The United States Supreme Court has stated that "at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown." *Rogers v. United States*, 340 U.S. 367, 375 (1951). Because *Rogers* does not require the identity of unknown conspiracy members to be proven, we conclude that Washington's second amended criminal information was not defective. As a result, Washington has failed to demonstrate substantial prejudice and reversal is not warranted on this basis.

Accordingly, for the reasons set forth above, we affirm the judgment of conviction.[6]

SAITTA and PICKERING, JJ., concur.

ELIEZER MIZRACHI, APPELLANT, *v.*
DIANE MIZRACHI, RESPONDENT.

No. 66176

September 15, 2016 385 P.3d 982

Appeal from a district court order granting a motion to clarify the holiday parenting time provisions in the parties' divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Gerald W. Hardcastle, Senior Judge.[1]

In post-dissolution proceedings, mother filed motion to clarify stipulated divorce decree granting father parenting time on "the Jewish holidays." The district court, Family Court Division, Clark County, Jack B. Ames, Senior Judge, granted motion, and Gerald W. Hardcastle, Senior Judge, signed order granting motion. The court of appeals, GIBBONS, C.J., held that: (1) the district court's order was clarification of term "the Jewish holidays" rather than modification of divorce decree; (2) provision granting father parenting time on "the Jewish holidays" was ambiguous, and thus, the district court had authority to construe term; and (3) issue of parties' intent as to meaning of "the Jewish holidays" could not be resolved in absence of evidentiary hearing.

Reversed and remanded.

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[6]Washington also argues that cumulative error entitles him to a new trial. However, because Washington has failed to demonstrate any error, we conclude that he was not deprived of a fair trial due to cumulative error.

[1]Although Judge Hardcastle signed the order, the Honorable Jack B. Ames, Senior Judge, decided the motion at issue while sitting in Department C.

Jacobson Law Office, Ltd., and *Rachel M. Jacobson*, Las Vegas, for Appellant.

Diane Mizrachi, North Las Vegas, in Pro Se.

1. Child Custody.
   Parties in family law matters are free to contract regarding child custody, and such agreements are generally enforceable if they are not unconscionable, illegal, or in violation of public policy.
2. Child Custody.
   Parents are encouraged to reach child custody agreements, and the court will generally recognize the preclusive effect of such agreements if they are deemed final.
3. Child Custody.
   When parties enter into a parenting agreement, the terms of that agreement will control unless and until a party moves to modify those terms.
4. Child Custody.
   When a motion to modify a parenting agreement is filed, the court must use the terms and definitions provided under Nevada law to resolve the motion, and at that time, the parties' definitions no longer control.
5. Child Custody.
   A change in circumstances must be shown when modifying a primary physical custody arrangement but is not necessary to support a modification of a joint physical custody arrangement.
6. Child Custody.
   The district court's order granting mother's motion to clarify meaning of term "the Jewish holidays," as used in stipulated divorce decree assigning father parenting time on "the Jewish holidays," which the district court determined meant the first night of four particular Jewish holidays, was clarification of term "the Jewish holidays" rather than modification of decree, and thus, the district court had inherent authority to clarify term, so long as term was ambiguous; decree gave father substantive right to exercise parenting time on "the Jewish holidays," and the district court did not purport to alter that right in any way but instead merely sought to define which days were included within the meaning of the provision. NRS 125C.0045(1)(b).
7. Judgment.
   Distinction between an order modifying a judgment or decree and an order construing or clarifying a judgment or decree is important in many cases because modification of a judgment may not be permitted, absent special circumstances, once the judgment has become final and the time for seeking relief from the judgment has passed. NRCP 60(b).
8. Child Custody.
   Distinction between an order modifying a custody order and an order clarifying a custody order is important in custody cases because certain specific standards must be met in order for a court to properly modify a custody order. NRS 125C.0045(1)(b).
9. Judgment.
   With respect to an order clarifying a judgment or decree, the district court only has inherent power to construe its judgments and decrees for the purpose of removing any ambiguity.

10. JUDGMENT.

A modification of a judgment by the district court alters the parties' substantive rights, while a clarification involves the district court defining the rights that have already been awarded to the parties and leaves their substantive rights unchanged.

11. CHILD CUSTODY.

Provision in stipulated divorce decree granting father parenting time on "the Jewish holidays" was ambiguous, and thus, the district court had authority to construe term. Father asserted "the Jewish holidays" meant the full span of 12 specified holidays, which was an arguably reasonable interpretation as there were no restrictions placed on the term in the divorce decree; mother's interpretation that "the Jewish holidays" meant the first night of four specified holidays was reasonable given that it was consistent with the district court's default schedule; and there were likely many more reasonable interpretations of "the Jewish holidays," as it could be reasonable to interpret term as some other combination made up of more than four identified by mother, but less than all of the Jewish holidays.

12. CHILD CUSTODY.

Issue of parties' intent as to meaning of "the Jewish holidays," as that ambiguous term was used in stipulated divorce decree granting father parenting time on "the Jewish holidays," could not be resolved on mother's motion to clarify decree in absence of evidentiary hearing, in view of factual dispute as to what parties intended when they reached their agreement; parties each made allegations that they had particular intent when they reached agreement regarding the Jewish holidays, as father suggested mother was aware of all of the Jewish holidays and agreed to give him parenting time on those days because he gave up other rights, and mother disputed father's explanation as to why he gave up other rights and she contended that she was unaware of many of the holidays. EDCR 2.21(a), 5.25(b).

13. DIVORCE.

When the district court approves and adopts the parties' agreement into a decree of divorce, the agreement merges into the decree unless both the decree and the agreement contain a clear and direct expression that the agreement will survive the decree, and when an agreement is merged into a decree of divorce, it loses its character as an independent agreement and the parties' rights rest solely upon the decree.

14. DIVORCE.

As in contract interpretation cases, a court that is called upon to clarify the meaning of a disputed term in an agreement-based divorce decree must consider the intent of the parties in entering into the agreement, and in doing so, the court may look to the record as a whole and the surrounding circumstances to interpret the parties' intent.

