing procedural bars and availability of a postconviction-counsel claim as good cause and prejudice); *see also Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 728 (2015) (stating that a good-cause claim based on a *Brady* violation must be raised within a reasonable time after the claim became available); *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012) (same); *Riker*, 121 Nev. at 235, 112 P.3d at 1077 (explaining that a postconviction-counsel claim is not "immune to other procedural default [statutes]" such as NRS 34.726); *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (explaining that ineffective-assistance claim asserted as good cause "itself must not be procedurally defaulted" and thus must be raised in a timely fashion). The first question, then, is whether Chappell timely raised his good-cause claims based on ineffective assistance of postconviction counsel, which requires a showing that he raised those claims within a reasonable time after they became available. *Rippo*, 134 Nev. at 419-22, 423 P.3d at 1095-97 (discussing the time bar set forth in NRS 34.726 as applied to a postconviction-counsel claim that is asserted as good cause to obtain review of other procedurally barred grounds for relief). A postconviction-counsel claim is raised within a reasonable time and therefore is not itself procedurally barred when it is raised within one year of "the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred." *Id*. at 420, 423 P.3d at 1096. Thus, the postconviction-counsel claim must be raised within one year after entry of a final written decision by the district court resolving all the grounds in the petition or, if a timely appeal was taken, the issuance of the appellate court's remittitur. *Id*. at 421, 423 P.3d at 1096.

Chappell did not timely raise the good-cause claims based on ineffective assistance of first postconviction counsel

Chappell claims first postconviction counsel's ineffectiveness provides good cause for him to raise procedurally barred grounds for relief from the conviction (i.e., grounds related to the guilt phase of the 1996 trial and the subsequent direct appeal). He contends that the third petition provided the first opportunity to pursue those postconviction-counsel claims and that he filed that petition within a reasonable time after those claims became available. We disagree.

The remittitur in Chappell's first postconviction appeal issued on May 2, 2006. Any good-cause claim based on first postconviction counsel's ineffectiveness became available on that date. Thus, Chappell had one year from May 2, 2006, to assert first postconviction counsel's ineffectiveness as good cause to raise procedurally barred challenges to his conviction. Having missed that deadline by almost a decade, Chappell urges us to hold that the first-postconviction-counsel claims were not available until November 17, 2015, when the remittitur issued on appeal from the order denying his second postconviction habeas petition, in which Chappell challenged the death sentence imposed at the penalty phase retrial. We find Chappell's arguments unpersuasive.

First, relying on *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017), Chappell argues that after he obtained relief from the original death sentence, there was no judgment of conviction to challenge in a postconviction petition until the new judgment was entered after the penalty phase retrial. In *Johnson*, we held that there was no final judgment of conviction to trigger the one-year period outlined in NRS 34.726(1) until after a penalty phase retrial where the penalty phase retrial had been granted *on direct appeal*. *Id.* at 573-75, 402 P.3d at 1271-73. But here, the penalty phase retrial was granted in a postconviction proceeding. Chappell's reliance on *Johnson* is therefore misplaced. Indeed, *Johnson* distinguished between cases where the death sentence was reversed on direct appeal and those where the death sentence was vacated in a postconviction proceeding. *Id*. at 575 n.1, 402 P.3d at 1273 n.1. As succinctly put by the California Supreme Court, when a capital defendant is granted a new penalty hearing on collateral review, "[t]he scope of [the] retrial is a matter of state procedure under which *the original judgment on the issue of guilt remains final during the retrial of the penalty issue* and during all appellate proceedings reviewing the trial court's decision on that issue." *People v. Kemp*, 517 P.2d 826, 828 (Cal. 1974) (emphasis added) (internal quotation marks omitted). We reached a similar conclusion on appeal from the judgment entered after the penalty phase retrial. In that appeal, Chappell tried to raise guilt-phase trial errors, arguing that his conviction was not yet final. Citing *Kemp* and other similar cases, we determined that the issue of Chappell's guilt was final on October 4, 1999, when the United States Supreme Court denied certiorari from our decision in *Chappell I*. *Chappell III*, 2009 WL 3571279, at *13.

Second, Chappell argues that if he had to file a petition raising the postconviction-counsel claims before the penalty phase retrial, related appeal, and postconviction challenges were complete, there would have been confusion about whether the petition would be subject to the special rules that apply to petitions filed by a person who is under a death sentence. His primary concern in this respect seems to be the appointment of postconviction counsel to assist with

that petition. But there is no statutory right to appointed counsel to represent a petitioner who has filed a successive petition, even when the petitioner has been sentenced to death. *See* NRS 34.820(1)(a) (mandating the appointment of postconviction counsel if the "petitioner has been sentenced to death and the petition is the *first one* challenging the validity of the petitioner's conviction or sentence" (emphasis added)). We therefore are not convinced that it would be unworkable in practice to require a person in Chappell's position to file a postconviction petition before a penalty phase retrial and related appellate and postconviction challenges are complete. *Cf. Johnson*, 133 Nev. at 574-75, 402 P.3d at 1272-73 (recognizing possible confusion as to whether the rules regarding statutorily appointed postconviction counsel for a petitioner who has been sentenced to death would apply to a first petition filed while the petitioner is facing a retrial of the penalty phase).

Third, Chappell argues that he could not raise his good-cause claims based on first postconviction counsel's performance earlier because first postconviction counsel (Schieck) continued to represent him in the penalty phase retrial and new postconviction counsel had not been appointed to represent him on a second postconviction petition. We again disagree. Schieck's continued representation of Chappell with respect to the penalty phase retrial and subsequent direct appeal did not impede Chappell's ability to file a second postconviction petition asserting that Schieck's ineffectiveness as first postconviction counsel provided good cause to raise procedurally barred challenges to the conviction. Because such a petition would have been a wholly separate proceeding from the penalty phase retrial, Chappell could have filed the second petition pro se and requested the appointment of counsel under NRS 34.750. And any adverse impact a second postconviction petition might have had on Schieck's performance during the penalty phase retrial could have been addressed in the retrial proceedings or in a subsequent postconviction petition challenging the sentence imposed on retrial.

We acknowledge that parallel retrial and postconviction proceedings in these circumstances may be complicated. But we must weigh those complications against the "[p]assage of time, erosion of memory, and dispersion of witnesses" that would affect both a possible retrial of the issue of guilt and litigation of the second postconviction petition. *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982)); *see also Rippo*, 134 Nev. at 420, 423 P.3d at 1095-96 (pointing to interest in finality of a criminal conviction as support for the conclusion that "a petitioner does not have an indefinite period of time to raise a postconviction-counsel claim"). And while we generally prefer to avoid piecemeal litigation, that preference similarly "must be counterbalanced against the interest in the finality of a conviction." *Witter v. State*, 135 Nev. 412, 416, 452 P.3d 406, 409

(2019). That balance tips toward finality in the circumstances presented here, given that piecemeal litigation is unavoidable when a penalty phase retrial is ordered on collateral review.

Consistent with *Rippo* and earlier cases, Chappell's good-cause claims based on first postconviction counsel's performance as to guilt-phase issues were available when the remittitur issued on appeal from the district court's order denying his first postconviction petition in that regard. Because Chappell filed the petition asserting those postconviction-counsel claims more than one year later, those claims were untimely and could not provide good cause. Accordingly, the district court did not err in denying the petition as to the asserted grounds for relief related to the issue of Chappell's guilt because those grounds are procedurally barred under NRS 34.726(1), NRS 34.810(1)(b)(2), and NRS 34.810(2).

Chappell timely raised good-cause claims based on second postconviction counsel's alleged ineffective assistance

Chappell claims that counsel's ineffectiveness during the second postconviction proceeding provides good cause to raise procedurally barred grounds for relief from the death sentence imposed during the penalty phase retrial.[2] These good-cause claims were raised within one year after they became available (i.e., when remittitur issued on appeal from the order denying the second postconviction petition). Thus, Chappell has "met the first component of the good-cause showing required under NRS 34.726(1)." *Rippo*, 134 Nev. at 422, 423 P.3d at 1097. But to satisfy the second component of the showing required under NRS 34.726(1)(b)—undue prejudice—and the cause-and-prejudice showings required under NRS 34.810(1)(b) and NRS 34.810(3), Chappell also had to *prove* that second postconviction counsel was ineffective. *Id.* at 422, 425, 423 P.3d at 1097, 1099. We turn then to the substance of Chappell's claims regarding second postconviction counsel's performance.

[2]Chappell also argues that second postconviction counsel's ineffectiveness excuses any delay in raising good-cause claims based on first postconviction counsel's ineffectiveness. He is wrong. The appointment of second postconviction counsel (Oram) was statutorily mandated only because that petition was the first one challenging the validity of the death sentence imposed at the penalty phase retrial. *See* NRS 34.820(1)(a) (requiring the district court to appoint postconviction counsel "[i]f a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence"). Because Chappell did not have a right to appointed postconviction counsel for a second challenge to his conviction, second postconviction counsel's acts or omissions do not provide good cause to excuse the delay in asserting first postconviction counsel's ineffectiveness. *See Brown v. McDaniel*, 130 Nev. 565, 569 & n.1, 331 P.3d 867, 870 & n.1 (2014) (reiterating that "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel" and that death-penalty defendants are entitled to effective assistance of appointed counsel in first postconviction proceedings (alteration in original) (internal quotation marks omitted)).

Chappell's claims that second postconviction counsel provided ineffective assistance lack merit

We have adopted the *Strickland* test "to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of that counsel." *Id.* at 423, 423 P.3d at 1098; *see generally Strickland v. Washington*, 466 U.S. 668 (1984). Thus, to prove that second postconviction counsel was ineffective, Chappell had to show "(1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced [him]." *Rippo*, 134 Nev. at 423, 423 P.3d at 1098. Both showings are required. *Id*. The inquiry on the first prong focuses on whether postconviction counsel's performance fell below an objective standard of reasonableness. *See id*. at 438, 423 P.3d at 1108 (indicating that postconviction counsel's performance is not deficient if it comes within "the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689)). The inquiry on the second prong focuses on whether the "deficient performance prevented [Chappell] from establishing . . . that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." *Id*. at 424, 423 P.3d at 1099 (recognizing that "the question is more than whether the first post-conviction relief proceeding should have gone differently" (internal quotation marks omitted)).

Before evaluating Chappell's postconviction-counsel claims under the *Strickland* test, we find it necessary to address the level of specificity required when pleading such claims in a postconviction petition and arguing them on appeal. NRS Chapter 34 requires a petitioner to identify the applicable procedural bars for *each* claim presented and the good cause that excuses those procedural bars. *See* NRS 34.735 (outlining the form for a postconviction habeas petition, questions 17-19); *see also* NRS 34.726(1) (requiring a petitioner to show cause for the delay in filing a petition and undue prejudice); NRS 34.810(3) (providing that "*the petitioner has the burden of pleading* and proving *specific facts that demonstrate* . . . [*g*]*ood cause* for the petitioner's failure to present the claim or for presenting the claim again[ ] *and* . . . [*a*]*ctual prejudice* to the petitioner" (emphases added)). And a petitioner's explanation of good cause and prejudice for each procedurally barred claim must be made on the face of the petition. *See State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). Thus, to avoid dismissal under NRS 34.726(1) or NRS 34.810, a petitioner "cannot rely on conclusory claims for relief but must provide supporting specific factual allegations that if true would entitle him to relief." *Riker*, 121 Nev. at 232, 112 P.3d at 1075; *see also Haberstroh*, 119 Nev. at 181, 69 P.3d at 681; *Bejarano v. Warden*, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996). This pleading requirement is nothing new. *See, e.g.*, *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (requiring a postconviction petitioner to assert more than bare or naked allegations

but rather specific factual allegations, not belied or repelled by the record, that would entitle him or her to relief if true).

The specificity required to plead an ineffective-assistance claim as good cause is further reflected in the *Strickland* standard. In particular, courts must presume that counsel performed effectively, and "[t]o overcome this presumption, a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently." *Johnson*, 133 Nev. at 577, 402 P.3d at 1274. "Instead, he must *specifically explain* how his attorney's performance was objectively unreasonable . . . ." *Id*. (emphasis added); *see also Strickland*, 466 U.S. at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). When it comes to postconviction-counsel claims in particular, conclusory or general assertions of deficient performance are insufficient because "the mere omission of a claim developed by new counsel does not raise a presumption that prior [postconviction] counsel was incompetent, or warrant consideration of the merits of a successive petition." *In re Reno*, 283 P.3d 1181, 1210 (Cal. 2012) (internal quotation marks omitted), *quoted with approval in Rippo*, 134 Nev. at 429, 423 P.3d at 1102. Similarly, a petitioner must specifically articulate how counsel's deficient performance prejudiced him or her. *See Riley v. State*, 110 Nev. 638, 649, 878 P.2d 272, 279 (1994) (rejecting an ineffective-assistance claim where the petitioner did not "articulate prejudice in a persuasive manner" because he or she failed "to present an argument demonstrating the type and strength of evidence that might have been presented, and that there exists a reasonable probability that presentation of the evidence would have resulted in a different outcome at trial"). We have reiterated these requirements when reviewing ineffective-assistance claims on appeal, making it clear that a petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just "in a *pro forma*, perfunctory way" or with a "conclusory[ ] catch-all" statement that counsel provided ineffective assistance. *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), *overruled on other grounds by Lisle*, 131 Nev. at 366 n.5, 351 P.3d at 732 n.5.

To satisfy those specificity requirements, a petitioner arguing good cause and prejudice in a capital case based on the ineffective assistance of postconviction counsel must specifically plead in the petition and explain in any appellate briefs how postconviction counsel's performance was objectively unreasonable and how postconviction counsel's acts or omissions prejudiced the petitioner in the prior postconviction proceeding. The merits of the procedurally barred grounds for relief may play an integral part in pleading and arguing good cause and prejudice based on the ineffective assistance of postconviction counsel. *See Rippo*, 134 Nev. at 424, 423 P.3d at 1098 (recognizing that "when a petitioner presents a claim

of ineffective assistance of postconviction counsel on the basis that postconviction counsel failed to prove the ineffectiveness of his trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys"). But the petitioner cannot satisfy his or her burden to plead and argue postconviction counsel's ineffectiveness with specificity by focusing solely on the merits of the procedurally barred grounds for relief.

With these principles in mind, we consider whether Chappell proved that second postconviction counsel (Oram) provided ineffective assistance. In doing so, we address the merits of the procedurally barred grounds for relief only to the extent that they are intertwined with the merits of the postconviction-counsel claim asserted as good cause and prejudice. And to the extent that we address the merits of any postconviction-counsel claims that lack the required specificity in pleading or appellate argument, we do so only as an alternative basis to deny relief.

Failure to support claims related to evidence of Fetal Alcohol Spectrum Disorders

Chappell argues that penalty phase counsel should have presented evidence of Fetal Alcohol Spectrum Disorders (FASD) and of Chappell's irreversible brain damage due to prenatal exposure to alcohol and drugs. The second postconviction petition included a claim regarding FASD that the district court and this court rejected on the merits. To overcome the procedural bars to raising that claim again, Chappell argues that second postconviction counsel did not support the claim with readily available evidence, did not support his request for an investigator and funding with sufficiently specific arguments to establish necessity, and should have presented the claim in a more compelling manner.