15. CHILD CUSTODY.

When the matter agreed upon by the parties, as merged into the divorce decree, concerns child custody, a court construing the terms of the decree must be mindful of whether the impact of the agreement is in the child's best interest because the best interest of the child is the paramount concern in determining the custody and care of children. NRS 125C.0035(1).

16. CHILD CUSTODY.

The district court's involvement with a parenting agreement should be exercised cautiously in light of the presumption that fit parents act in their children's best interests and the principle that the state generally may only limit parental authority when severe concerns, such as protecting a fundamental right or the safety of the parties' child, are at stake. NRS 125C.0035(1).

Before GIBBONS, C.J., TAO and SILVER, JJ.

OPINION

By the Court, GIBBONS, C.J.:

In family law cases, parents are encouraged to work together to reach agreements to allow them to maintain control over how they will exercise custody of their children. *See Bluestein v. Bluestein*, 131 Nev. 106, 111, 345 P.3d 1044, 1047 (2015) ("Public policy encourages parents to enter into private custody agreements for co-parenting."). And when they do, the resulting agreements are generally enforceable, as long as "they are not unconscionable, illegal, or in violation of public policy." *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 227 (2009). But even when parents come to an agreement, disputes may later arise as to what the parties meant by a term in the agreement, or whether the agreement is working as the parties intended. Thus, when the agreement is incorporated into a judgment, order, or decree, there are mechanisms in place for parents to return to court to resolve such disputes.

In this appeal, we discuss one such dispute and the proper method for resolving that dispute. In particular, we consider whether a motion filed in the district court was a motion to modify an agreement-based decree, or rather, was a motion to clarify, interpret, or construe the decree. And we conclude that, in the underlying action, the district court clarified, rather than modified, the parties' divorce decree, as that court defined the rights assigned to the parties by the decree. While it was proper for the court to clarify the decree, our review of the record demonstrates that the district court did not apply the proper procedure in doing so, as the court failed to take evidence or otherwise consider the intent of the parties in reaching the agreement that led to the decree. Thus, we reverse the district court's decision and remand this matter to the district court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Based on the parties' unwritten, out-of-court stipulation, the district court entered a divorce decree drafted by respondent Diane Mizrachi's attorney.[2] As relevant to this appeal, the decree grants the parties joint legal and physical custody and provides that appellant Eliezer Mizrachi (Eli) "will have the minor child for the Jewish holidays every year," and Diane "will have the minor child on the

[2]EDCR 5.09(2) states "all contested divorces which are settled by the parties with all issues resolved . . . may be submitted without hearing by agreement of the parties and with the approval of the court."

Christian holidays every year." The decree does not identify specific days or times or otherwise define what is meant by "the Jewish holidays" or "the Christian holidays."

Less than ten months after the court entered the divorce decree, Diane filed a motion to clarify the decree as to the holiday parenting time schedule, asserting that disputes had arisen between the parties with regard to Eli's holiday parenting time.[3] In particular, Diane asserted that Eli was requesting parenting time with the child for the full period of 12 Jewish holidays,[4] whereas she believed the divorce decree only allowed him to have holiday parenting time on the first day of Hanukkah, Passover, Rosh Hashanah, and Yom Kippur. In support of her position, Diane alleged that, during their 13-year marriage, Eli rarely observed any of the Jewish holidays. She also noted that, if the provision was interpreted as Eli suggested, there would be potential conflicts with her parenting time on the Christian holidays, as the days of the Jewish and Christian holidays sometimes overlap.

In the motion, Diane asserted that each department of the Family Division of the Eighth Judicial District Court used a default schedule, which identified only Hanukkah, Passover, Rosh Hashanah, and Yom Kippur as the relevant Jewish holidays for setting a custody schedule. And she argued that the parties' divorce decree should be interpreted consistently with the default schedule.[5] Eli opposed the motion, contending that the decree's reference to "the Jewish holidays" included all 12 of the holidays that he sought, which extended for the full holiday time frame. Moreover, Eli contended that Diane had agreed to give him these holidays in exchange for him giving up certain other rights in the divorce decree. Diane filed a reply, asserting that Eli gave up the other rights for reasons unrelated to his holiday parenting time.

The district court subsequently held a hearing on the motion, but did not hear testimony or take other evidence. Instead, the district

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[3]Diane's motion and Eli's subsequent countermotion contained additional requests for relief beyond what is discussed in this opinion. Because the district court's resolution of these additional requests is not challenged on appeal, the requests are not discussed further herein.

[4]Specifically, Eli asserted that he was entitled to parenting time on Rosh Hashanah, Yom Kippur, Sukkot, Shemini Atzeret, Simchat Torah, Hanukkah, Tu B'Shevat, Purim, Passover, Lag B'Omer, Shavuot, and Tisha B'Av. In a post-decree letter that was attached to Diane's motion, Eli indicated that he was willing to compromise to some extent on these holidays. To that end, he stated that he wanted the full time period for Yom Kippur (one day), Hanukkah (eight days), and Passover (eight days) and at least the first night of four of the other holidays.

[5]Although the underlying case was assigned to Department C, Diane attached the default schedule for Department D as an exhibit to her motion. At a later hearing, her attorney represented that he spoke to Department C's law clerk, who had informed him that Department C used Department D's default schedule.

court, relying solely on the parties' verified pleadings, arguments of counsel, and its own independent Internet research, found that "there [was not] a clear understanding between the two parties at the time [of the agreement] and there needs to be a clarification on the Jewish holidays." To that end, the court granted Diane's request to clarify the meaning of the term "the Jewish holidays" as used in the divorce decree. In so doing, the court adopted Department D's religious holiday default schedule, concluding that Eli would have holiday parenting time only on the first day of Hanukkah, Passover, Rosh Hashanah, and Yom Kippur. This appeal followed.

ANALYSIS

[Headnotes 1-4]

Parties in family law matters are free to contract regarding child custody and such agreements are generally "enforceable if they are not unconscionable, illegal, or in violation of public policy." *Rivero*, 125 Nev. at 429, 216 P.3d at 227. Indeed, even beyond the idea that parents are free to enter into such agreements, the Nevada Supreme Court has gone further and explained that public policy favors parenting agreements.[6] *See Bluestein*, 131 Nev. at 111, 345 P.3d at 1047; *see also St. Mary v. Damon*, 129 Nev. 647, 658, 309 P.3d 1027, 1035-36 (2013) (recognizing a presumption "that fit parents act in the best interest of their children" and that public policy favors those parents entering into custody agreements). Thus, parents are encouraged to reach such agreements, and the court "will generally recognize the preclusive effect of such agreements if they are deemed final." *See Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011). Moreover, when parties enter into a parenting agreement, the terms of that agreement will control unless and until a party moves to modify those terms.[7] *Rivero*, 125 Nev. at 429, 216 P.3d at 226; *see also Harrison v. Harrison*, 132 Nev. 564, 570, 376 P.3d 173, 177 (2016) (explaining that the appellate court will not rewrite a contract to include terms not agreed to by the parties).

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[6]The Nevada Revised Statutes and local court rules for several of the judicial districts in Nevada also contemplate such agreements, further demonstrating their desirability. *See* NRS 125C.0653(1) ("The parents may modify an agreement regarding custodial responsibility . . . by mutual consent."); *see also* NRS 123.080(1) (providing that parents can contract with each other "for the support . . . of their children" during a legal separation); NRS 123.080(4) (providing for ratification and adoption of contracts between spouses into decrees of divorce); NRS 125C.005(1) ("The court may . . . require the parents to submit to the court a plan for carrying out the court's order concerning custody."); *see also* FJDCR 25(1)(A); WDFCR 53(1)(a); 4JDCR 5(4); EDCR 5.70(a); NJDCR 26(a)(1).

[7]When a motion to modify is filed, "the court must use the terms and definitions provided under Nevada law" to resolve the motion, and at that time, "the parties' definitions no longer control." *Rivero*, 125 Nev. at 429, 216 P.3d at 227.

While we reiterate that parenting agreements are valuable and enforceable, *see Rivero*, 125 Nev. at 429, 216 P.3d at 227, we also recognize that, despite the parties' best efforts in reaching such agreements, disputes will sometimes arise once the parties begin putting their agreed-upon terms into practice. Such is the situation here, where the parties discovered, after having agreed that Eli would have parenting time on the Jewish holidays, that they disagreed as to what that term actually meant.

[Headnote 5]

That disagreement has led to this appeal, in which Eli argues that the district court erred by finding the holiday provision to be ambiguous when the term could only be reasonably interpreted to mean the 12 Jewish holidays for their full time span. He also contends that, to the extent there was any ambiguity, the district court improperly failed to consider the intent of the parties and to construe such ambiguity against Diane, whose attorney drafted the decree. Finally, although Eli asserts that the motion was presented and decided only as a motion for clarification, he also argues that, by interpreting the term in the manner that it did, the district court essentially modified the divorce decree without considering whether the modification was in the child's best interest.[8] Diane agrees that the term was unambiguous, but argues that the district court properly clarified the meaning of the term to include only the first day of the four specified holidays.

[Headnote 6]

As a preliminary matter, Eli's argument regarding effective modification raises the question of whether the district court actually modified or only clarified the holiday parenting time provision in the divorce decree. Thus, we begin our analysis by briefly addressing that question before turning to the merits of the court's conclusion as to the meaning of the term, "the Jewish holidays."

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[8]Eli also asserts that the district court failed to consider whether there had been a change in circumstances. A change in circumstances must be shown when modifying a primary physical custody arrangement, but is not necessary to support a modification of a joint physical custody arrangement. *See Rivero*, 125 Nev. at 430, 216 P.3d at 227 (explaining that a joint physical custody arrangement may be modified whenever modification "is in the child's best interest," but that a primary physical custody arrangement may only be modified "when there is a substantial change in the circumstances affecting the child and the modification serves the child's best interest"). Because the parties in this case share joint physical custody, even if the court did modify the custody arrangement as Eli contends, no change in circumstances was necessary to support that modification; the court would have needed to find only that the modification was in the child's best interest. *See id.*

Clarification versus modification

[Headnote 7]

The Nevada Supreme Court has long distinguished between an order modifying a judgment or decree and an order construing or clarifying a judgment or decree. *See Murphy v. Murphy*, 64 Nev. 440, 445, 183 P.2d 632, 634 (1947) (concluding that the district court's order defining the effect of a divorce decree but not changing that decree construed, rather than modified, the decree). This distinction is important in many cases because modification of a judgment may not be permitted, absent special circumstances, once the judgment has become final and the time for seeking relief from the judgment has passed. *See* NRCP 60(b) (generally limiting the time for filing certain motions for relief from a judgment to six months); *Kramer v. Kramer*, 96 Nev. 759, 762-63, 616 P.2d 395, 397-98 (1980) (concluding that a district court lacked jurisdiction to modify a divorce decree's property distribution provisions more than six months after the decree was entered).

[Headnote 8]

Of course, custody cases are somewhat different because, on a proper showing, a custody decision may be modified at any time. *See* NRS 125C.0045(1)(b) (providing that the court may modify its custody order at any time). Nevertheless, the distinction between modification and clarification is still important in custody cases because certain specific standards must be met in order for a court to properly modify a custody order. *See, e.g.*, *Rivero*, 125 Nev. at 430, 216 P.3d at 227 (explaining that, to modify a joint physical custody arrangement, the court must find that modification "is in the child's best interest[,]" and to modify a primary physical custody arrangement, the court must find "a substantial change in the circumstances affecting the child and [that] modification serves the child's best interest"); *see also Bluestein*, 131 Nev. at 111-13, 345 P.3d at 1048-49 (discussing modification of an agreement providing for joint physical custody); *Ellis v. Carucci*, 123 Nev. 145, 149-53, 161 P.3d 239, 242-44 (2007) (discussing modification of primary physical custody arrangements).