The district court conducted an evidentiary hearing on this claim. Second postconviction counsel testified that he requested funding for a PET scan and for an FASD expert, using uncontroverted information that Chappell's mother had been addicted to drugs and alcohol to support the request. Counsel recollected the State's argument that FASD would not have made a difference to the jury and his counterargument that he needed to retain an expert because penalty phase counsel had not looked into FASD. Second postconviction counsel recalled that the district court denied the request as bare and conclusory and that, while he believed FASD was an important enough topic to raise in the petition, he focused more on challenging the sole aggravating circumstance so that Chappell would be ineligible for the death penalty. The district court concluded that penalty phase counsel presented most of the evidence Chappell hoped to introduce about an FASD diagnosis during the penalty phase retrial and therefore rejected Chappell's postconviction-counsel claim.

Chappell argues that the district court erred because the jury did not hear evidence about FASD and resulting brain damage, evidence he contends is fundamentally different from any other evidence presented during the penalty phase retrial because it could have explained his actions. We disagree. As we noted on appeal from the order denying the second postconviction petition, penalty phase counsel presented extensive evidence of Chappell's cognitive deficits at the penalty phase retrial and the jury determined that the evidence was not sufficiently mitigating. *Chappell IV*, 2015 WL 3849122, at *2. Thus, we concluded that Chappell had not shown deficient performance or prejudice due to penalty phase counsel's failure to further investigate FASD. *Id*. Likewise here, Chappell fails to show prejudice due to second postconviction counsel's performance where the omitted information merely supplements what the jury heard during the penalty phase retrial: that Chappell suffered from substance abuse, was born to a mother addicted to drugs and alcohol, and suffered a learning disability. One expert explained during the penalty phase retrial that Chappell had less free will than the average person. That same expert noted Chappell's placement in special-education classes as early as second grade, his lack of early success in school, his behaviors that were atypical of a second grader, and his classification "as severely learning disabled" in fourth grade. Additionally, the expert explained that those with a low verbal IQ, such as Chappell, were overrepresented in the prison population because they have trouble problem solving and making good decisions. Lastly, the expert testified that Chappell's low verbal IQ, difficult childhood, constant drug use, and diagnosed personality disorder(s) negatively affected his free will. Thus, the jury heard evidence that Chappell had cognitive deficits and that those deficits, along with Chappell's upbringing, resulted in diminished free will and difficulty with decision-making. Information regarding FASD may have explained the *cause* of Chappell's cognitive deficits, but we are not convinced that the cause of those deficits would have been more compelling than the deficits themselves. Therefore, Chappell has not demonstrated that he would have been granted relief had second postconviction counsel handled the FASD claim differently. Accordingly, the district court did not err in rejecting this claim as procedurally barred.[3]

[3]Chappell alternatively contends that the district court's denial of second postconviction counsel's request for funding and for an evidentiary hearing provides good cause because that decision precluded him from discovering the factual and legal bases for some of his grounds for relief. Any issues related to the district court's decisions in the second postconviction proceeding could have been raised in the second postconviction appeal, *see* NRS 34.810(1)(b), and Chappell does not demonstrate good cause for his failure to do so, *see* NRS 34.810(3).

Failure to raise grounds for relief based on ineffective assistance during jury selection at the penalty phase retrial

Chappell raises multiple procedurally barred grounds for relief related to jury selection at the penalty phase retrial, claiming that second postconviction counsel provided ineffective assistance by omitting them from the prior petition. He first argues that the State used two of its peremptory strikes in a racially biased manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In his appellate brief, Chappell summarily alleges in a footnote that "postconviction counsel was ineffective for failing to challenge [penalty phase] counsel's effectiveness on this basis."[4] The pleading below fares no better, as it simply identified the procedurally barred ground for relief, along with a list of others, and summarily alleged that it was not "raised previously due to ineffective assistance of . . . state post-conviction counsel." Chappell's appellate arguments and pleading below are deficient. Beyond those deficiencies, Chappell has not shown second postconviction counsel's omission of the *Batson* claim was unreasonable, as Chappell does not point to another juror who expressed a doubt as to the ability to be fair like prospective Juror Mills did or who was as inconsistent and equivocal in expressing hesitations about the death penalty as prospective Juror Theus was or other evidence to show the challenges were exercised based on discrimination. *See Ford v. State*, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006) (identifying one category of circumstantial evidence that is probative of the prosecutor's intent as "the similarity of answers to voir dire questions given by African-American prospective jurors who were struck by the prosecutors and answers by nonblack prospective jurors who were not struck"). Thus, Chappell did not demonstrate cause and prejudice. Accordingly, the district court did not err in denying the underlying claim as procedurally barred without conducting an evidentiary hearing.

Next, Chappell claims that penalty phase counsel should have challenged several biased veniremembers who ultimately were seated on the jury for the penalty phase retrial. To excuse the procedural bars to that claim, Chappell alleges that second postconviction counsel provided ineffective assistance by omitting it. But once again, Chappell's pleading and appellate argument regarding second postconviction counsel's ineffectiveness are deficient. We have found no assertions about second postconviction counsel's performance specifically related to this penalty-phase-counsel

[4]Chappell's reply brief adds scarcely more, as he offers a perfunctory assertion that second postconviction counsel's failure to raise a *Batson* claim "amounted to prejudicial, deficient performance."

claim in Chappell's appellate briefing.[5] The pleading below is similarly deficient. Additionally, Chappell averred in his petition both that he was raising the penalty-phase-counsel claim again "because state post-conviction counsel failed to adequately develop, present, or demonstrate prejudice" and that he was raising the penalty-phase-counsel claim as a new ground for relief "due to ineffective assistance of . . . state post-conviction counsel." This contradictory pleading is problematic—the penalty-phase-counsel claim is either new or it is not. *See* NRS 34.735 (postconviction habeas petition form, questions 17-18, requiring a petitioner to identify, among other things, which claims are re-raised and which are new); *cf. Reno*, 283 P.3d at 1196 (requiring petitioners to submit a table or chart to identify which claims are re-raised and which are new). A reviewing court, and a responding party, should not be expected to scour a voluminous petition and record in an effort to ascertain whether a particular ground for relief has been raised in a prior postconviction petition. Beyond those pleading and briefing deficiencies, Chappell has not shown second postconviction counsel acted unreasonably in omitting this claim, as he has not demonstrated that the challenged jurors were biased and therefore has not shown good cause and actual prejudice. We conclude the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Chappell next claims that the trial court erroneously denied his for-cause challenges of three veniremembers who did not serve on the jury during the penalty phase retrial. To excuse the procedural bars to that claim, Chappell relies on ineffective assistance of second postconviction counsel in omitting it. But again, Chappell's appellate argument and pleading are deficient. There is no specific argument about second postconviction counsel's performance related to this claim in Chappell's appellate briefs. The petition includes this claim as part of a larger allegation that is inconsistent as to whether the claim is new and not specific about how second postconviction counsel's performance was deficient or prejudiced Chappell. Chappell also did not sufficiently identify which facts supporting this claim are new and which have been previously considered. *See Moore v. State*, 134 Nev. 262, 264, 417 P.3d 356, 359 (2018) (recognizing that, where a petitioner claims new facts provide good cause for a successive claim, the petitioner must "identify with specificity which facts this court previously considered and which facts are new"). Beyond the deficiencies in Chappell's pleading and appellate argument, the record reveals an objectively reasonable basis for second postconviction counsel to have omitted

[5]Although Chappell's opening brief includes a section that generally asserts second postconviction counsel's ineffectiveness as good cause and prejudice, the allegations in that section—save for those surrounding the FASD claim, addressed *supra*—are bare and conclusory.

the underlying claim: it would have been barred by the law-of-the-case doctrine because it was raised on direct appeal and rejected on the merits, *Chappell III*, 2009 WL 3571279, at *5. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (recognizing that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same" and that "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument" (internal quotation marks omitted)). Although the law-of-the-case doctrine can sometimes be avoided, *see Hsu v. County of Clark*, 123 Nev. 625, 630-31, 173 P.3d 724, 729 (2007) (recognizing reasons for law of the case to be avoided), the record does not clearly reveal any reasons to reconsider the law of the case here, particularly given our caselaw that would have made it impossible for second postconviction counsel to demonstrate prejudice because none of the purportedly biased veniremembers were seated, *see Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005) ("If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury."). We therefore conclude the district court did not err in denying this trial-error claim as procedurally barred without conducting an evidentiary hearing.

Last, Chappell claims that penalty phase counsel did not attempt to rehabilitate death-penalty-scrupled veniremembers. Again, Chappell relies on ineffective assistance of second postconviction counsel to overcome the procedural bars to this claim, but his pleadings below do not specifically allege how postconviction counsel's performance was deficient. And although the petition includes conflicting assertions as to whether the underlying ground for relief was new, it appears Chappell had not raised the claim regarding juror rehabilitation in any prior proceeding. Beyond the deficiencies in Chappell's pleading and appellate argument, the record reveals an objectively reasonable basis for second postconviction counsel to omit the underlying claim: it lacked merit, given that it did not focus on the jurors who were actually seated. *See Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005) ("Any claim of constitutional significance must focus on the jurors who were actually seated, not on excused jurors."), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). We therefore conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to raise grounds for relief based on evidence of Chappell's traumatic childhood

Chappell argues that penalty phase counsel did not investigate and present evidence of his traumatic childhood. Specifically, Chappell claims that penalty phase counsel should have presented

more evidence about his family history of substance abuse and mental illness; the abuse, neglect, and loss he suffered while living with his grandmother; the poverty-stricken neighborhood where he spent his childhood; the brain damage he suffered due to prenatal exposure to drugs and alcohol; and his use of drugs to escape reality. To overcome the procedural bars to this penalty-phase-counsel claim, Chappell asserted that second postconviction counsel provided ineffective assistance in omitting it. But his pleadings below omitted anything specific about second postconviction counsel's performance in this respect and did not clearly indicate whether the underlying claim was new or had been raised in a prior proceeding. In his appellate briefs, Chappell's arguments about second postconviction counsel's performance in omitting this claim are limited to catchall statements that counsel failed to investigate readily available witnesses to discover the evidence and failed to do any extra-record investigation. Beyond the deficiencies in the pleadings and appellate argument, the record reveals objectively reasonable grounds for second postconviction counsel to have omitted the penalty-phase-counsel claim. First, penalty phase counsel's omission did not prejudice Chappell. One or more jurors found several mitigating circumstances that covered the subjects identified in this penalty-phase-counsel claim, including that Chappell (1) suffered from substance abuse, (2) had no father figure in his life, (3) was raised in an abusive household, (4) was the victim of physical abuse as a child, (5) was born to a mother addicted to drugs and alcohol, (6) suffered a learning disability, and (7) was raised in a depressed housing area. Cumulative evidence on the same subjects would not have had a reasonable probability of altering the jury's determination that the mitigating circumstances did not outweigh the aggravating circumstance. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 200 (2011) (concluding there was no reasonable probability that "new" mitigation evidence would have changed the jury's verdict, in part because "[t]he 'new' evidence largely duplicated the mitigation evidence at trial"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (recognizing that mitigating evidence "can be a two-edged sword that" juries might find to show future dangerousness). Second, postconviction counsel pursued an objectively reasonable strategy focused on eliminating the single aggravating circumstance that, if successful, would have made Chappell ineligible for the death penalty. *See Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."), *cited with approval in Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."); *see also Lara*

v. State, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (observing that strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)). We therefore conclude that the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Chappell also summarily suggests that penalty phase counsel should have presented witnesses at the penalty phase retrial that counsel identified in the first postconviction petition. But second postconviction counsel *did* raise that claim, and this court rejected it. *Chappell IV*, 2015 WL 3849122, at *2. Chappell has not explained in his petition below or his appellate briefing how second postconviction counsel's performance was deficient or prejudiced him in litigating this penalty-phase-counsel claim. And Chappell has not provided any cogent argument to overcome the doctrine of the law of the case. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99; *see also Hsu*, 123 Nev. at 630-31, 173 P.3d at 729. Accordingly, we conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to present expert witnesses

Chappell argues that penalty phase counsel should have investigated and presented evidence of his addiction to drugs through an addiction expert, of the effects of drugs on the brain through a neuropharmacologist, and of his childhood through an expert on trauma. He again relies on the ineffective assistance of second postconviction counsel to overcome the procedural bars to this claim. But in the petition filed below, Chappell did not specifically allege how second postconviction counsel performed deficiently with respect to investigating and retaining expert witnesses. And in his appellate briefing, Chappell acknowledges that counsel hired some experts but broadly asserts that more were needed. Beyond these deficiencies in the pleadings and appellate argument, the record reveals an objectively reasonable basis for second postconviction counsel to omit this penalty-phase-counsel claim: penalty phase counsel's omission did not prejudice the defense. A defense expert testified in the desired manner at the penalty phase retrial, telling the jury that Chappell became dependent on cocaine at a young age and that regular use of the drug may cause paranoid delusions and psychosis and result in uncontrollable behaviors and thoughts. And one or more jurors found *as a mitigating circumstance* that Chappell suffered from substance abuse. Thus, the jury was able to and did consider Chappell's substance abuse as a mitigating circumstance without additional testimony from an addiction expert or neuropharmacologist. And because the jury also heard evidence about Chappell's traumatic childhood, we are not convinced

there is a reasonable probability that an expert's testimony about how the trauma impacted the course of Chappell's life would have altered the jurors' sentencing decision. *See Pinholster*, 563 U.S. at 201; *Atkins*, 536 U.S. at 321. Under these circumstances, Chappell has not demonstrated that second postconviction counsel provided ineffective assistance by omitting this penalty-phase-counsel claim. Accordingly, we conclude the district court did not err by denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to prepare witnesses

Chappell argues that penalty phase counsel did not adequately prepare witnesses to testify during the penalty phase retrial. He again summarily points to second postconviction counsel's alleged ineffective assistance to overcome the procedural bars to this claim without pleading below or arguing on appeal any specifics about second postconviction counsel's performance in this respect. Beyond the deficiencies in the pleadings and appellate argument, the record belies in part the cause-and-prejudice claim based on second postconviction counsel's performance. Specifically, second postconviction counsel argued that penalty phase counsel failed to prepare expert witnesses Dr. Lewis Etcoff, Dr. William Danton, and Dr. Todd Grey and lay witness Benjamin Dean to testify at the penalty phase retrial, but this court concluded that penalty phase counsel was not ineffective.[6] *Chappell IV*, 2015 WL 3849122, at *3-4. The record also reveals an objectively reasonable ground for second postconviction counsel to omit another aspect of this penalty-phase-counsel claim: the allegation that counsel did not adequately prepare Chappell to testify was procedurally barred because it implicated trial counsel's performance in the first trial.[7] And finally, as for the remaining witnesses, Chappell has not presented cogent argument that the State was able to discredit those witnesses because penalty phase counsel did not adequately prepare them to testify, *see Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987), nor has he shown prejudice due to penalty phase counsel's failure to adequately prepare those witnesses. For these reasons, we conclude the district court did not err by denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

[6]This court's decision on the penalty-phase-counsel claim in *Chappell IV* is the law of the case. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99. Chappell does not identify any basis to reconsider the law of the case on that claim. *See Hsu*, 123 Nev. at 630-31, 173 P.3d at 729.

[7]This aspect of the penalty-phase-counsel claim implicates trial counsel's performance because it was Chappell's testimony from the 1996 trial that the jury heard during the penalty phase retrial; Chappell did not take the stand during the penalty phase retrial.

Failure to object to prosecutorial misconduct[8]

Chappell complains about multiple instances of alleged prosecutorial misconduct, claiming that penalty phase counsel should have objected. To overcome the procedural bars to this claim, Chappell asserts that second postconviction counsel provided ineffective assistance. But once again, he did not plead in his petition how second postconviction counsel's performance was deficient, and his appellate briefing is similarly deficient with catchall contentions that second postconviction counsel failed to effectively raise this penalty-phase-counsel claim in the previous postconviction petition. Beyond these deficiencies in the pleadings and appellate argument, the record belies the arguments about second postconviction counsel in part and reveals objectively reasonable grounds for second postconviction counsel to omit other parts of this penalty-phase-counsel claim. First, second postconviction counsel raised some of the prosecutorial misconduct arguments; this court rejected them. *Chappell IV*, 2015 WL 3849122, at *5 (rejecting Chappell's argument that counsel should have objected to the prosecution describing him "as 'a despicable human being' who 'chose evil' " and concluding that there was no prejudice from the prosecutor's improper impeachment of Fred Dean). And it was objectively reasonable for second postconviction counsel to omit the underlying allegations of prosecutorial misconduct that had been raised and rejected on direct appeal after the penalty phase retrial, *see Chappell III*, 2009 WL 3571279, at *11-12 (rejecting Chappell's claim of prosecutorial misconduct based on arguments about comparative worth, justice for the victim and the State, no mercy for Chappell, the jury not being "conned," and the role of mitigating circumstances), given that this court's decision in *Chappell III* established the law of the case as to those allegations. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99; *see also Hsu*, 123 Nev. at 630-31, 173 P.3d at 729.

And finally, as to the underlying allegations of prosecutorial misconduct that have not been previously considered, Chappell asserts the prosecutor disparaged the defense by characterizing it as an attempt to blame Chappell's upbringing for the crimes and making sarcastic comments. As we previously held the State was allowed

[8]To the extent Chappell alleges good cause because the State withheld material impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), he did not adequately plead the claim. The burden is on Chappell "to identify with specificity which facts this court previously considered and which facts are new" and to "explain why he is raising [the] claim again, or if it is new, why he did not raise it sooner." *Moore*, 134 Nev. at 264, 417 P.3d at 359. But Chappell has not specified what facts are new, when he discovered this alleged *Brady* violation, and why this claim should excuse the procedural bars. Therefore, the district court did not err by denying this claim as procedurally barred without conducting an evidentiary hearing. *See State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (outlining good cause and prejudice requirements for a *Brady* claim).

to rebut evidence of Chappell's childhood, mental impairment, and character and the State properly commented that Chappell's past "did not take away his actions," *see Chappell III*, 2009 WL 3571279, at *12 (internal quotation marks omitted), and as the comments went to the State's point of view as to the incredulity of the defense, *cf. Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990) ("It was within the parameters of proper argument to point out to the jury that [a witness's] testimony might be incredible."), Chappell has not shown second postconviction counsel acted unreasonably in omitting this claim. Regarding Chappell's claim that the prosecutor improperly referenced the Holocaust,[9] the record reveals an objectively reasonable basis for second postconviction counsel to omit this penalty-phase-counsel claim: penalty phase counsel's omission did not prejudice the defense. In reviewing the death sentence on appeal after the penalty phase retrial, we referenced evidence that Chappell had supported his drug habit for nearly a decade by stealing from the victim and their children; he also beat the victim during this same time frame. After Chappell was mistakenly released from custody, he immediately went to the victim's home, where he stabbed her 13 times. While one or more jurors found 7 of the 13 alleged mitigating circumstances, we observed that the mitigating evidence waned when considered alongside the rebuttal evidence of Chappell's history of blaming others for his problems and behavior. Indeed, Chappell may have acknowledged killing the victim, but he continued to blame her, at least partially, for her own murder. Other evidence at the penalty phase retrial showed that Chappell had an overall indifference to others' well-being and that he had a lengthy criminal history, including crimes of domestic violence. Under these circumstances, Chappell has not proven that second postconviction counsel provided ineffective assistance by omitting this penalty-phase-counsel claim. Accordingly, we conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to object during penalty phase retrial

Chappell claims that penalty phase counsel should have made various objections during the penalty phase retrial. To overcome the procedural bars, he asserts that second postconviction counsel provided ineffective assistance. But his pleadings filed below and his

[9]On appeal, Chappell also alleges that the prosecutor compared the victim's life living with Chappell to Anne Frank's life during the Holocaust. Because Chappell did not cogently raise this specific allegation in district court, we will not consider it for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). Even were we to overlook this pleading defect, Chappell's claim is not clearly borne out by the record, as the prosecutor never mentioned Frank's name or the Holocaust in the challenged quotation.

appellate briefing provide no specifics as to second postconviction counsel's performance in this regard or how it was unreasonable.[10] And the petition indicates that Chappell was re-raising this penalty-phase-counsel claim and raising it for the first time without identifying which parts of the claim were successive and which were new. Our review of the record reveals that Chappell raised some of the allegations in his direct appeal after the penalty phase retrial and this court rejected them. *Chappell III*, 2009 WL 3571279, at *6-7 (rejecting claims that hearsay testimony and old presentence investigation reports were erroneously admitted). Because the decision in *Chappell III* establishes the law of the case as to those issues, *see Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99, second postconviction counsel had an objectively reasonable basis to omit a penalty-phase-counsel claim based on them. Second postconviction counsel raised another allegation in this penalty-phase-counsel claim as an appellate-counsel claim, *see Chappell IV*, 2015 WL 3849122, at *4 (rejecting claim "that appellate counsel was ineffective for failing to argue that the victim-impact evidence was unfairly cumulative"), thus rebutting the claim that second postconviction counsel omitted that allegation. The remaining allegations in this penalty-phase-counsel claim (failure to object to prosecutorial misconduct, jury instructions, prospective jurors who were allegedly biased, and improper impeachment of Fred Dean) are addressed and rejected elsewhere in this opinion in the context of other penalty-phase-counsel claims. For these reasons, we conclude the district could did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to challenge jury instructions

Chappell contends that penalty phase counsel did not object to erroneous jury instructions and that second postconviction counsel provided ineffective assistance by omitting related penalty-phase-counsel claims. Chappell argues that penalty phase counsel should have (1) asked the court to instruct the jury that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances, (2) objected to an instruction that told the jury it had to unanimously find mitigating circumstances, and (3) objected to the instruction that told the jury "[a] verdict may never be influenced by prejudice or public opinion." He again made no specific allegations in the petition or his appellate briefing about second postconviction counsel's performance as to this penalty-phase-counsel claim, focusing instead on the merits of the underlying omitted claims. Beyond those deficiencies in his

[10]In his appellate briefing, Chappell presents no cogent argument related to his allegations about unrecorded bench conferences and gruesome photographs. We therefore do not address them. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

pleadings and appellate arguments, the record reveals an objectively reasonable ground for second postconviction counsel to omit these claims: they lacked merit. The first claim depends on a strained reading of *Hurst v. Florida*, 577 U.S. 92 (2016), that we have repeatedly rejected, *see, e.g.*, *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019), *cert. denied* 140 S. Ct. 2682 (2020); *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018).[11] The second claim lacks merit because the trial court properly instructed the jury that "[a] mitigating circumstance itself need not be agreed to unanimously" but that "[t]he entire jury must agree unanimously . . . as to whether the aggravating circumstances outweigh the mitigating circumstances." And as to the final claim, we have previously approved of the given instruction and have rejected the idea that it undermines the "right to have the jury consider all mitigating evidence" when "the jury was also instructed to consider any mitigating factors." *Byford v. State*, 116 Nev. 215, 233, 994 P.2d 700, 712 (2000). The trial court so instructed the jury in the penalty phase retrial. For these reasons, we conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to challenge the death penalty

Chappell raises numerous challenges to Nevada's death penalty scheme and his death sentence. He asserts that the penalty is applied in an arbitrary and capricious way, clemency is not practically available, and the total time on death row renders the sentence unconstitutional. He also contends that Nevada's system of electing judges renders his convictions and sentence invalid and that his severe mental illness renders him ineligible for execution.[12]

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[11]Chappell asks us to reconsider *Jeremias* and *Castillo* but provides no compelling reason to overrule this precedent. *See Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). And to the extent he relies on *Hurst* as good cause to challenge the constitutionality of Nevada's capital sentencing statutes on the ground that they allow this court to act as a sentencer, his contention lacks merit. Nevada's death-penalty statutes abide by *Hurst*'s holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 577 U.S. at 94; *see Jeremias*, 134 Nev. at 59, 412 P.3d at 54. As we have observed, *Hurst* does not mention appellate reweighing or harmless-error review and the United States Supreme Court has not overruled *Clemons v. Mississippi*, 494 U.S. 738 (1990), which permits both. *Castillo*, 135 Nev. at 131 n.2, 442 P.3d at 561 n.2. And more recently, the Supreme Court has acknowledged that "*Hurst* did not require jury weighing of aggravating and mitigating circumstances." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020).

[12]While Chappell also challenges Nevada's lethal injection protocol, he acknowledges that his claim "falls outside the scope of a post-conviction petition for a writ of habeas corpus," *McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009). To the extent Chappell argues this amounts to an

Chappell could have raised these claims on appeal from the judgment entered after the penalty phase retrial. By not raising them in that proceeding, Chappell waived these claims and must demonstrate good cause and actual prejudice to assert them now. NRS 34.810(1)(b). Although Chappell generically asserted ineffective assistance of second postconviction counsel to overcome that procedural bar, his petition did not include any specific allegations about counsel's performance in this respect. Instead, Chappell focused below and in his appellate briefing on the substance of the procedurally barred claims. Beyond the deficiencies in Chappell's pleadings and appellate arguments, the record reveals that second postconviction counsel did raise some of these challenges to the death sentence. *Chappell IV*, 2015 WL 3849122, at *1 n.1 (rejecting arguments that the death penalty is unconstitutional because state law does not genuinely narrow death eligibility, the death penalty is cruel and unusual, and executive clemency is not available). And second postconviction counsel had an objectively reasonable basis to omit the other, new arguments against the death penalty, given that "[t]his court has repeatedly upheld Nevada's death penalty against similar challenges," *Leonard v. State*, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001) (listing cases); *see Nunnery v. State*, 127 Nev. 749, 782-83, 263 P.3d 235, 257 (2011) (rejecting claims that "Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty, [that] it constitutes cruel and unusual punishment, and [that] executive clemency is unavailable"); *see also McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009) (rejecting claim of bias regarding elected judges who preside over capital proceedings); *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) (rejecting contention that lengthy confinement before imposition of the death penalty amounted to cruel and unusual punishment). Additionally, neither this court nor the United States Supreme Court has suggested that the severely mentally ill are ineligible for the death penalty. We therefore conclude the district court did not err in denying these claims as procedurally barred.

Ineffective assistance of appellate counsel

Chappell claims appellate counsel who represented him in *Chappell III* (the direct appeal from the judgment entered after the penalty phase retrial) should have argued, or did not effectively argue, claims he raised elsewhere in the third petition. The allegations about appellate counsel's performance are vague. And Chappell has not sufficiently asserted that second postconviction

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unconstitutional suspension of the writ of habeas corpus, that argument is raised for the first time on appeal, and we therefore decline to consider it. *See Wade*, 105 Nev. at 209 n.3, 772 P.2d at 1293 n.3.

counsel unreasonably omitted those appellate-counsel claims. We therefore conclude the district court did not err in denying the appellate-counsel claim as procedurally barred without conducting an evidentiary hearing.

Cumulative error as good cause

Chappell argues that the district court should have considered several claims that he raised in his prior appeals and petitions so that it could take into account their cumulative effect alongside the claims presented in the third petition. This argument fails because the claims raised in the prior proceedings were rejected on the merits or as procedurally barred. A petitioner cannot turn to "cumulative error" in an effort to relitigate claims that the court has rejected on the merits or to reach the merits of claims that are procedurally barred. *See Rippo*, 134 Nev. at 436, 423 P.3d at 1107.

Actual innocence

Chappell contends that even if he has not demonstrated cause and prejudice, he can overcome the procedural bars based on actual innocence. To do so, Chappell had to "make[ ] a colorable showing [that] he is actually innocent of the crime or is ineligible for the death penalty." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12.

Chappell claims he is actually innocent of burglary, robbery, and murder. To succeed he had to "show that it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015) (internal quotation marks omitted); *see also House v. Bell*, 547 U.S. 518, 537 (2006) ("[A] gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995))); *Schlup*, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim."). But Chappell does not identify any new evidence; instead, he focuses on perceived inconsistencies or insufficiencies in the evidence presented at trial. And Chappell's argument that he cannot be convicted of an underlying felony and felony murder consistent with the Double Jeopardy Clause does not implicate factual innocence and is inconsistent with our caselaw. *See Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014) (holding that a showing of actual innocence must be "of actual innocence—factual innocence, not legal innocence"); *Talancon v. State*, 102 Nev.

294, 297, 721 P.2d 764, 766 (1986) ("[W]e disagree with [appellant's] contention that double jeopardy prohibits his conviction for both felony-murder and the underlying felony.").

Chappell next claims he is ineligible for the death penalty. Specifically, he argues that scant and conflicting evidence supports the sole aggravating circumstance, there were inconsistencies in the State's case, his counsel was ineffective, the aggravating circumstance also functioned as an uncharged felony for felony murder such that it did not narrow the class of defendants eligible for capital punishment, and the State violated the Confrontation Clause when introducing DNA evidence. Chappell "points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance," and "his arguments [do not] present any issue of first impression as to the legal validity of the aggravating circumstance." *Lisle*, 131 Nev. at 362, 351 P.3d at 730; *see also Chappell III*, 2009 WL 3571279, at *1-2 (rejecting challenges to the sexual assault aggravating circumstance on the grounds that it was not supported by sufficient evidence and was invalid under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004)). Equally unavailing is Chappell's claim that he is ineligible for the death penalty based on his severe mental illness. Although he cites caselaw recognizing that juveniles and intellectually disabled persons are ineligible for the death penalty, *see Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins*, 536 U.S. at 321, he cites no authority holding that the mentally ill are also categorically ineligible for the death penalty. And neither this court nor the United States Supreme Court has recognized such a categorical exemption.[13] Accordingly, Chappell does not demonstrate a fundamental miscarriage of justice would occur if his procedurally barred claims are not considered on the merits. We therefore conclude the district court did not err in denying this claim.

Statutory laches

Chappell's petition was also subject to dismissal under NRS 34.800. NRS 34.800(1) states that a petition may be dismissed if the delay in filing the petition prejudices the State in either responding to the petition or retrying the petitioner. A rebuttable presumption of prejudice arises when the delay is more than five years from a decision on direct appeal. NRS 34.800(2). To overcome the presumption of prejudice to the State in responding to the petition, the petitioner must show that "the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). And to overcome the prejudice to the State in retrying the petitioner, the petitioner must demonstrate

[13]We note there are mechanisms by which a person sentenced to death may challenge the execution of the sentence based on his or her current mental status. *See* NRS 176.425; NRS 176.455.

that "a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b); *see also Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). A petitioner may demonstrate a fundamental miscarriage of justice by presenting new evidence of actual innocence. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (indicating that a fundamental miscarriage of justice to overcome the procedural bars to an untimely or successive petition and to satisfy NRS 34.800(1)(b) can both be satisfied with a showing of actual innocence); *see also Berry*, 131 Nev. at 974, 363 P.3d at 1159 (indicating that if a petitioner could not show a fundamental miscarriage of justice for purposes of an actual-innocence-gateway claim, his or her petition would also be barred by NRS 34.800).

Here, the State pleaded laches under NRS 34.800, and the district court found that Chappell had not rebutted the presumption of prejudice to the State. We agree with the district court's assessment. The overwhelming majority of the claims in the third petition are based on grounds of which Chappell could or did have knowledge long before he filed the third petition. In fact, the district court and this court have considered and rejected the substance of many claims in the petition in prior proceedings. And again, Chappell does not allege new evidence demonstrating his factual innocence. Accordingly, we conclude the district court did not abuse its discretion in applying statutory laches to Chappell's petition.