[Headnote 9]

This distinction is also important because, on the clarification side, the district court only "has inherent power to construe its judgments and decrees for the purpose of removing any ambiguity." *Kishner v. Kishner*, 93 Nev. 220, 225-26, 562 P.2d 493, 496 (1977) (vacating an order clarifying a judgment and decree because the judgment and decree was not ambiguous, and thus, no clarification was warranted). Thus, we must determine whether the court mod-

ified or clarified the decree in order to consider whether the proper standards were applied.

[Headnote 10]

To that end, the Nevada Supreme Court has held that a modification "alters the parties' substantive rights, while a clarification involves the district court defining the rights that have already been awarded to the parties" and leaves their substantive rights unchanged. *Vaile v. Porsboll*, 128 Nev. 27, 33, 268 P.3d 1272, 1276 (2012). Here, the divorce decree assigned Eli the substantive right to exercise parenting time on the Jewish holidays, and the district court did not purport to alter that right in any way. Instead, the court merely sought to define which days were included within the meaning of the provision. Thus, we conclude that the court was only clarifying the term, which it had authority to do, so long as the term was ambiguous. *See Kishner*, 93 Nev. at 225, 562 P.2d at 496.

Ambiguity

[Headnote 11]

Our supreme court has held that a provision "is ambiguous if it is capable of more than one reasonable interpretation." *See In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010) (discussing ambiguity of statutory language); *see also Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (providing that "[a] contract is ambiguous if its terms may reasonably be interpreted in more than one way"). In this case, both parties assert that the term, "the Jewish holidays," was unambiguous, but they each ascribe a different meaning to that term. It follows that, if both meanings put forth by the parties are reasonable, then the term would necessarily be ambiguous. *See Candelaria*, 126 Nev. at 411, 245 P.3d at 520; *see also Galardi*, 129 Nev. at 309, 301 P.3d at 366.

Eli asserts that "the Jewish holidays" means the full span of 12 specified holidays. As there were no restrictions placed on the term, "the Jewish holidays," in the divorce decree, it is at least arguably reasonable to interpret the term as including the full length of all of the Jewish holidays sought by Eli. *See* Jessica H. Ressler, *Adjudicating Custody and Visitation Matters Involving Jewish Families: What You Didn't Know!*, 40 Westchester B.J. 43, 51-57 (2015) (identifying a number of Jewish holidays that may be relevant to custody determinations, including the 12 holidays sought by Eli). On the other hand, insofar as Diane's interpretation is consistent with the default schedule used by at least two departments of the Family Division, it seems that her interpretation may also be a reasonable one. Indeed, because not all Jewish followers observe all of the Jewish holidays, it could also be reasonable to interpret the term as some other combination made up of more than the four holidays identified by Diane, but less than all of the Jewish holidays. *See id.* at 49,

57-58 (explaining that an attorney representing a Jewish client in a custody matter should ask the client which holidays are celebrated "because every family is different," and noting that the holidays that will need to be considered for a holiday parenting schedule "will vary on a case-by-case basis"). As there are at least two, and likely many more, reasonable interpretations of the term "the Jewish holidays," the district court properly found that the term was ambiguous. As a result, it was appropriate for the district court to construe that term. *See Kishner*, 93 Nev. at 225, 562 P.2d at 496.

Clarification of the term "the Jewish holidays," as used in the decree

[Headnote 12]

Having determined that it was proper for the court to construe the term, we now turn to the procedure the court applied in doing so. After determining that the provision needed to be clarified, the district court simply adopted the default schedule offered by Diane without considering what the parties actually intended when they agreed that Eli would have parenting time on the Jewish holidays. But the parties' arguments largely suggest that the court should have applied contract interpretation principles to determine the intention of the parties in reaching the agreement that ultimately yielded the underlying divorce decree.

[Headnote 13]

In considering agreement-based decrees, the Nevada Supreme Court has indicated in some cases that, once an agreement is merged into a decree, a court's application of contract principles, such as rescission, reformation, and partial performance, is improper to resolve a dispute arising out of the decree.[9] *See Vaile*, 128 Nev. at 33 n.7, 268 P.3d at 1276 n.7. Nevertheless, other cases have treated agreement-based decrees as contracts and directly applied contract interpretation principles without addressing the propriety of doing so. *See, e.g.*, *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003). Thus, the extent to which contract principles may apply to interpret an agreement-based decree is somewhat unclear under current Nevada law. In this regard, two cases are instructive.

In *Aseltine v. Second Judicial District Court*, 57 Nev. 269, 271-72, 62 P.2d 701, 701-02 (1936), the parties agreed to reduce the husband's alimony obligation should his income be reduced, and

[9]Generally, when the district court approves and adopts the parties' agreement into the decree of divorce, the agreement merges into the decree unless both the decree and the agreement contain a clear and direct expression that the agreement will survive the decree. *Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964). And when an agreement is merged into a decree of divorce, it loses its character as an independent agreement and the parties' rights "rest solely upon the decree." *Id*. at 389, 395 P.2d at 322. Merger is not an issue in this case.

that agreement was merged into the divorce decree. Subsequently, the husband sought a reduction in alimony based on the provision, but the district court denied that request, finding that it would be an impermissible modification of the decree. *Id*. at 272, 62 P.2d at 702.

In reviewing the district court's decision, the Nevada Supreme Court explained that it needed to interpret the decree in order to determine whether the decree permitted the change to the alimony.[10] *Id*. And in order to interpret the decree, the *Aseltine* court examined the district court's intent, noting that, when there was ambiguity in a decree, the reviewing court could look to the record as a whole and the surrounding circumstances to determine the district court's intent. *Id.* at 273, 62 P.2d at 702. Moreover, the *Aseltine* court came to the conclusion that, in entering the decree, it must have been "the intention of the [district] court . . . that the agreement of the parties should be given effect according to its intent and spirit." *Id.* at 274, 62 P.2d at 702. The supreme court determined that the parties had intended to permit the subsequent change to the alimony. *Id.* at 274, 62 P.2d at 702-03. Thus, the supreme court held that the district court's denial of the husband's request for a reduction in alimony based on that provision was improper. *Id*.