CONCLUSION

Various mandatory procedural bars foreclosed Chappell's petition, and he did not show good cause and prejudice to overcome those bars. The untimely claims about first postconviction counsel's performance could not constitute good cause, and Chappell does not show good cause and prejudice based on the alleged ineffective assistance of second postconviction counsel, of which most instances were not adequately pleaded below or addressed in the appellate briefs. Finally, Chappell did not demonstrate that the failure to consider his petition would result in a fundamental miscarriage of justice, and we conclude the district court did not abuse its discretion in applying statutory laches. Therefore, we affirm the district court's order dismissing the petition.

Hardesty, C.J., and Parraguirre, Stiglich, and Pickering, JJ., concur.

A CAB, LLC; AND A CAB SERIES, LLC, APPELLANTS, *v.* MICHAEL MURRAY; AND MICHAEL RENO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RESPONDENTS.

No. 77050

December 30, 2021 501 P.3d 961

Appeal from a summary judgment and post-judgment orders in a minimum wage class action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Affirmed in part, reversed in part, and remanded.

Hutchison & Steffen, PLLC, and *Michael K. Wall*, Las Vegas; *Rodriguez Law Offices, P.C.*, and *Esther Rodriguez*, Las Vegas, for Appellants.

Leon Greenberg Professional Corporation and *Leon Greenberg*, Las Vegas, for Respondents.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, STIGLICH, J.:

Under the Minimum Wage Act (MWA) of the Nevada Constitution, employers are required to pay their employees minimum wage and to annually notify employees of the minimum wage rate. Employers are also statutorily required to maintain records of wages and hours worked by employees and to readily provide that information to employees upon request.

Respondents Michael Murray and Michael Reno, the named representatives in this class action, were taxi drivers who brought suit against their former employer, appellants A Cab, LLC, and A Cab Series, LLC (collectively A Cab),[2] and its owner, alleging A Cab failed to pay them minimum wage. The district court severed the claims against A Cab's owner, Creighton Nady, and entered summary judgment for the drivers. A Cab appeals from the summary judgment, challenging certain interlocutory orders as well, and from several post-judgment orders.

[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter.

[2]As discussed in this opinion, the parties strongly disagree as to whether "A Cab, LLC," and "A Cab Series, LLC," are separate entities or one and the same. Given the judgment appealed to this court lists them separately, we do so as well here.

We affirm in part, reverse in part, and remand. We must first consider subject matter jurisdiction, and after doing so, we conclude this matter was properly in front of the district court because plaintiffs in a class action may aggregate damages for jurisdiction. Accordingly, we overrule *Castillo v. United Federal Credit Union*, 134 Nev. 13, 409 P.3d 54 (2018), to the extent that it held to the contrary.

For the reasons discussed in this opinion, we further conclude that (1) the district court erred in tolling the statute of limitations because it incorrectly interpreted the MWA notice requirement, (2) damages were reasonably calculated using approximation evidence, (3) claims against A Cab, LLC's owner were properly severed, (4) the attorney fees award must be reconsidered for reasonableness, (5) the award of costs, including expert witness fees, must be reconsidered under the proper standards, (6) the judgment was properly amended to include the new name of A Cab, LLC, and (7) the district court erroneously denied a motion to quash a writ of execution without conducting an evidentiary hearing.

BACKGROUND

In 2006, Nevada voters amended the state constitution by enacting the MWA. Nev. Const. art. 15, § 16. The MWA requires, in part, that employers pay employees the minimum wage set forth therein, as adjusted yearly. *Id*. at § 16(A). Following publication of the yearly adjustment, employers "shall provide written notification of the rate adjustments to each of [their] employees." *Id*.

Murray[3] and Reno's 2012 district court class action complaint against A Cab and its owner alleged that A Cab failed to pay drivers the minimum wage under the MWA and compensation due to former employees under NRS 608.040.[4] The drivers sought compensatory damages, injunctive and equitable relief, and punitive damages. Although taxicab drivers were exempt from statutory minimum wage protections when the complaint was filed, in 2014, we clarified that taxicab drivers were afforded minimum wage protections under the MWA. *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (2014).

In 2015, A Cab offered to settle with Murray and Reno for $7,500 and $15,000, respectively, but they did not accept the offers. Also

[3]Due to a clerical error, Murray was listed as Michael *Murphy* in the caption of the original complaint, which was corrected in the first amended complaint. Although A Cab alleged below and on appeal that "Michael Murray" and "Michael Murphy" are two different men, we have been provided with no evidence to support that contention, and it appears the correct parties are involved. A district court can correct a misnomer in the caption at any time, "so long as it is not misleading." *Detwiler v. Eighth Judicial Dist. Court*, 137 Nev. 202, 206, 486 P.3d 710, 716 (2021) (internal quotation marks omitted).

[4]In issuing the summary judgment, the district court dismissed the NRS 608.040 claims without prejudice.

in 2015, the drivers amended their complaint to add Creighton Nady (the principal of A Cab) as a defendant. Two new claims were added specifically against Nady: one for civil conspiracy, concert of action, and liability as the alter ego of the corporate defendants; and the other for unjust enrichment. Thereafter, the district court certified the class as "all persons employed by any of the defendants as taxi drivers in the State of Nevada at any[ ]time from July 1, 2007[,] through December 31, 2015." Additionally, the district court equitably tolled the statute of limitations for drivers who were employed by A Cab on the annual minimum wage notification date because it found that A Cab did not provide proper annual notice for the minimum wage rate.

Throughout the litigation, the parties disputed what evidence should be provided to determine damages. In theory, minimum wage damages are simple to calculate: multiply the hours worked in a pay period by the applicable minimum hourly wage to calculate the minimum amount due, then subtract the actual pay received to determine whether a deficiency exists. For the time period between January 1, 2013, and December 31, 2015, that is what occurred. A Cab electronically provided the drivers with all relevant data points, and the damages calculations were easily performed, compiled, and submitted by the drivers to the court as proof of damages. For the period between July 1, 2007, and January 1, 2013, however, A Cab provided the information in a different format. The drivers were given data, in electronic format, for the wages paid and the number of shifts worked. A Cab failed to provide computed hours-worked data, however. Instead, A Cab provided copies of the drivers' handwritten "tripsheets," which reflected the hours actually worked during each shift. Extracting the needed hours-per-shift data from these tripsheets would have required extensive (and expensive) effort.

The district court found that supplying the hours-worked information only in the form of the tripsheets constituted noncompliance with the statutory requirements for employer record-keeping. Consequently, the district court appointed a special master to calculate the hours-per-shift information from the tripsheets and ordered A Cab to pay the special master's fees. A Cab failed to meet deadlines the district court set to pay the special master, however, so the drivers proved damages for the pre-2013 time period another way. The drivers' expert calculated the average hours per shift using the data from the 2013-2015 time period and multiplied that estimated average by both the number of shifts per each pay period and the minimum wage per hour to determine the wages that should have been paid for each pay period. The amount actually paid per period was subtracted to determine the deficiency. For this period, the only *estimated* data point was the hours-per-shift. Against A Cab's objection, the district court accepted the drivers' proof of damages.

The district court then severed the claims against Nady and granted summary judgment against A Cab, determining that the drivers were entitled to damages for A Cab's failure to pay minimum wages. The parties engaged in lengthy post-judgment motion practice. A Cab moved to reconsider and to dismiss for lack of subject matter jurisdiction, arguing that Murray and Reno had failed to demonstrate their claims met the minimum threshold amount for district court jurisdiction under this court's decision in *Castillo v. United Federal Credit Union*, 134 Nev. 13, 16, 409 P.3d 54, 57 (2018), and that there was no longer a claim for injunctive relief. The court denied the motions to dismiss and for reconsideration, concluding it did not believe it was devoid of jurisdiction in the matter. The drivers moved to amend the judgment to include "A Cab Series, LLC," as a defendant and for costs and attorney fees. The court granted these motions. A Cab appeals the summary judgment and the post-judgment orders.

DISCUSSION

District courts have original jurisdiction over class actions when the aggregate amount in controversy exceeds the statutory threshold

A Cab argues that the district court lacked subject matter jurisdiction because no individual class member sought damages in an amount that met the statutory threshold. It argues that, per this court's decision in *Castillo*, individual class members' claims may not be aggregated to establish district court jurisdiction. *See Castillo v. United Fed. Credit Union*, 134 Nev. 13, 16, 409 P.3d 54, 57 (2018). A Cab further contends that the district court did not have jurisdiction based on the drivers' request for injunctive relief.[5]

In Nevada, justice courts have original jurisdiction over most actions seeking to recover less than a statutory amount-in-controversy threshold, which, when this action was filed in 2012, was $10,000.[6] *See* 2011 Nev. Stat., ch. 253, § 54, at 1136 (amending NRS 4.370(1) and taking effect July 1, 2011); *Castillo*, 134 Nev. at 16, 409 P.3d at 57. District courts have original jurisdiction over matters in which the amount in controversy is greater than this statutory threshold. *See* Nev. Const. art. 6, § 6(1).

Historically, whether aggregation of class claims to meet the statutory threshold to establish district court jurisdiction was permitted under the Nevada Constitution had never been meaningfully challenged. And NRCP 23—setting out the rules for class actions—was silent on the issue prior to its amendment in 2019. In 2018, however, the ability to aggregate class claims to establish jurisdiction was directly challenged and heard by this court in *Castillo*.

[5]In light of this disposition, we need not reach the issue of whether subject matter jurisdiction was proper as a result of the request for injunctive relief.

[6]The statutory amount has since been raised to $15,000. 2015 Nev. Stat., ch. 200, § 2.2, at 945.

In *Castillo*, plaintiffs in a consumer protection case sought to aggregate their claims to meet the statutory threshold amount to establish jurisdiction in the district court. 134 Nev. at 14, 409 P.3d at 56. The defendant filed a motion to dismiss, arguing the district court did not have jurisdiction because each plaintiff failed to prove that they were individually entitled to damages in excess of the statutory threshold. *Id.* at 15, 409 P.3d at 56. The district court determined the plaintiffs could not aggregate their claims and dismissed the case. *Id.* The plaintiffs then appealed to this court. *Id.* Ultimately, a panel of this court reversed the district court's decision and remanded the case, but did so on the basis that the district court had jurisdiction through the plaintiffs' request for injunctive relief. *Id.* at 19, 409 P.3d at 59.

However, in *Castillo*, the court also considered the aggregation issue and concluded that class claims could not be aggregated to establish district court jurisdiction. *Id.* at 14, 409 P.3d at 56. In deciding that aggregation of class claims was not permissible, the *Castillo* court looked to other jurisdictions and distinguished Nevada. *See id.* at 16-17, 409 P.3d at 57-58. *Castillo* noted that "[o]ther jurisdictions have allowed for aggregation" in meeting their district court equivalents' jurisdictional threshold because those states' courts of limited jurisdiction are not "equipped to adjudicate class actions." *Id.* (quoting *Dix v. Am. Bankers Life Assurance Co. of Fla.*, 415 N.W.2d 206, 210-11 (Mich. 1987), and citing *Thomas v. Liberty Nat'l Life Ins. Co.*, 368 So. 2d 254, 257 (Ala. 1979); *Judson Sch. v. Wick*, 494 P.2d 698, 699 (Ariz. 1972); and *Galen of Fla., Inc. v. Arscott*, 629 So. 2d 856, 857 (Fla. Dist. Ct. App. 1993)). *Castillo* distinguished Nevada because, under JCRCP 23, "justice courts have the ability to hear class actions." *Id.* at 17, 409 P.3d at 58.

Thereafter, disagreeing with the court's conclusion regarding aggregation of claims, multiple parties moved to proceed as amicus curiae and requested this court depublish *Castillo*. *See generally* Amicus Curiae Progressive Leadership Alliance of Nev.'s Motion to De-Publish Opinion and to Stay Issuance of Remittitur, and for Possible Alternative Relief and Motion to Exceed Page Limitation, *Castillo v. United Fed. Credit Union*, Docket No. 70151 (Apr. 27, 2018). This court denied the motion to depublish and stated that, "[b]ecause the aggregation discussion is not necessary to the disposition, it arguably constitutes dictum, not mandatory precedent." *Castillo*, Docket No. 70151, at *2 (Order Denying Motion to Depublish, June 12, 2018).

Then, in 2019, NRCP 23 was amended to expressly allow for the aggregation of class claims to establish district court jurisdiction. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). Under the

current rule, "[t]he representative parties may aggregate the value of the individual claims of all potential class members to establish district court jurisdiction over a class action." NRCP 23(b).

Recognizing this complicated and conflicting history, we take this opportunity to review our decision in *Castillo* and to clarify the rule regarding aggregation of class claims to establish district court jurisdiction. Applying this court's precedent, we are not persuaded the aggregation holding in *Castillo* is nonbinding dicta. In *St. James Village, Inc. v. Cunningham*, we indicated, "[a] statement in a case is dictum when it is unnecessary to a determination of the questions involved." 125 Nev. 211, 216, 210 P.3d 190, 193 (2009) (internal quotation marks omitted). Despite the panel's subsequent equivocation in its Order Denying Motion to Depublish, the *Castillo* court expressly chose to consider the aggregation issue prior to resolving the injunctive-relief issue, and therefore, we disagree that the aggregation discussion was mere dicta. *See* 134 Nev. at 16-17, 409 P.3d at 57-58.

"[U]nder the doctrine of *stare decisis*," this court will not overturn its prior decisions absent compelling reasons to do so. *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (alteration in original) (quoting *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008)). Compelling reasons include "badly reasoned" or "unworkable" decisions. *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (internal quotation marks omitted). We are persuaded that there are compelling reasons for overturning *Castillo*, to the extent that it holds that individual class members' claims cannot be aggregated to determine jurisdiction.[7]

First, *Castillo* suggests that justice courts' ability to hear class actions under JCRCP 23 somehow counsels against aggregation, but nothing in JCRCP 23 speaks to aggregation and the two concepts are not mutually exclusive.[8]

Second, the *Castillo* aggregation holding is in conflict with the newly amended NRCP 23(b),[9] which expressly allows for aggregation of claims to establish district court jurisdiction.

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[7]This opinion does not alter the approach to aggregation of claims in non-class actions. In non-class actions with multiple plaintiffs, each plaintiff must meet the statutory and constitutional requirements for the court to have subject matter jurisdiction over its claim. *See* NRS 4.370(1); Nev. Const. art. 6, § 6(1).

[8]Nothing in this opinion prevents justice courts from hearing *small* class actions in which the *total* amount claimed does not exceed the jurisdictional threshold.

[9]While the recently amended NRCP 23(b) expressly permits aggregation of class members' alleged damages for jurisdictional purposes, amendments to court rules do not apply retroactively, so NRCP 23(b) does not apply in this case. *See Nev. Pay TV v. Eighth Judicial Dist. Court*, 102 Nev. 203, 205 n.2, 719 P.2d 797, 798 n.2 (1986) (citing NRS 2.120), *superseded by rule on other grounds as stated in State, Dep't of Motor Vehicles & Pub. Safety v. Eighth Judicial Dist. Court*, 113 Nev. 1338, 948 P.2d 261 (1997).

Finally, we believe the opinion did not account for the purposes behind the jurisdictional threshold and failed to fully consider the impact of its decision on justice courts, which, as this case illustrates, could be significant. *Castillo* correctly observed that Nevada justice courts have the authority under JCRCP 23 to hear class actions, but it did not consider whether a justice court is—as a practical matter—"equipped to adjudicate" a *large* class action, with hundreds of plaintiffs and millions of dollars at stake. The foreign cases the court cited, soundly, were not concerned so much with the legal authority of local courts of limited jurisdiction to adjudicate such a case as with those courts' ability to provide "*effective* relief." *Wick*, 494 P.2d at 699 (emphasis added). Justice courts are designed to handle relatively small cases efficiently and quickly; that is precisely why the Legislature has imposed a maximum amount in controversy on the jurisdiction of justice courts. In our view, the monetary threshold of NRS 4.370 was designed to limit justice courts' civil docket to relatively small and simple cases—not to blindly impose a rule that would result in a justice court hearing a massive and complex case like the one before us today.

We find these practical concerns to be serious and not fully ameliorated by the existence of a procedural rule—JCRCP 23—allowing justice courts to preside over class actions. We are unaware of even a single large class action that has ever been tried in a Nevada justice court pursuant to JCRCP 23. We have the utmost respect for the competence and professionalism of Nevada's justices of the peace, but we think the best way to show that respect is by declining to saddle them with massive class actions for which they are wholly unprepared.

Accordingly, as it appears that no "legitimate reliance interest[ ]" will be affected by our decision today, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (internal quotation marks omitted) ("Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent."), we hold that the jurisdictional interpretation set forth in *Castillo* regarding aggregation was incorrect and that total damages sought by the class, rather than those sought by any individual class member, must be considered in determining whether the justice court has jurisdiction under NRS 4.370.[10] Because the class here sought more than $10,000, jurisdiction was proper in district court. *Castillo* is overruled to the extent it is inconsistent with this opinion.

[10]At oral argument before this court, counsel for A Cab expressed concern that, should we overrule *Castillo*, plaintiffs would have the option of aggregating their damages or not as they saw fit and could therefore choose whether to file in district court or justice court. We can identify no legal basis for that concern, but to remove any doubt, we clarify that the total damages sought by the class *must*—not may—be considered.

The district court improperly interpreted the MWA notice requirements and so improperly tolled the statute of limitations

A Cab contends that the district court's equitable tolling of the MWA's two-year statute of limitations was based on an improper interpretation of the MWA's notice requirement in the Nevada Constitution. *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 768, 383 P.3d 257, 258 (2016) (concluding that applying the two-year statute of limitations in NRS 608.260 is proper for MWA claims). "We review questions of constitutional interpretation de novo." *W. Cab Co. v. Eighth Judicial Dist. Court*, 133 Nev. 65, 73, 390 P.3d 662, 670 (2017).

Under the MWA, the Labor Commissioner is required each spring to publish a bulletin announcing the adjusted minimum wage rates. The MWA provides that "[a]n employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin." Nev. Const. art. 15, § 16(A). Here, the district court concluded that "[a] plain reading of the MWA can only result in an obligation on the employer to 'provide' to 'each' of its employees 'written notification' of the rate adjustments to the minimum wage." Upon determining that the drivers had not been properly informed of yearly minimum wage increases, the district court remedied the situation by tolling the statute of limitations, such that drivers whose claims arose prior to October 2010 and who were employed by A Cab on the annual notification date—July 1—of 2007, 2008, 2009, and/or 2010 were included in the class.

The purpose of the MWA annual notification requirement is to inform employees of the current minimum wage. There is no express requirement that each employee be individually provided with written notice; notice posted in a common work area is a form of written notification that is available to each employee. The drivers here obtained this notification, in writing, through the notices posted by A Cab in employee common areas along with other required employment information. We therefore conclude that, by posting the written notices in a common, conspicuous area to which each driver had access, A Cab fulfilled the MWA's requirements to provide written notice to each employee.[11] *See, e.g.*, NRS 608.013 (requiring employers to "conspicuously post and keep so posted on the premises where any person is employed a printed abstract of

[11]While we do not defer to an agency's interpretation of the state constitution, we find it persuasive that, for over a decade, the Office of the Nevada Labor Commissioner has required only posted notice. The Office of the Labor Commissioner website instructs employers to post the annual minimum wage bulletin in each place of business where employees work and does not mention sending additional notices. State of Nev. Dep't of Bus. & Indus., Office of the Labor Comm'r: Required Emp'r Postings (Dec. 3, 2021) (https://labor.nv.gov/Employer/Employer_Posters/).

this chapter [on Compensation, Wages and Hours] to be furnished by the Labor Commissioner" to inform employees of their rights).

Given that the district court's incorrect reading of the MWA was its only justification for tolling the statute of limitations, we reverse the tolling decision and conclude that the drivers' claims extend backwards only two years before their suit was filed. We remand to the district court to recalculate damages for this shorter time period.

The district court properly granted summary judgment for the drivers

A Cab contends that the district court erred by entering summary judgment in favor of the drivers, arguing that there were outstanding issues of material fact regarding claims for wages for both the 2013-2015 period and prior to 2013. A Cab argues that, as for the pre-2013 period, detailed analysis of the tripsheets it provided is the only accurate way to calculate any damages, although the district court found that A Cab did not present any evidence of inaccuracy in the final calculations.

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists "and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id*. To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings but must instead present "specific facts demonstrating the existence of a genuine factual issue" supporting the party's claims. *Id.* at 731, 121 P.3d at 1030-31 (internal quotation marks omitted).

Period between 2013 and 2015

Reviewing A Cab's claim that the district court erred in ordering summary judgment, this later time period, 2013-2015, presents a simple question for our review. A Cab provided the drivers with its own computerized pay and hour records, and the drivers' expert simply entered that data into a spreadsheet to calculate each driver's hours, pay, and minimum wage deficiencies. The calculations showed a disparity between the amounts owed as minimum wage and the actual pay, entitling the drivers to recovery. The district court concluded that these spreadsheets were mathematically accurate and entered summary judgment for the damage amounts calculated in those spreadsheets.

A Cab argues that we should reverse the summary judgment as to this period, yet it has not demonstrated existing issues of material fact on the underlying data points (data points *it* provided to

the drivers), the calculations performed by the drivers' experts, or the minimum wage deficiencies revealed by those calculations. As a result, we have been provided with no justification to reverse the district court's order granting summary judgment for this period.

Period before 2013

A Cab contends the district court incorrectly granted summary judgment for the pre-2013 time period, arguing the records it provided to the drivers were sufficient and that the district court improperly shifted the burden to A Cab by requiring it to pay for a special master. Because A Cab believes it provided all statutorily required information, A Cab further asserts that the district court allowing reasonable approximation damages was not appropriate. We review this issue de novo and conclude the district court properly granted summary judgment for this period.

Pursuant to NRS 608.115(1), every employer is required to "establish and maintain records of wages" for each pay period for its employees. In pertinent part, these wage records must "show[ ] for each pay period," among other things, the "[g]ross wage," "[n]et cash wage," and "total hours employed in the pay period by noting the number of hours per day." NRS 608.115(1)(a), (c) & (d). Additionally, employers are required to maintain these records for two years, and the employer is required to provide this information "to each employee within 10 days after the employee submits a request." NRS 608.115(2)-(3).

During the discovery process, A Cab provided the drivers with two forms of pay information for the period before 2013: data from its computerized pay records and handwritten tripsheets. There is no dispute that the computerized data for this period did not contain information regarding the total hours worked per shift. However, the tripsheets accounted for all hours worked by the drivers, including the start and end times and handwritten notes from the drivers about breaks during the shift. So, the wage and shift information was in the computerized form, and the hours worked information was in the handwritten tripsheets. Therefore, to determine hours worked per shift and pay period for each of the drivers in the class based on the tripsheets, it would have been necessary to perform extensive calculations from the tripsheets, and then to harmonize those with the shift and wages per pay period information to establish any deficiencies.

The district court held that the information A Cab provided to the drivers did not conform to the requirements of what records employers must keep and provide under NRS 608.115. We agree. The plain meaning of the statute requires employers to keep records showing an employee's wage and the number of hours worked per day

and to provide this information to employees on request. *See* NRS 608.115(1), (2); *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (providing this court interprets clear and unambiguous language by its plain meaning). Although the drivers could have ultimately determined hours worked from what was provided, A Cab did not fulfill its burden to provide this statutorily required information to the drivers.[12]

As a result, we conclude that the district court properly required A Cab to pay for a special master to analyze the information. Under NRCP 53, a court may appoint a master to assess and determine factual issues, and the court is required to consider fairness when imposing the expenses of the master on the parties. We agree with the district court that "it would not have been equitable nor justified to require Plaintiffs to pay for work performed by the Special Master when it was Defendant A Cab's failure to comply with NRS 608.115" that led to the need to hire a special master in the first place.

After A Cab did not pay the special master fees, the district court appropriately permitted the drivers to approximate the damages for this time period. In doing so, the district court relied on *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), *superseded by statute on other grounds as stated in Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014), which this court relied upon in *Bombardier Transportation (Holdings) USA, Inc. v. Nevada Labor Commissioner*, 135 Nev. 15, 28, 433 P.3d 248, 259 (2019). In *Mount Clemens*, the United States Supreme Court permitted plaintiffs to use approximate calculations of damages in a Fair Labor Standards Act action when the defendant employer failed to keep proper and accurate records and also failed to produce evidence to negate the approximation evidence. 328 U.S. at 687-88. In *Bombardier*, this court agreed with that analysis on the grounds that employees "should not be penalized for the employer's failure to keep accurate records as required by law." 135 Nev. at 28, 433 P.3d at 259 (internal quotation marks omitted).

Although here, A Cab had the information required and requested, it was in a form different and more complicated than that required by statute, and we conclude this difference is immaterial for the purposes of a *Mount Clemens* analysis. We conclude that the district court's decision to permit the drivers to approximate damages was proper, given A Cab's insufficient information and refusal to pay the special master.

[12]We recognize that this information provided by A Cab may be sufficient in other civil actions. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787 (2017) (recognizing that a party requesting damages has a duty to provide a computation of damages based upon information available to it). However, in this matter, the employer has the burden to maintain and produce the records in the manner provided by the statute. *See* NRS 608.115.

We must next consider whether the spreadsheets for this period were reasonable approximations of the records that the district court found defendants should have produced. In *Mount Clemens*, the approximation evidence presented was employee testimony regarding time spent walking to worksites and engaging in extensive work-related preparation before the shift period began, which the employees would not be able to prove with a high degree of reliability or accuracy. 328 U.S. at 692-93. In *Bombardier*, the evidence was in the form of the plaintiffs' reasonable estimates of what proportion of hours worked and tasks completed "constituted repair work." 135 Nev. at 28, 433 P.3d at 259. Here, as described above, the drivers made calculations from the actual pay given to the drivers, the actual number of shifts worked by the drivers per pay period, and an approximation of the hours worked per shift (using the hours-per-shift in the 2013-2015 data to estimate the average shift length in the earlier time period). We agree this was an appropriate method to approximate damages. *See Mount Clemens*, 328 U.S. at 693 ("Unless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence . . . .").

A Cab points out that the district court initially declined to enter summary judgment on the calculations based on the estimations, which is true. However, the district court had merely said that, while its *preference* would have been for the special master to make calculations based on the tripsheets, A Cab did not enable that to happen, and consequently, the district court was permitted to use less specific data to calculate damages. *See id.* at 687-88 (stating that when an employer does not keep accurate records, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate"); *see also Bombardier*, 135 Nev. at 28, 433 P.3d at 259. The spreadsheets provided reasonable approximations of the records that defendants should have produced and provided appropriate calculations of damages. The only approximation evidence was the 9.21 hours-per-shift average estimate, which had ample support, including one of A Cab's own experts' testimony acknowledging that his average sampling would have allowed for 9.7 hours-per-shift. Therefore, with damages calculated based on these reasonable estimates, the district court properly granted summary judgment. We affirm the district court's summary judgment; however, as stated above, we remand to the district court to recalculate damages based on the two-year statute of limitations.

The district court did not abuse its discretion in severing the claims against Nady

A Cab argues that the district court erred in severing the claims against Nady, contending that the district court severed the claims only "to artificially create finality" to beat a similar, concurrently litigated class action to judgment. We have not previously stated the standard of review for a severance under NRCP 21. We note that "NRCP 21 parallels FRCP 21," *Valdez v. Cox Commc'ns Las Vegas, Inc.*, 130 Nev. 905, 908, 336 P.3d 969, 971 (2014), and under the federal rule, "[t]he trial court has broad discretion to sever issues to be tried before it," *Brunet v. United Gas Pipeline Co.*, 15 F.3d 500, 505 (5th Cir. 1994). We today clarify that we review a district court's severance of claims for an abuse of discretion.

Under NRCP 21, the court may drop or add a party through a motion of any party or on its own, and the court may sever claims. We have said that "when a judgment has been entered resolving claims properly severed, it is final and appealable, despite the existence of other pending, unsevered claims." *Valdez*, 130 Nev. at 907, 336 P.3d at 971. However, we have not provided guidance on when severance is proper.

Federal courts consider several factors in deciding whether severance is proper under FRCP 21, including

> (1) whether the claims arise out of the same transaction or occurrence;
>
> (2) whether the claims present some common questions of law or fact;
>
> (3) whether settlement of the claims or judicial economy would be facilitated;
>
> (4) whether prejudice would be avoided if severance were granted; and
>
> (5) whether different witnesses and documentary proof are required for separate claims.

Parchman v. SLM Corp., 896 F.3d 728, 733 (6th Cir. 2018).

The trials of A Cab and Nady had already been bifurcated for purposes of judicial economy under NRCP 42(b). During the summary judgment hearing, the drivers stressed the importance of finality as to the corporate defendants and asked the court to sever the remaining claims against Nady. The district court severed all claims against Nady pursuant to NRCP 21 and stayed them for 60 days in its order.[13]

[13]In 2019, we dismissed Nady's appeal in this matter on the jurisdictional ground that no final judgment had been entered against Nady since the claims against him had been severed. *Nady v. Murray*, No. 77050, 2019 WL 3072593 (Nev. July 12, 2019) (Order Dismissing Appeal).

A Cab's only cogent argument against the severance is based on one case, where the United States Court of Appeals for the Second Circuit found an abuse of discretion because "the severance was so transparently a confusion of" bifurcation and severance "or an attempt to separate an essentially unitary problem" for the purposes of creating finality. *Spencer, White & Prentis Inc. of Conn. v. Pfizer Inc.*, 498 F.2d 358, 362 (2d Cir. 1974) (internal quotation marks omitted). A Cab argues this matter is comparable to *Spencer* and that the district court severed the claims against Nady to win the race between the two similar class actions, to get to a final judgment to vindicate the MWA, and to defeat Nady's right to a timely trial.

We find no merit in A Cab's arguments that the district court abused its discretion and no support for its bald claims regarding the district court's supposed ulterior motives for severing the case. A Cab speculates on the judge's actual reasons for granting finality while ignoring the judge's legitimate, stated reasons. In considering the *Parchman* factors, we see several reasonable justifications for the district court's severance. Most prominently, the district court sought to facilitate settlement and judicial economy by severing the alter ego claims—particularly because, if the drivers collected the full amount of their judgment against the corporate defendants, there would be no need to proceed with the claims against Nady. The claims against Nady (as an alter ego of A Cab and under an unjust enrichment theory) were severable under the *Parchman* factors because those claims involved different forms of evidence and might be rendered unnecessary. Therefore, we conclude that A Cab has not shown that the district court abused its discretion in severing these claims.