Similarly, in *Murphy*, the parties agreed to alimony terms and their agreement was merged into their divorce decree. 64 Nev. at 442, 183 P.2d at 633. In particular, the agreement provided for a reduced alimony obligation if the husband's military rank reverted from Brigadier General to Lieutenant Colonel. *Id*. at 443, 451-52, 183 P.2d at 633, 637-38. Several years later, the husband's rank reverted to Lieutenant Colonel for one day, after which he was promoted to Colonel, the rank between Brigadier General and Lieutenant Colonel. *Id.* Thereafter, the husband apparently asserted that his alimony should be reduced under the divorce decree, and the wife moved the district court to construe the alimony provision as providing that the one-day reversion to Lieutenant Colonel, followed by the promotion to Colonel, was not the type of reversion contemplated by the divorce decree. *Id*. at 443, 183 P.2d at 633. The district court granted the motion for clarification and held that this one-day reversion did not trigger the reduced alimony obligation. *Id*. at 443-44, 183 P.2d at 634.

On appeal, the *Murphy* court held that the district court had properly applied certain interpretation principles to construe the terms of the decree, including the principles that agreements and their resulting decrees "should be construed fairly and reasonably, and not too

[10]At times, the *Aseltine* court spoke of modifying the provision in the divorce decree, but because the court merely construed the decree and modified the alimony based on that construction, it was not accurate to say that the decree itself was modified. *See Aseltine*, 57 Nev. at 272-74, 62 P.2d at 702-03; *see also Murphy*, 64 Nev. at 449-50, 183 P.2d at 636-37 (recognizing that the underlying motion in *Aseltine* did not actually seek a modification of the decree).

strictly or technically." *Id.* at 452-53, 183 P.2d at 638. Further, like the *Aseltine* court, the *Murphy* court also noted that an agreement underlying a decree should be construed as meaning what it could be reasonably inferred that the parties intended it to mean. *Id.* at 453, 183 P.2d at 638.

[Headnotes 14-16]

Thus, *Murphy* and *Aseltine* demonstrate that, as in contract interpretation cases, *see Galardi*, 129 Nev. at 310, 301 P.3d at 367 ("Contract interpretation strives to discern and give effect to the parties' intended meaning."), a court that is called upon to clarify the meaning of a disputed term in an agreement-based decree must consider the intent of the parties in entering into the agreement.[11] *See Murphy*, 64 Nev. at 453, 183 P.2d at 638; *Aseltine*, 57 Nev. at 274, 62 P.2d at 702; *see also Harrison*, 132 Nev. at 570, 376 P.3d at 177 (refusing to construe a provision in a stipulated parenting agreement in a manner that would restrict the meaning of the provision because to do so would "risk[ ] trampling the parties' intent" as demonstrated by the language of the written agreement). And in doing so, the court may look to the record as a whole and the surrounding circumstances to interpret the parties' intent. *See Aseltine*, 57 Nev. at 273, 62 P.2d at 702.

In this case, the district court adopted the default schedule, but there is no indication in the record that the parties intended for the default schedule to apply when they entered into their agreement. In particular, nothing in the divorce decree referenced the default schedule, and neither party asserted that they had even been aware of the default schedule when they came to the agreement that led to

[11]Of course, where, as here, the matter concerns child custody, a court must also be mindful of whether the impact of the agreement is in the child's best interest because, "[i]n Nevada, as in other states, the best interest of the child is the paramount concern in determining the custody and care of children." *St. Mary*, 129 Nev. at 654, 309 P.3d at 1033; *see* NRS 125C.0035(1) ("In any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child."); *Harrison*, 132 Nev. at 568, 376 P.3d at 174 (noting that the "paramount public policy concern in child custody matters" is "the best interest of the child"). Indeed, as far back as 1927, the Nevada Supreme Court has recognized that a district court could go so far as to reject an agreement reached by parents if the court determined that the agreement was not in the child's best interest. *See Atkins v. Atkins*, 50 Nev. 333, 338-39, 259 P. 288, 289-90 (1927) (affirming the district court's rejection of the parties' agreement to waive child support where the court concluded that the agreement was not for the good of the child), *superseded by statute on other grounds as stated in Lewis v. Hicks*, 108 Nev. 1107, 1111-12, 843 P.2d 828, 831 (1992). Nevertheless, the court's involvement with a parenting agreement should be exercised cautiously in light of the presumption that fit parents act in their children's best interests, *St. Mary*, 129 Nev. at 658, 309 P.3d at 1035, and the principle that the state generally may only limit parental authority when severe concerns, such as protecting a fundamental right or the safety of the parties' child, are at stake. *Harrison*, 132 Nev. at 569, 376 P.3d at 176.

the decree, much less that they had meant for that schedule to apply to their arrangement.

Instead, in seeking clarification of the decree, the parties each made allegations suggesting that they had a particular intent when they reached the agreement regarding the Jewish holidays. In particular, Eli's arguments suggested that Diane was aware of all of the Jewish holidays and agreed to give him parenting time on those days because he gave up certain other rights. Diane, on the other hand, disputed Eli's explanation as to why he gave up certain other rights and contended that she was unaware of many of the holidays now sought by Eli because he did not celebrate those holidays during their marriage. These assertions on both sides present factual questions that should have been considered by the district court to address the parties' intentions in giving Eli parenting time on the Jewish holidays.