The award of attorney fees must be reconsidered, in light of this disposition, and the district court abused its discretion in awarding costs

A Cab argues that the district court disregarded procedural rules and awarded excessive fees and costs, even though the eventual recovery by the class representative plaintiffs was less than the amounts A Cab had offered in settlement.[14]

Under the MWA, "[a]n employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs." Nev. Const. art. 15, § 16(B). "A district court's decision regarding an award of costs will not be overturned absent a finding that the district court abused its discretion." *Village Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d

[14]A Cab argues the drivers did not best the settlement offer under NRCP 68 and therefore may not recover any attorney fees or costs. However, we need not consider this argument because the drivers were entitled to reasonable attorney fees and costs under the MWA. *See* Nev. Const. art. 15, § 16(B).

1082, 1092 (2005). The district court in this matter awarded the drivers $568,071 in attorney fees and $46,528 in costs, including $29,022 in expert fees. For the reasons outlined below, we reverse the award of attorney fees and costs, and remand to the district court for further proceedings consistent with this opinion.

Attorney fees

With respect to attorney fees, district courts have discretion regarding which method is used to determine the fees but must consider the four factors outlined in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969). These factors include the attorney's "professional qualities, the nature of the litigation, the work performed, and the result. In this manner, whichever method the court ultimately uses, the result will prove reasonable as long as the court provides sufficient reasoning and findings in support of its ultimate determination." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).

A Cab argues the attorney fees award was excessive and that the drivers did not provide proper documentation for the district court to calculate the amount awarded. The drivers supported their request for attorney fees with a declaration by counsel that detailed the experience of the advocates, the difficulty of the work, and the time devoted to the work through a review of "contemporaneous time records" (which were not attached). A Cab argues this did not meet NRCP 54(d)(2)(B)'s requirement at the time that a request for fees must, among other things, "state the amount sought or provide a fair estimate of it; and be supported by counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable, [as well as] documentation concerning the amount of fees claimed." NRCP 54(d)(2)(B) (2009). The district court awarded attorney fees in the amount of $568,071. It supported that award by going through three possible formulations to calculate hours and fees and through a consideration of the four *Brunzell* factors. We conclude that the declaration of counsel constituted the "documentation" required under NRCP 54(d)(2)(B), and A Cab has not shown that the attorney fees award was unsupported or excessive beyond asserting that the drivers did not provide the appropriate documentation. However, in light of this disposition and the district court's improper tolling of the statute of limitations, the amount of the attorney fees must be reconsidered for reasonableness, and we therefore reverse and remand the award of attorney fees.

Costs

With respect to costs, trial courts are urged to exercise restraint and strictly construe statutes permitting recovery of costs. *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993),

superseded by statute on other grounds as stated in In re DISH Network Derivative Litig., 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093 n.6 (2017). "To support an award of costs, justifying documentation must be provided to the district court to demonstrate how such [claimed costs] were necessary to and incurred in the present action." *In re DISH*, 133 Nev. at 452, 401 P.3d at 1093 (alteration in original) (internal quotation marks omitted).

The drivers supported their request for nonexpert costs with a declaration by counsel that included a table noting litigation expenses extracted from a review of office records. However, this documentation was insufficient because the drivers did not provide justification for why each cost was necessary or proof that each cost was incurred in the present action. *See id.*; *see also Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015) ("'[J]ustifying documentation' must mean something more than a memorandum of costs."); *Village Builders 96, L.P. v. U.S. Labs, Inc.*, 121 Nev. 261, 276-78, 112 P.3d 1082, 1092-93 (2005) (explaining that providing justification for each copy made or call placed is necessary in order for the district court to properly assess whether the cost was actually incurred and reasonable); *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998) (concluding the district court abused its discretion in awarding costs where parties did not provide itemization or justification of certain costs incurred). Accordingly, the district court abused its discretion in awarding the drivers their nonexpert-related costs, and we remand for further proceedings.

A Cab additionally argues that the district court erred in its award of expert witness fees because the amount exceeded the statutory cap and the case did not go to trial. NRS 18.005(5) caps expert witness fees at $1,500 per expert, for not more than five experts. Any award beyond that cap requires careful evaluation by the district court, in which the court must consider several factors, including "the importance of the expert's testimony to the party's case," the extent of the expert's work, and "whether the expert had to conduct independent investigations or testing." *Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Ct. App. 2015).

We conclude that the district court did not adequately support its award of expert witness fees in excess of NRS 18.005(5)'s limitation, in light of *Frazier*'s instructions for how that analysis should be conducted. The district court referenced the dispute regarding who bore the burden of providing and analyzing wage-and-hour information, saying "defendants might have a colorable argument against the [drivers'] expert costs had the [s]pecial [m]aster completed his work regarding the trip sheets. . . . [The drivers'] experts were necessary and their expenses were reasonable given the extent of the work performed in calculating the damages based

upon the computer data information which was provided by A Cab." However, this weighs against awarding excess expert witness fees. The drivers did not hire an expert to do the work the special master would have done; their expert performed only the wage-and-hour calculations that would have been required even if A Cab had provided sufficient information for both time periods. Given that the district court did not provide a reasonable justification for such excess expert fees, we also reverse and remand this portion of the costs award for further consideration by the district court in light of *Frazier*.

The district court did not err in amending the judgment, but it should have held an evidentiary hearing on the motion to quash collection of the judgment amount

The day after summary judgment was entered, the district court granted a motion to amend the judgment to include "A Cab Series LLC" (one of the named appellants here). This order allowed the judgment to be amended "to indicate it is against 'A Cab Series LLC' as the current name of the originally summoned defendant and judgment debtor 'A Cab LLC.'" A Cab contends that "A Cab, LLC," and "A Cab Series, LLC," are different entities and the district court's order "add[ed] a party after final judgment." The drivers insist that "A Cab Series, LLC," is simply the new name of the defendant they originally sued.

A Cab urges us to review this order as an impermissible addition of a third party as a judgment debtor. For the purposes of framing this question, we use the language of amending the judgment, as per the district court's order. NRCP 59(e) permits motions to alter or amend a judgment. Orders deciding an NRCP 59(e) motion are not independently appealable but are reviewed for an abuse of discretion when included with a proper appeal. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

In 2005, Nevada amended NRS 86.296 to allow for the creation of "Series LLCs," a relatively new form of corporate entity that exists only in certain states. 2005 Nev. Stat., ch. 459, § 27, at 2193-94. Within a Series LLC structure, an "LLC may establish and contain within itself separate series or cells. . . . Each such separate Protected Series is treated as an enterprise separate from each other and from the Series LLC itself." Alberto R. Gonzales & J. Leigh Griffith, *Challenges of Multi-State Series and Framework for Judicial Analysis*, 42 J. Corp. L. 653, 655 (2017). If certain conditions are met, then "[t]he debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series are enforceable against the assets of that series only, and not against the assets of the company generally or any other series." NRS 86.296(3). In Nevada, a Series LLC is created by first

allowing for the creation of one or more cell series in the articles of organization or operating agreement of an LLC. NRS 86.296(2). Second, in order to trigger the liability shield protections of the created cell series, a cell series must have separate records from the LLC as a whole and from any other cell series, and the articles of organization or operating agreement must provide that debts, liabilities, and expenses are only enforceable against that individual cell series. NRS 86.296(3).

Although we have not previously had occasion to interpret the statutory scheme, the plain text of the statute governs a few important considerations for this case. First, the one-or-more cell series within the Series LLC is created by the LLC's operating agreement or articles of organization—not by a filing with the Nevada Secretary of State. NRS 86.296(2). Second, NRS 86.296(2) provides a list of optional, but not mandatory, attributes for a Series LLC. Third, the liability shield protections require the triggers discussed above, which are shown in the operating agreement or articles of organization and through the practice of separate and distinct record-keeping and accounting. NRS 86.296(3).

In 2012, A Cab, LLC, amended its articles of organization and filed them with the Secretary of State. The attached articles listed the name of the company as "A Cab, LLC," and stated in one article—

> This is a Series Limited Liability Company that may establish designated series of members, managers, company interests having separate rights, powers or duties with respect to specified property or obligations of the Company or profits and losses associated with specified property or obligations, and, to the extent provided in the Operating Agreement of the Company, any such series may have a separate business purpose or investment objective and/or limitation on liabilities of such series in accordance with the provisions of Section 86.161[(1)](e) of the Nevada Revised Statutes.

According to A Cab, after the Series LLC was formed, at least five separate cell series entities were created: "A Cab Series, LLC, Maintenance Company; [A] Cab Series, LLC, Administration Company; A Cab Series, LLC, Taxi Leasing Company; A Cab Series, LLC, Employee Leasing Company[;] A Cab Series, LLC, Medallion Company; and others." In 2016, the Nevada Taxicab Authority authorized "Admiral Taxicab Service, LLC d b a A Cab, LLC," to operate 115 taxicab medallions. In 2017, A Cab, LLC, again filed with the Secretary of State an amendment to the articles of organization, with the statement, "The name is now A Cab, Series L.L.C."

Following the district court's summary judgment in August 2018, the drivers moved to amend the judgment to include "A CAB SERIES LLC," and then served a writ of garnishment (execution) on Wells Fargo Bank for any accounts or monies "owned by judgment debtors A Cab LLC or A Cab Taxi Service LLC."[15] The defendants moved to quash that writ of execution on the grounds that funds were taken from "separate independent entities which although related to A Cab LLC are not subject to execution," i.e., various series companies created under the umbrella of A Cab Series, LLC, and that the court had not yet granted the drivers' motion to amend the judgment. The district court then granted the drivers' motion to amend the judgment to include "A Cab Series, LLC," and denied the defendants' motion to quash the writ of execution.

On appeal, A Cab argues again that the district court should not have allowed a new, third party (A Cab Series, LLC) to be added to the judgment and should not have allowed garnishment from accounts belonging to separate series entities such as "A Cab Series, LLC, Maintenance Company." A Cab argues that the requirements of NRS 86.296 have been met, and as a result, separate, shielded series entities exist. The drivers respond that no third party was added because "A Cab Series, LLC," is one and the same as "A Cab, LLC," given the name change in 2017. Further, the drivers contend that collection from the individual series entity accounts is appropriate because no cell series entities with the NRS 86.296(3) liability shield exist. Even if cell series entities *did* exist, the drivers insist the cell entities' alleged injury should not be part of this appeal since neither of the appellants may assert the rights of third parties.

The record convinces us that the drivers are correct that the original defendant "A Cab, LLC," no longer exists except under the changed name of "A Cab Series, LLC," and the district court properly allowed the judgment to be amended to reflect that change. In 2012, A Cab, LLC, became a Series LLC, and, in 2017, it changed its name to reflect that shift. A Cab's arguments that there are two separate entities is belied by the record, the 2017 name change document, and even the way the names were used interchangeably to refer to the parties within the dispute below and on appeal. As a result, we conclude that the district court did not abuse its discretion in amending the judgment to include "A Cab Series, LLC."[16]

We next must consider whether the district court nevertheless erred in permitting collection from the Wells Fargo accounts without conducting an evidentiary hearing on whether the requirements

[15]A Cab Taxi Service LLC was named as a party to the case from the beginning but was not served and did not appear, and it does not appear to exist.

[16]For clarity, the district court should have *substituted* "A Cab, LLC," with "A Cab Series, LLC," to reflect the fact that there was only ever one such entity.

of NRS 86.296 had been met and the separate series liability shield had been created. Series entities under the umbrella of a Series LLC either exist or not based on their compliance with NRS 86.296. In a hearing on the motion to amend the judgment, the district court said, "I don't think this is the time to take evidence, frankly," and such evidence was never taken. We acknowledge that the district court's concerns about standing were valid. The district court was understandably unsure of what corporate entities were even *represented* during the hearings discussing the motions to quash the writ of execution and to amend the judgment.

But the district court did err in denying the motion to quash without conducting an evidentiary hearing. The district court acknowledged that while the issues could potentially "be cured by a belated appearance by the alleged series LLCs (if they are, in fact, properly constituted and exist), the interests of justice, and the need to promote judicial efficiency," led the court to make its decision without such appearances. The only way to assess the existence of the individual series entities for the purpose of judgment collection is through examining the operating agreements, and A Cab did not have the opportunity to use those agreements to present the district court with an argument for the series' existence. A Cab (and the series entities, if they actually exist and join the action) is entitled to an opportunity to present such evidence and argue its motion to quash. Accordingly, we reverse on this point and remand to the district court in order to reconsider the motion to quash the writ of execution.

CONCLUSION

This complex litigation ultimately hinged on two questions: (1) were the drivers underpaid? and (2) if yes, by how much? As a preliminary matter, we necessarily conclude the district court had jurisdiction over this class action because the drivers could aggregate their claims to meet the statutory threshold. Accordingly, we overrule *Castillo* to the extent that it conflicts with this opinion.

We conclude the district court erred by tolling the statute of limitations far beyond two years based on an erroneous interpretation of the MWA's notice requirements. We affirm the district court decision to grant summary judgment for the drivers using reasonable approximation evidence when A Cab failed to disclose the drivers' hours worked as required by statute. And we conclude the claims against Nady were properly severed. However, we conclude the district court must reconsider the award of attorney fees, in light of this disposition. Furthermore, the district court erred in its award of costs because its order did not adequately support the award of expert fees in excess of the statutory cap. Additionally, the drivers

did not provide sufficient documentation for the district court to award the remaining costs. Finally, while the district court properly amended the judgment to include "A Cab Series, LLC," it erred by denying A Cab's motion to quash the execution of judgment without taking evidence on what corporate entities existed and were actually liable for the judgment.

Accordingly, we affirm in part the district court's summary judgment, as amended to include A Cab Series, LLC, and the severance of claims against Nady; however, we reverse the summary judgment as to damages for claims outside of the two-year statute of limitations, the order denying the motion to quash, the order awarding attorney fees, and the costs award. We remand this matter to the district court for further proceedings consistent with this opinion.

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

DANIEL LAKES, an Individual, Appellant, *v.* U.S. BANK TRUST, Trustee for LSF9 MASTER PARTICIPATION TRUST, Respondent.

No. 79324

December 30, 2021 501 P.3d 426

Appeal from a district court summary judgment quieting title in a real property action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Affirmed.

Hartwell Thalacker, Ltd., and *Doreen M. Spears Hartwell* and *Laura J. Thalacker*, Las Vegas, for Appellant.

Ballard Spahr LLP and *Maria A. Gall* and *Joel E. Tasca*, Las Vegas; *McGuire Woods LLP* and *Gilbert Charles Dickey* and *Stephanie J. Peel*, Los Angeles, California, and Washington, D.C., for Respondent.

Fennemore Craig, P.C., and *Leslie Bryan Hart* and *John D. Tennert III*, Reno, for Amicus Curiae Federal Home Loan Mortgage Corporation.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

By statute, a homeowners' association (HOA) obtains a lien afforded superpriority status for a portion of delinquent HOA assessments. When the HOA properly forecloses on that lien, it extinguishes the first deed of trust on the property. The first deed-of-trust beneficiary can protect its interest therein, however, by tendering the superpriority portion of the HOA's lien before the foreclosure sale. While appellant questions whether that happened here, the undisputed evidence confirms that it did, such that no issue of fact exists as to the first deed of trust's survival.

However, appellant also challenges the district court's decision quieting title in favor of respondent, the first deed of trust holder, arguing that respondent cannot enforce its first-priority interest in the property because the assignment evidencing its status as the first deed-of-trust beneficiary was not recorded until after appellant recorded his grant, bargain, and sale deed showing the interest he obtained in the property from a successor in interest to the purchaser at the HOA's foreclosure sale. We are not persuaded by appellant's proposed reading of the recording statute. Appellant acquired only

the interest in the property that was conveyed to him when he purchased it, and because of the superpriority tender, he took the property subject to the first deed-of-trust lien recorded years before the HOA foreclosure sale. The fact that the deed-of-trust assignment was recorded after appellant recorded his deed does not affect respondent's right to enforce its lien because the assignment does not change the status of appellant's title, which was always subordinate to the interest secured by the first deed of trust. As the district court properly quieted title in respondent's favor, we affirm.

FACTS AND PROCEDURAL HISTORY

In April 2007, a borrower purchased the underlying property through a loan secured by a first deed of trust duly recorded with the Clark County Recorder. In May 2007, Freddie Mac purchased the loan. In 2008, the HOA recorded a lien for $625.04 in delinquent assessments. The following month, the lender's nominee recorded an assignment of the deed of trust to Freddie Mac's loan servicer, Ocwen Loan Servicing, LLC. That same month, the HOA recorded a notice of default and election to sell the property listing the amount owed as $1,668.57. In April 2015, the HOA recorded a notice of foreclosure sale stating that the property was in default under the lien for delinquent assessments recorded in 2008. Ocwen tendered $3,241.52 to satisfy the superpriority portion of the lien, which the HOA accepted, but the HOA nevertheless foreclosed on its lien in August 2015. Over the next five months, the property was transferred three more times, with the final conveyance made to appellant Daniel Lakes in January 2016, by a grant, bargain, and sale deed, which expressly provided that his interest was subject to any claims, encumbrances, or liens. Lakes recorded his deed in January 2016. In the meantime, in December 2015, respondent U.S. Bank Trust acquired the loan from Freddie Mac. In May 2016, Ocwen assigned the first deed of trust to U.S. Bank Trust. Ocwen recorded the assignment in the Clark County Recorder's Office that same month.

Both parties sought to quiet title. The district court granted U.S. Bank Trust's motion for summary judgment, concluding that Lakes took title to the property subject to U.S. Bank Trust's first deed of trust because the superpriority tender cured the default, such that the ensuing foreclosure sale did not extinguish the first deed of trust. The district court also rejected Lakes's argument that title should be quieted in his favor as a bona fide purchaser because he lacked notice of U.S. Bank Trust's interest in the property. In so doing, the court concluded that "Lakes' argument that U.S. Bank's interest in the Deed of Trust is void and unenforceable as to him pursuant to N.R.S. § 111.325 is without merit because the timing of the Assignment is immaterial to the HOA Sale not extinguishing the Deed of Trust." The district court certified its order as final

under NRCP 54(b). On appeal, the court of appeals reversed and remanded, concluding that U.S. Bank Trust's failure to record its assignment of the deed of trust before Lakes recorded his grant, bargain, and sale deed created a genuine issue of material fact as to Lakes's status as a bona fide purchaser. We granted U.S. Bank Trust's petition for review under NRAP 40B.

DISCUSSION

Lakes argues that a genuine issue of material fact exists as to whether Ocwen tendered enough to cover the superpriority amount of the HOA's lien. While the record does not contain documentation expressly stating the superpriority amount, we may nonetheless infer from admissible evidence in the record that Ocwen tendered enough to satisfy it. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC* (*Diamond Spur*), 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) (stating that, as explained in prior decisions, "[a] plain reading of [NRS 116.3116(2) (2012)] indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid [common expense] assessments"). Here, the HOA's notice of delinquent assessments stated that the borrower owed $625.04 in assessments. Thus, the superpriority amount of the HOA's lien could not exceed $625.04. *See* NRS 116.3116(2) (2013) (describing the superpriority component of an HOA's lien as "the assessments for common expenses . . . which would have become due . . . during the 9 months immediately *preceding* institution of an action to enforce the lien" (emphasis added)); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 26, 388 P.3d 226, 231 (2017) (recognizing that under the pre-2015 version of NRS 116.3116, serving a notice of delinquent assessments constitutes institution of an action to enforce the lien). Ocwen tendered $3,241.52, which the HOA accepted.[1] Thus, the district court properly determined that the tender, which was in excess of the superpriority portion of the HOA's lien as shown on the notice of delinquent assessments, cured the default as to that portion of the lien such that the ensuing foreclosure sale did not extinguish the first deed of trust. *Diamond Spur*,

[1]Although Lakes asserts that his declaration stating that he paid past due fees and assessments after acquiring the property creates an issue of fact as to whether Ocwen's payment satisfied the HOA's superpriority lien, the declaration does not state when those past due fees and assessments accrued or what they covered. Also, because the HOA conveyed all of its rights, title, and interest to the purchaser at the HOA foreclosure sale, any fees and assessments that were unpaid when Lakes acquired the property must have accrued after the foreclosure sale, such that they would not be part of the superpriority lien that precipitated the foreclosure sale at issue here. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing the standard to survive summary judgment); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (explaining the moving and opposing parties' respective burdens of production and persuasion on summary judgment).

134 Nev. at 606-09, 427 P.3d at 118-21; *see Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing de novo a district court order granting summary judgment); *cf. Prop. Plus Invs., LLC v. Mortg. Elec. Registration Sys., Inc.*, 133 Nev. 462, 467, 401 P.3d 728, 731-32 (2017) (observing that an HOA must restart the foreclosure process to enforce a second superpriority default).

Relying on NRS 111.325, Lakes argues that if the first deed of trust survived the foreclosure sale, the district court nevertheless erred in quieting title in U.S. Bank Trust's favor because he recorded his grant, bargain, and sale deed showing his interest in the property before Ocwen recorded the assignment of the deed of trust to U.S. Bank Trust, making the deed of trust unenforceable. We disagree.

NRS 111.325 provides that unrecorded conveyances of real property, as defined by NRS 111.010 and required to be recorded by NRS 111.315, "shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded." The statute does not speak to the precise question at issue, i.e., whether a party who acquires the beneficial interest in the first deed of trust by post-foreclosure assignment may enforce its interest therein when another party who purchased the property downstream from the foreclosure sale (which was void as to the interest secured by the deed of trust) records his grant, bargain, and sale deed before the recording of the deed-of-trust assignment. Construing the statute in accordance with reason and in a way that harmonizes legislative purpose and policy, we conclude that it does not apply to allow Lakes to avoid all indebtedness on the property, including the duly recorded first deed-of-trust lien. *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 31, 434 P.3d 287, 289 (2019) ("[W]here the statutory language does not speak to the issue before us, we will construe it according to that which reason and public policy would indicate the legislature intended." (internal quotation marks and alteration omitted)).

Here, Lakes does not qualify as a subsequent purchaser under NRS 111.325 because Ocwen assigned the first deed of trust to U.S. Bank Trust roughly four months *after* Lakes obtained his subordinate interest in the property via the grant, bargain, and sale deed. His interest was subordinate because when he purchased the property in 2016, it was encumbered by a secured creditor's senior lien, as evidenced by the duly recorded first deed of trust. On the date of the foreclosure sale, the HOA owned no interest beyond its subpriority claims for assessments and related fees. The purpose of the recording statute is to protect those who honestly believe they are acquiring a good title. *See SFR Invs. Pool 1, LLC v. First Horizon Home Loans*, 134 Nev. 19, 22, 409 P.3d 891, 893 (2018) ("The very purpose of recording statutes is to impart notice to a subsequent

purchaser."); *Allison Steel Mfg. Co v. Bentonite, Inc.*, 86 Nev. 494, 497, 471 P.2d 666, 668 (1970) ("Recording statutes provide 'constructive notice' of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected."); *see Bank of Am., N.A. v. Casey*, 52 N.E.3d 1030, 1035 (Mass. 2016) (observing that the state's recording statute "requires that a mortgage be recorded . . . in order to provide effective notice to anyone beyond the parties to the mortgage transaction and those with actual notice of it").

A post-foreclosure, off-record deed-of-trust assignment is not material to Lakes's title because the deed-of-trust lien recorded in 2007 was enforceable against the property when Lakes purchased his interest in 2016. The property was not sold to Lakes free and clear of all claims, liens, and encumbrances. And his deed reflects that. Lakes purchased title subject to the recorded first deed-of-trust lien, and neither the assignment to U.S. Bank Trust in May 2016 nor the statutory requirement for recording the assignment change Lakes's interest in the property from what he acquired in January 2016. *Cf. Kapila v. Atl. Mortg. & Inv. Corp.*, 184 F.3d 1335, 1337 (11th Cir. 1999) (concluding that the owner of a mortgage interest may transfer its interest after the mortgagor files for bankruptcy because "the perfected mortgage is neither actually nor potentially the property of the debtor," who holds only legal title, rather than an equitable interest, in the mortgaged property). Thus, applying NRS 111.325 to these facts, Lakes and U.S. Bank Trust do not have conflicting claims to the same interest because Lakes's interest in the property was always subordinate to the first deed-of-trust lien, which remained unsatisfied. The fact that the beneficiary of the first deed of trust may subsequently assign its interest to another party does not affect that interest. In that regard, the unreleased first deed of trust, recorded in 2007, provided notice of the first-priority lien, no matter who the beneficiary. It is impossible for a bona fide purchaser to exist under these circumstances, as any purchaser would have constructive notice of the deed-of-trust lien, *see* NRS 111.320, and could not assume the lien was satisfied absent a record of satisfaction, *see* NRS 106.260-.270, or until ten years after the maturity date, *see* NRS 106.240.

As the district court found, U.S. Bank Trust's deed-of-trust lien is enforceable under NRS 106.210, which governs recording requirements for deed-of-trust assignments. That statute provides that such assignments must be recorded before the assignee may exercise the power of sale.[2] NRS 106.210 (requiring that "any assignment of the

[2]Although Lakes relies on *Allen v. Webb* in his supplemental reply brief as supporting his interpretation of NRS 111.325 and his status as a bona fide purchaser, *Allen* is inapposite because it addressed the recording of a *new* deed of trust, not a post-foreclosure assignment of an *already recorded* deed of trust. 87 Nev. 261, 264, 485 P.2d 677, 678 (1971).

beneficial interest under a deed of trust must be recorded" to be enforced, and "the trustee under the deed of trust may not exercise the power of sale pursuant to NRS 107.080 unless and until the assignment is recorded"). NRS 111.325 and NRS 106.210 complement each other, as the former allows avoidance of unrecorded instruments against subsequent bona fide purchasers for valuable consideration. The fact that the deed-of-trust assignment here was not recorded until after Lakes took title simply affects who could enforce it at that time, not whether Lakes was on notice of its existence. Lakes was not induced into purchasing the property as a result of U.S. Bank Trust not recording the assignment until May 2016, and he was not prejudiced by U.S. Bank Trust's post-foreclosure recordation of its assignment, as the first deed of trust, no matter who owned it, was unreleased when the HOA foreclosed on its subordinate lien. *Cf. Smith v. FDIC*, 61 F.3d 1552, 1558-59 (11th Cir. 1995) (concluding that purchaser at foreclosure sale under a second mortgage was not "without notice" of a mortgage assignee's interest in the first mortgage, such that he could benefit from Florida's recording statute, because he had implied actual notice of that interest from the original lender's recording of the first mortgage); *Bank W. v. Henderson*, 874 P.2d 632, 637 (Kan. 1994) (reasoning that a bank that failed to record its assignment of a first-priority mortgage until after a subordinate lienholder foreclosed in 1991 did not "hold a secret equity by virtue of its failure to record its assignment," because the underlying first mortgage, duly recorded in 1973, gave effective notice of a superior lien, and it "mattered not who actually owned the first mortgage; it was enough that [others] had notice of it").

CONCLUSION

Given that U.S. Bank Trust recorded its assignment before it counterclaimed to quiet title, and because Lakes does not qualify as a subsequent purchaser under NRS 111.325, the district court properly concluded that U.S. Bank Trust may enforce its deed-of-trust lien in accordance with NRS 106.210. We therefore affirm the summary judgment in favor of U.S. Bank Trust.

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

LYFT, INC., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MARK R. DENTON, District Judge, Respondents, and KALENA DAVIS, Real Party in Interest.

No. 82148

December 30, 2021 501 P.3d 994

Original petition for a writ of mandamus challenging a district court order overruling an objection to the discovery commissioner's recommendation that examinations of the real party in interest's mental and physical condition proceed under NRS 52.380.

Petition granted.

Lewis Brisbois Bisgaard & Smith LLP and *Jeffrey D. Olster, Jason G. Revzin*, and *Blake A. Doerr*, Las Vegas, for Petitioner.

Clear Counsel Law Group and *Jared R. Richards* and *Dustin Birch*, Henderson, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

In 2019, this court amended Nevada Rule of Civil Procedure (NRCP) 35, which governs mental and physical examinations of a party ordered during discovery in civil litigation.[1] The Legislature subsequently enacted NRS 52.380,[2] which also governs conditions for such examinations. The conditions imposed by NRS 52.380 differ from those imposed under NRCP 35, however. Specifically, the statute allows the examinee's attorney to attend and make audio recordings of all physical and mental examinations, while NRCP 35 disallows observers at certain mental examinations, prohibits the examinee's attorney from attending any examination, and allows audio recordings only upon a showing of good cause.

In the underlying dispute, the discovery commissioner concluded that NRS 52.380 supersedes NRCP 35, such that real party in interest's examinations must follow the procedures set forth in the statute. The district court summarily affirmed and adopted the

[1]*See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018 (effective March 1, 2019)).

[2]*See* 2019 Nev. Stat., ch. 180, § 1, at 966-67.

discovery commissioner's report and recommendations. Petitioner, the party that sought the examinations, asserts that NRS 52.380 violates the separation of powers doctrine, which prevents one branch of government from encroaching on the powers of another branch, by attempting to abrogate NRCP 35. Petitioner seeks a writ of mandamus precluding the district court from requiring adherence to the assertedly unconstitutional statute during the examinations.

The judiciary has the power to regulate court procedure, and the Legislature may not enact a procedural statute that would abrogate a preexisting court rule. We conclude that NRS 52.380 attempts to abrogate NRCP 35 and that, by enacting it, the Legislature encroached on the inherent power of the judiciary. Thus, we hold that NRS 52.380 violates the separation of powers doctrine. The district court's decision to allow the examinations to proceed under NRS 52.380 was therefore a manifest abuse of discretion, and mandamus relief is warranted.

FACTS AND PROCEDURAL HISTORY

Petitioner Lyft, Inc., operates a ridesharing network. A vehicle providing services for Lyft's network collided with real party in interest, Kalena Davis, who was riding a motorcycle. Davis was seriously injured and sued Lyft for negligence, claiming $11.8 million in damages. Lyft disputed liability and retained three experts to contest the amount of Davis's damages. Lyft filed a motion to compel Davis to attend physical and mental examinations with its experts under NRCP 35. Davis opposed Lyft's motion on the ground that good cause did not exist for the examinations under NRCP 35.

After a hearing on Lyft's motion to compel, the discovery commissioner issued a report and recommendations concluding that Lyft showed good cause for its experts to examine Davis because he placed his mental and physical condition in controversy. The discovery commissioner *sua sponte* asked the parties to submit supplemental briefing regarding the differing examination conditions imposed by NRCP 35 and NRS 52.380. Thereafter, Davis argued that NRS 52.380 governed and requested the presence of his attorney at the examinations.

Following submission of supplemental briefing by the parties, the discovery commissioner concluded that NRS 52.380 irreconcilably conflicts with NRCP 35. Without citation to legal authority, the discovery commissioner concluded that NRS 52.380 provides substantive rights and thus supersedes NRCP 35. Consistent with NRS 52.380, the discovery commissioner recommended that Davis be allowed to have his attorney present to observe and make an audio recording of each exam. Lyft filed an objection to the discovery commissioner's recommendations. The district court overruled Lyft's objection without a hearing and entered an order summarily

affirming and adopting the recommendations, and Lyft filed this writ petition.