Despite these factual issues, the district court did not hold an evidentiary hearing or take any evidence to determine the intent of the parties when they formed the agreement. Indeed, nothing in the record before us indicates that the court even attempted to discern the intent of the parties at all. Instead, the court made its decision based upon contradictory sworn pleadings, arguments of counsel,[12] and its own independent Internet research. In light of the foregoing discussion, we conclude the district court should have held an evidentiary hearing to determine the parties' intent at the time they agreed to share parenting time based upon the term "the Jewish holidays."[13] *See Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 646, 837 P.2d 1354, 1360 (1992) (concluding that an evidentiary hearing may be necessary in order to determine disputed questions of fact); *see also* EDCR 2.21(a) (stating that an evidentiary hearing may be held to resolve disputed factual contentions raised in affidavits and declarations that support motions); EDCR 5.25(b) (stating that factual contentions in family law matters must be presented to the court pursuant to EDCR 2.21). And because the district court failed to

[12]We note that arguments of counsel are not evidence. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014).

[13]Eli argues that, if the agreement is ambiguous, it should be construed against Diane because her attorney drafted the divorce decree. *See Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007) (providing that ambiguities in a contract are generally construed against the drafter). It is not clear from the authority we have considered whether it would be appropriate to apply that particular principle of contract interpretation to a case involving the interpretation of a custody decree. Nevertheless, once the district court takes evidence as to the underlying facts and the parties' intent, it may be able to resolve the ambiguity without resorting to construing it against Diane based on her attorney drafting the divorce decree. Thus, we do not reach Eli's argument that the agreement should be construed against Diane on that basis.

resolve the underlying factual issues or ascertain the parties' intent as to what was encompassed by "the Jewish holidays," we conclude that the court erred by interpreting the holiday provision in the decree to include only the first day of the four designated Jewish holidays. *See Shelton*, 119 Nev. at 497, 78 P.3d at 510 (providing that the interpretation of an agreement-based divorce decree presents a question of law); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (providing that appellate courts conduct de novo review of questions of law).

CONCLUSION

As used in the parties' parenting agreement, the term, "the Jewish holidays," is ambiguous. The record, however, does not contain sufficient evidence to discern the parties' intent at the time of their agreement because the district court did not hold an evidentiary hearing to resolve the disputed factual issues. Therefore, we reverse the district court's decision construing the provision and remand this matter to the district court for further proceedings consistent with this opinion.

TAO and SILVER, JJ., concur.

JAMES DAEVON MANNING, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65856

September 15, 2016 382 P.3d 908

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The supreme court, PARRAGUIRRE, C.J., held that defendant was entitled to instruction for battery as lesser-included offense of battery with intent to commit crime.

Reversed and remanded.

Philip J. Kohn, Public Defender, and *William M. Waters*, Deputy Public Defender, Clark County, for Appellant.

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

1. Criminal Law.
   The district court has broad discretion to settle jury instructions, and the supreme court reviews the district court's decision for an abuse of that discretion or judicial error.
2. Criminal Law.
   Defendant was entitled to instruction for battery as lesser-included offense of battery with intent to commit crime, where he requested instruction, record indicated defendant's belief that he was seeking instruction for battery as lesser-included offense, battery instruction was consistent with his defense that he did not take anything from victim's pocket after he caused victim to fall, and there was some evidence to support theory that defendant committed simple battery, namely his testimony that he admitted making contact with victim and that victim fell as result, but that he did not take anything from victim's pocket. NRS 175.501.
3. Criminal Law.
   A district court should solicit written copies of a party's proposed instructions when settling jury instructions.
4. Criminal Law.
   A defendant need not demonstrate that a requested lesser-included-offense instruction would be consistent with his or her testimony or theory of defense. NRS 175.501.

Before the Court En Banc.[1]

OPINION

By the Court, Parraguirre, C.J.:

In this case, we are asked to determine whether appellant requested a lesser-included-offense instruction at trial and, if so, whether the district court erred in failing to provide the jury with such an instruction. We hold that appellant sufficiently requested an instruction on battery as a lesser-included offense of battery with intent to commit a crime and that the district court erred in denying appellant's request. Therefore, we reverse the judgment of conviction and remand for a new trial. Furthermore, although a district court may settle jury instructions in chambers pursuant to NRS 175.161(6), we advise the district courts to solicit written copies of proposed instructions in order to ensure a clear record on appeal.

FACTS

On March 29, 2013, appellant James Manning caused 62-year-old Thor Berg to fall down on a crowded bus. The details of this incident were disputed: Berg testified that he had felt a hand reach into his right pocket, and that a knee was pushed against the back of his leg; Manning admitted that he had walked past Berg "rough," which caused Berg to fall, but claimed that he did not take anything

[1]The Honorable Nancy M. Saitta, Justice, having retired, this matter was decided by a six-justice court.

from Berg or reach into Berg's pocket. Nonetheless, the contents of Berg's pocket went missing, including his identification, casino player's cards, and a small amount of cash. The State charged Manning with robbery, victim 60 years of age or older, and battery with intent to commit a crime (robbery).

In settling jury instructions, the district court asked defense counsel if she had any instructions the court was declining to give to the jury that she wanted marked as court exhibits. The following exchange took place:

> MS. PENSABENE: the last one your Honor, the last issue is that we had asked for a lesser included in this case. We are of the belief, based on the testimony of Mr. Berg and Ms. Borley's testimony it shows that the battery in this case is the force required in the robbery. We'd like that also included.
>
> THE COURT: The previous discussion we had on that was if I recall correctly I said that it may be that you can argue if he gets convicted of both crimes that the battery was subsumed into the force necessary to commit the robbery. I don't think that makes the battery a lesser included offen[s]e. It just make[s] the defense apply the alternative.
>
> So they can only adjudicate him on one or the other. So I'm very open to having that discussion if they convict. I think the State is entitled to put both charges forward. If the jury returns a verdict as to both, we'll speak about sentencing and adjudication. It may be he gets adjudicated on one.

After a three-day trial, the jury found Manning not guilty of robbery and guilty of battery with intent to commit a crime (robbery). Manning now appeals the judgment of conviction.