DISCUSSION

We exercise our discretion to entertain Lyft's writ petition

The decision to entertain a writ petition is discretionary. *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013). Although "[a] writ of mandamus is not a substitute for an appeal," *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)), entertaining a petition for advisory mandamus is "appropriate when an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition," *id.* at 820, 407 P.3d at 706 (internal quotation marks omitted). However, we will entertain an advisory mandamus petition only "to address the rare question that is likely of significant repetition prior to effective review, so that our opinion would assist other jurists, parties, or lawyers." *Id.* at 822-23, 407 P.3d at 708 (internal quotation marks omitted). Finally, advisory mandamus is appropriate when our intervention will "clarify a substantial issue of public policy or precedential value." *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 684, 476 P.3d 1194, 1199 (2020) (internal quotation marks omitted).

Whether NRS 52.380 supersedes NRCP 35 is an issue of statewide importance that presents a novel question of law requiring clarification. Because physical and mental examinations are frequently conducted during discovery, our clarification of this issue will assist the district courts and parties alike by resolving the uncertainty that exists over whether NRS 52.380 or NRCP 35 governs mental and physical examinations performed during discovery. Our intervention is further warranted because district courts are reaching different conclusions on this very issue. Moreover, this is a substantial issue of public policy due to the conflicting interests of plaintiffs and defendants with respect to the procedures for the examinations. Thus, we choose to entertain Lyft's petition.

NRS 52.380 plainly conflicts with NRCP 35

The parties dispute whether NRS 52.380 violates the separation of powers between the branches of government. The separation of powers "prevent[s] one branch of government from encroaching on the powers of another branch." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009); *see also* Nev. Const. art. 3, § 1. We review the constitutionality of a statute de novo, even in the context of a writ petition. *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237 (2015). "Statutes are presumed to

be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Id.* at 796, 358 P.3d at 237-38.

"[T]his court indisputably possesses inherent power to prescribe rules necessary or desirable to handle the judicial functioning of the courts . . . ." *State v. Second Judicial Dist. Court (Marshall)*, 116 Nev. 953, 963, 11 P.3d 1209, 1215 (2000); *see also* NRS 2.120(2) (explaining that this court "shall regulate original and appellate civil practice and procedure"). Thus, in the context of a conflicting statute and court rule, our separation of powers analysis examines "whether the challenged statutory provision is substantive or procedural." *See Hefetz*, 133 Nev. at 330 n.5, 397 P.3d at 478 n.5 (quoting *Seisinger v. Siebel*, 203 P.3d 483, 489 (Ariz. 2009)). As we have explained, "the [L]egislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and . . . such a statute is of no effect." *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983). However, a "legislative encroachment on judicial prerogatives" is implicated only where the statute "interfere[s] with procedure to a point of disruption or attempted abrogation of an existing court rule." *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988). The parties ostensibly agree that before analyzing whether NRS 52.380 violates the separation of powers doctrine, we must first analyze whether NRS 52.380 irreconcilably conflicts with NRCP 35 or whether the provisions can be harmonized.

Lyft argues that NRS 52.380 and NRCP 35 irreconcilably conflict. Davis argues that these provisions can be read in harmony. Specifically, Davis asserts that NRCP 35 sets forth general procedures for the examinations, whereas NRS 52.380 provides examinees the substantive right to have an attorney present at all examinations.

NRCP 35 applies in civil actions where a party's "mental or physical condition . . . is in controversy" and the opposing party seeks to have an "examination [of that party's condition] by a suitably licensed or certified examiner." NRCP 35(a)(1). However, a party can seek the examination only "on motion for good cause." NRCP 35(a)(2)(A). In interpreting the federal counterpart to NRCP 35, the United States Supreme Court held that good cause under FRCP 35 is "not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require[s] an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy." *Schlagenhauf*, 379 U.S. at 118. NRCP 35 also prescribes the conditions under which the examination may take place. Relevant to this case, subsection (a)(3) governs recordings, providing that "[o]n request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded."

And subsection (a)(4) governs when, and by whom, observation of the examination will be allowed, giving considerable discretion to the district court in determining when good cause is shown to depart from the general rule:

> The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer may not be the party's attorney or anyone employed by the party or the party's attorney.
>
> (A) The party may have one observer present for the examination, unless:
>
> (i) the examination is a neuropsychological, psychological, or psychiatric examination; or
>
> (ii) the court orders otherwise for good cause shown.
>
> (B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.
>
> (C) An observer must not in any way interfere, obstruct, or participate in the examination.

NRCP 35(a)(4).

Like the court rule, NRS 52.380 regulates the conditions of "a mental or physical examination ordered by a court for the purpose of discovery in a civil action." NRS 52.380(7)(a). Under the relevant subsections of NRS 52.380, an observer, including an attorney, is automatically allowed to attend and record any examination:

> 1. An observer may attend an examination but shall not participate in or disrupt the examination.
>
> 2. The observer attending the examination pursuant to subsection 1 may be:
>
> (a) An attorney of an examinee or party producing the examinee; or
>
> (b) A designated representative of the attorney, if:
>
> (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
>
> (2) The designated representative presents the authorization to the examiner before the commencement of the examination.
>
> 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.

Here, the main arguments center on the provisions governing observers and recordings.

An observer's presence at the physical or mental examination

With respect to an observer's presence at the examination, NRCP 35(a)(4) generally allows a party being examined to request "to have an observer present at the examination," but "[t]he observer *may not be the party's attorney* or anyone employed by the party or the party's attorney." *Id.* (emphasis added). The party making the request is required to "identify the observer and state his or her relationship to the party being examined." *Id.* Further, this general rule does not apply to "neuropsychological, psychological, or psychiatric examination[s]" unless "the court orders otherwise for good cause shown." NRCP 35(a)(4)(A)(i)-(ii); NRCP 35(a)(4)(B).

NRS 52.380(1), on the other hand, unconditionally provides that "[a]n observer may attend an examination." In addition, NRS 52.380 omits any language that requires the party being examined to identify the observer or state the observer's relationship to the examinee before the exam. Thus, NRS 52.380 eliminates the district court's discretion to control the presence of observers at mental and physical examinations. *Compare* NRS 52.380(1)-(2), *with* NRCP 35(a)(4). Further, and crucially, under the statute, the observer may be an attorney or the attorney's representative. NRS 52.380(2)(a)-(b). In these ways, NRS 52.380 attempts to abrogate NRCP 35: allowing an observer—who can be the examinee's *attorney*—to attend all examinations regardless of whether good cause exists to allow or preclude an observer in deviation of the general rule.

An audio recording of the mental or physical examination

With respect to the audio recording of an exam, NRCP 35(a)(3) provides that, "[o]n request of a party or the examiner, the court may, *for good cause shown*, require as a condition of the examination that the examination be audio recorded." (Emphasis added.) NRS 52.380(3) removes the good cause requirement and provides that "[t]he observer attending the examination . . . may make an audio or stenographic recording of the examination." Thus, NRS 52.380 also removes the district court's discretion to control audio recordings at the examinations. Plainly, NRS 52.380(3) attempts to abrogate NRCP 35(a)(3).

Davis argues that NRS 52.380 and NRCP 35 can be harmonized because the statute allows what Davis refers to as a "victim's advocate" to attend the exam. NRS 52.380, however, omits the term "victim's advocate." Instead, like NRCP 35, the statute uses the term "observer." Thus, we conclude that Davis's argument is unsupported by the plain meaning of NRS 52.380. *See Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013) (stating that we effectuate the plain meaning of statutes).

Therefore, we conclude that NRS 52.380 conflicts with NRCP 35 and that these provisions cannot be harmonized. Thus, we next analyze whether NRS 52.380 violates the separation of powers doctrine.

NRS 52.380 violates the separation of powers doctrine

Lyft argues that NRS 52.380 violates the separation of powers doctrine because the statute is procedural and attempts to abrogate NRCP 35, a preexisting court rule. Lyft contends that NRS 52.380 is procedural because it does not provide substantive rights but rather sets forth processes applicable to an examination conducted, for discovery purposes, as incidental to a substantive claim. Davis cites caselaw, legislative history, and the statutory text to argue that NRS 52.380 is a substantive statute and therefore trumps. He specifically argues that NRS 52.380 provides examinees the substantive right to have an attorney present and make an audio recording at all examinations.

The United States Supreme Court has generally explained that "a substantive standard is one that creates duties, rights, and obligations, while a procedural standard specifies how those duties, rights, and obligations should be enforced." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019) (internal quotation marks omitted). More specifically, the Supreme Court has held that FRCP 35, which governs mental and physical examinations, is procedural because it is "the judicial process for enforcing rights and duties recognized by substantive law." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); *see also Schlagenhauf*, 379 U.S. at 113 (noting the same). Further, the United States District Court for the District of Nevada has also concluded—for the purposes of the *Erie*[3] doctrine's diversity analysis—that NRS 52.380 is procedural because it "sets forth [the] process allowed . . . [for] an examination under [NRCP] 35," and therefore "is not a substantive law." *Freteluco v. Smith's Food & Drug Ctrs., Inc.*, 336 F.R.D. 198, 203 (D. Nev. 2020) (applying FRCP 35 instead of NRS 52.380 after concluding that the statute is procedural).[4]

These federal authorities persuasively conclude that NRS 52.380 is a rule of procedure because it sets forth the process allowed for a mental or physical examination conducted during discovery. Like FRCP 35, this statute only provides a process for enforcing an underlying civil claim. NRS 52.380 applies to "discovery in a

[3]*See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that a federal court sitting in diversity applies the substantive law of the state).

[4]To the extent Davis argues that *Freteluco*'s analysis of NRS 52.380 and FRCP 35 under the *Erie* doctrine is irrelevant to this separation of powers analysis, we are unpersuaded because both analyses determine whether a law is substantive or procedural.

civil action," NRS 52.380(7)(a), so it can be invoked only after a party has asserted an underlying civil claim. Outside of civil discovery, NRS 52.380 has no application. Moreover, NRS 52.380 does not give litigants any substantive right because it does not create a cognizable claim for relief from a violation of its provisions. *See Legal Right*, *Black's Law Dictionary* (11th ed. 2019) (defining a right as "[t]he capacity of asserting a legally recognized claim against one with a correlative duty to act"). Indeed, the only relief a party can obtain under the statute is "a protective order pursuant to the Nevada Rules of Civil Procedure," if the exam has been suspended. NRS 52.380(6). Thus, the remedy for a violation of NRS 52.380 is the invocation of NRCP 26(c), which again can only be obtained if the party seeking the protective order is litigating an underlying civil claim. Therefore, the statute is procedural.

Insofar as Davis relies on *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988), to argue that NRS 52.380 is substantive, we are unpersuaded. In *Whitlock*, we examined whether NRS 16.030(6), which sets forth how voir dire is conducted, violated the separation of powers doctrine because it conflicted with the then-existing version of NRCP 47(a). 104 Nev. at 25-26, 752 P.2d at 211. We explained that the statute allows parties to conduct supplemental voir dire that the district court "must not . . . unreasonably restrict[ ]," *id.* at 25, 752 P.2d at 211 (emphasis omitted) (quoting NRS 16.030(6)), whereas the court rule allowed the district court to permit supplemental voir dire "as it deem[ed] proper," *id.* at 26, 752 P.2d at 211 (internal quotation marks omitted). Although the provisions seemingly conflicted, we explained that NRS 16.030(6) did not "interfere with procedure to a point of disruption or *attempted abrogation* of an existing court rule." *Id.* at 26, 752 P.2d at 211 (emphasis added). We further reasoned that the trial judge still had discretion to "reasonably control and limit an attorney's participation in voir dire." *Id.* at 28, 752 P.2d at 213. Thus, in recognizing a substantive right to counsel's reasonable participation in voir dire, the statute reflected the principles of the rule and did not violate the separation of powers doctrine. *Id.* at 26, 752 P.2d at 211-12. Here, unlike the situation in *Whitlock*, NRS 52.380 attempts to abrogate NRCP 35 by removing the district court's discretion to control the examinations and in the other above-mentioned ways.[5]

[5]Davis also cites to *Seisinger v. Siebel*, 203 P.3d 483, 494 (Ariz. 2009), which held that a statute was substantive because it "increas[ed] the plaintiff's burden of production in medical malpractice actions." There, the Arizona Supreme Court held that the statute at issue did not violate the separation of powers doctrine because it was substantive and "specifie[d] the kind of expert testimony necessary to *establish* medical malpractice." *Id.* (emphasis added). Davis, however, does not explain how NRS 52.380 changes the burden of proof such that it would affect any underlying claim. Thus, we conclude that Davis's reliance on *Seisinger* is misplaced.

In sum, NRS 52.380 does not confer any legally recognized claim such that it creates a substantive right.[6] Instead, NRS 52.380 is procedural because it specifies the process allowed for a mental or physical examination that is conducted only after a party has filed an underlying civil claim.[7] Accordingly, we hold that NRS 52.380 is unconstitutional because it attempts to abrogate an existing rule of procedure that this court prescribed under its inherent authority to regulate the judicial process.

Writ relief is appropriate because the district court manifestly abused its discretion

Lyft asks this court to issue a writ of mandamus that directs the district court to vacate its order overruling Lyft's objection to the discovery commissioner's report and recommendation. Lyft further asks this court to direct the district court to order that the NRCP 35 examinations proceed without an audio recording or the presence of Davis's attorney. Other than arguing that NRS 52.380 does not violate the separation of powers doctrine, Davis's brief does not address whether, and to what extent, writ relief is warranted.

In adopting and affirming the discovery commissioner's report and recommendations applying NRS 52.380 over NRCP 35, the district court manifestly abused its discretion by proceeding under an invalid law. Thus, we conclude that it is appropriate to issue a writ of mandamus directing the district court to vacate its order overruling Lyft's objection to the discovery commissioner's report and recommendation. *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009) (explaining that we will issue a writ of mandamus when the district court has manifestly abused its discretion); *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (defining abuse of discretion as "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule" (alteration in original) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997))).

[6]Insofar as Davis argues that NRS 52.380 is substantive because it allows a "victim's advocate" to attend the exam, we are unpersuaded because, as we noted above, the statutory text is devoid of any language indicating that a "victim's advocate" may attend the exam. *See* NRS 52.380.

[7]Davis also argues that, in the event we determine that NRS 52.380 is procedural, we should nonetheless hold that NRS 52.380 is "directory." He therefore suggests that we should order district courts to consider NRS 52.380 when conducting an NRCP 35 analysis. He cites to *Mendoza-Lobos v. State*, 125 Nev. 634, 641-42, 218 P.3d 501, 506 (2009), which concluded that a statute violating the separation of powers was directory because it created a "laudable goal." However, the sentencing statute in *Mendoza-Lobos*, unlike here, did not attempt to abrogate a preexisting court rule. Moreover, the Legislature expressly gave this court the power to regulate the Nevada Rules of Civil Procedure. *See* NRS 2.120(2). Thus, we conclude that Davis's argument is meritless.

However, we decline to direct the district court to order that the examinations proceed without an observer or an audio recording because it is unclear from the record whether Davis failed to show good cause for those conditions. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Thus, we direct the district court to consider the parties' motions consistent with NRCP 35.

CONCLUSION

NRS 52.380 violates the separation of powers doctrine because it is a procedural statute that conflicts with NRCP 35. Thus, we hold NRS 52.380 is unconstitutional. Accordingly, we grant Lyft's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order overruling Lyft's objection and affirming and adopting the discovery commissioner's report and recommendation, and to consider the parties' motions consistent with NRCP 35.

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