DISCUSSION

[Headnotes 1, 2]

Manning argues, inter alia, that he requested an instruction on battery as a lesser-included offense of battery with intent to commit a crime, and that the district court erred when it failed to give the instruction. We agree. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

[Headnote 3]

We take this opportunity to stress that a district court should solicit written copies of a party's proposed instructions when settling jury instructions. The above dialogue was the only information preserved regarding Manning's attempt to receive a lesser-included-offense instruction. The district court did ask for a written copy of some of Manning's rejected instructions, and Manning filed a doc-

ument titled "Defendant's Proposed Jury Instructions Not Used At Trial." However, the district court did not ask for a written copy of Manning's lesser-included-offense instruction, and Manning did not include the relevant instruction in his filing with the district court. Therefore, we must attempt to identify the nature of Manning's request from the context in which it was made.

Manning was charged with robbery and battery with intent to commit a crime. It is clear from the record that Manning sought an instruction on battery, and that Manning believed he was seeking a lesser-included-offense instruction. In addition, the parties concede that battery is not a lesser-included offense of robbery.[2] Therefore, Manning's request can reasonably be understood as a request for an instruction on battery as a lesser-included offense of battery with intent to commit a crime, despite the apparent confusion surrounding Manning's request.[3]

Furthermore, we hold that the district court committed judicial error in failing to provide the battery instruction. NRS 175.501 states in part that a "defendant may be found guilty . . . of an offense necessarily included in the offense charged." Accordingly, this court has held that "a defendant is entitled to a jury instruction on a lesser-included offense if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of that offense." *Rosas*, 122 Nev. at 1264-65, 147 P.3d at 1106 (internal quotation marks omitted).

[Headnote 4]

Although a defendant need not demonstrate that a requested lesser-included-offense instruction would be consistent with his or her testimony or theory of defense, *id.* at 1269, 147 P.3d at 1109, here, a battery instruction would have been entirely consistent with Manning's theory of defense. At trial, Manning admitted that he made physical contact with Berg when he walked "past him rough," and that Berg fell as a result. However, Manning denied attempting to take anything from Berg's pocket. Likewise, defense counsel ar-

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[2]*See Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (defining a lesser-included offense as an offense whose elements are "an entirely included subset of the elements of the charged offense," such that the charged offense cannot be committed without also committing the lesser offense), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1266 & n.22, 1269, 147 P.3d 1101, 1107 & n.22, 1109 (2006); *see also* NRS 200.380(1) (defining robbery in part as "the unlawful taking of personal property from the person of another . . . by means of force or violence or fear of injury, immediate or future, to his or her person or property"); NRS 200.481(1)(a) (defining battery as "any willful and unlawful use of force or violence upon the person of another").

[3]It appears the district court understood Manning's concern as one regarding the possibility of redundant convictions. We also note that defense counsel failed to correct the district court's misapprehension. Nonetheless, Manning clearly articulated a request for a lesser-included-offense instruction, and the district court should have addressed it as such.

gued in closing that Manning "pushed into the old man," and that doing so "was really rude," but that Manning never attempted to take any of Berg's possessions. Given Manning's testimony, there was some evidence, however slight, to support the theory that Manning committed a simple battery. *See Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) ("Evidence from the defendant alone need not be supported by other independent evidence.").

Therefore, we hold that Manning was entitled to an instruction on battery as a lesser-included offense of battery with intent to commit a crime, and that the district court erred in declining to give such an instruction. Furthermore, we reject the State's argument that the district court's error was harmless. *See McCraney v. State*, 110 Nev. 250, 255, 871 P.2d 922, 925 (1994) ("Failure to instruct the jury on a theory of the case supported by the evidence presented is reversible error."); *see also Williams*, 99 Nev. at 531, 665 P.2d at 261 ("If a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury's consideration and constitutes reversible error."). Accordingly, we reverse Manning's judgment of conviction and remand the matter for a new trial.[4]

HARDESTY, DOUGLAS, CHERRY, GIBBONS, and PICKERING, JJ., concur.

STELLA LOUISE SINDELAR, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 68789

September 29, 2016 382 P.3d 904

Appeal from a judgment of conviction, pursuant to a jury verdict, of driving while under the influence, a felony. Seventh Judicial District Court, White Pine County; Steven Dobrescu, Judge.

The supreme court, CHERRY, J., held that: (1) prior Utah conviction for driving under influence (DUI), which was third-degree felony due to two prior DUI convictions within ten years, could be used to enhance subsequent Nevada DUI offense to class B felony; (2) cross-examination of arresting officer regarding defendant's liberty interests was reversible error; (3) prosecutor's comments during closing argument that defense counsel "leashed in" witnesses during cross-examination and did not let witnesses answer questions be-

[4]Because we reverse Manning's conviction on this ground, we need not address his remaining arguments. *See Manuela H. v. Eighth Judicial Dist. Court*, 132 Nev. 1, 8 n.4, 365 P.3d 497, 502 n.4 (2016).

yond scope of his questions did not rise to level of prosecutorial misconduct; and (4) prosecutor's comment during closing argument that defense wanted jury to focus on arresting officer's conduct, rather than elements of charged offense was not prosecutorial misconduct.

Affirmed.

Sears Law Firm, Ltd., and *Richard W. Sears*, Ely, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Michael A. Wheable*, District Attorney, White Pine County, for Respondent.

1. Automobiles.

   Prior Utah conviction for driving under influence (DUI), which was third-degree felony due to two prior DUI convictions within ten years, prohibited same or similar conduct as Nevada DUI law, which made DUI felony if defendant suffered third conviction within seven years, and thus, subsequent Nevada DUI offense was class B felony, even though Utah's DUI law had longer look-back period; both Utah and Nevada prohibited driving under influence of intoxicating liquor, both states prohibited driving with blood-alcohol concentration at or above 0.08, both states classified third offense within statutorily prescribed recidivism window as felony, and three-year difference in look-back period did not change offending conduct. NRS 484C.110(1), 484C.400(1)(c); Utah Code Ann. §§ 41-6-44(2)(a), (6)(a)(i).

2. Criminal Law.

   When the defendant does not object to alleged instances of prosecutorial misconduct at trial, the supreme court reviews for plain error.

3. Criminal Law.

   Under plain-error review, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights by causing actual prejudice or a miscarriage of justice.

4. Criminal Law.

   In determining whether prosecutor engaged in misconduct rising to the level of plain error, the court begins by determining whether the prosecutor's conduct was improper.

5. Witnesses.

   Cross-examination of arresting officer regarding defendant's liberty interests should not have been allowed; importance of defendant's liberty interests was not relevant to whether State proved each element of offense of driving under influence beyond a reasonable doubt, and discussion of these liberty interests would only serve to confuse or inflame jury.

6. Criminal Law.

   A jury is tasked with finding whether, as a matter of fact, the State has proven each element of the charged offense(s) beyond a reasonable doubt, and in doing so, a jury may assess the weight of the evidence and determine the credibility of witnesses.

7. Criminal Law.

   Prosecutor's comments during closing argument that defense counsel "leashed in" witnesses during cross-examination and did not let witnesses answer questions beyond scope of his questions did not rise to level of prosecutorial misconduct in trial for felony driving under influence: prosecutor did not compare defense counsel to dog handler, as defendant alleged, although prosecutor could have used other terms like "prevented" or "reigned

in"; choice of words was not plainly prejudicial; and defendant did not indicate how those words prejudiced her substantial rights.

8. Criminal Law.

Prosecutor's comment during closing argument that defense wanted jury to focus on arresting officer's conduct, rather than elements of charged offense, was not prosecutorial misconduct in trial for felony driving under influence, but it was proper response to defense counsel's attempt to discredit arresting officer by arguing that he did not have requisite reasonable suspicion of criminal activity to justify stop, which had already been decided prior to trial and was not issue for jury to decide. U.S. Const. amend. 4.

Before Cherry, Douglas and Gibbons, JJ.

OPINION

By the Court, Cherry, J.:

Under Nevada law, a person's third conviction within seven years for driving under the influence (DUI) is a category B felony. NRS 484C.400(1)(c). Once a person has been convicted of felony DUI under the laws of this state or any other jurisdiction that prohibits the same or similar conduct, any subsequent DUI committed in Nevada is a category B felony, regardless of how much time has passed since the prior felony conviction. NRS 484C.410(1)(a), (d). The issue presented in this appeal is whether a felony DUI under Utah's statute that makes a third DUI conviction within ten years a felony can be used to make a subsequent DUI offense in Nevada a category B felony under NRS 484C.410. We hold that although the recidivism window is longer in Utah, the conduct required to violate the law is "the same or similar" as the conduct required in Nevada. Accordingly, a prior felony DUI in Utah satisfies NRS 484C.410(1)(d) for the purposes of adjudicating any subsequent violation of NRS 484C.110 or 484C.120 as a felony. Because this and appellant Stella Sindelar's other claims lack merit, we affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

On December 28, 2002, Stella Sindelar was cited for driving under the influence of alcohol in Utah. Because she had at least two prior DUI convictions within the preceding ten years, the offense was a third-degree felony under Utah law.[1] *See* Utah Code Ann. § 41-6-44(6)(a)(i) (LexisNexis 1998).[2] On May 10, 2004, Sindelar

[1]The record is unclear as to the exact dates of the two prior DUI convictions; however, at least one such conviction occurred more than seven years before the 2002 arrest, but less than ten years.

[2]Under current Utah law, the DUI recidivism statute has been recodified as Utah Code § 41-6a-503(2)(b).

pleaded guilty to the felony charge, spent 62 days in a Utah jail, and had her prison sentence suspended.

In March 2013, Sindelar was arrested for suspicion of driving under the influence of alcohol in Ely. While in custody, police drew Sindelar's blood to test for alcohol; the test results were positive. The State subsequently charged Sindelar with felony DUI because of her 2004 felony conviction in Utah. She was convicted after a two-day jury trial. At sentencing, the district court determined that Sindelar's 2004 felony DUI conviction in Utah was a violation involving "the same or similar conduct" as Nevada's felony DUI statute and adjudicated the current offense as a category B felony. The district court sentenced Sindelar to a term of 30 to 75 months in prison.

DISCUSSION

Sindelar makes only two arguments on appeal. First, she argues that the 2004 DUI conviction would have only been a misdemeanor had it occurred in Nevada, rather than Utah, and therefore the instant offense should not have been adjudicated as a felony under NRS 484C.410. Second, Sindelar argues that the State committed prosecutorial misconduct during her trial.

Utah's DUI laws contain a longer recidivism window but punish the same or similar conduct as Nevada's DUI laws

[Headnote 1]

Sindelar argues that using her 2004 felony conviction to enhance the instant DUI to a felony is improper because, despite the fact that the 2004 conviction was a felony in Utah, it would have been a misdemeanor under Nevada law. The State argues that although Nevada has a shorter window to enhance a third DUI to a felony, the critical inquiry is whether both statutes punish the same conduct, i.e., repeat DUI offenses. We agree with the State.

To sustain a felony conviction for DUI in Nevada based on Sindelar's Utah DUI conviction, the Utah statute must punish the same or similar conduct as that proscribed by NRS 484C.110. That issue is a question of law; therefore, we review it de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). The criminalized conduct need not be identical in order to satisfy NRS 484C.410(1)(d). *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). The conduct may merely be the same "kind or species." *Id.* In *Blume*, we considered whether California's DUI statute punishing driving with a blood-alcohol concentration of 0.08 or higher constitutes the same or similar conduct as Nevada's DUI laws, even though Nevada's DUI statutes then utilized a higher minimum blood-alcohol concentration of 0.10. *Id.* at 474, 915 P.2d at 283. We concluded that "driv-

ing under the influence of intoxicating liquor in California, even though the blood alcohol weight in California [was] 0.02 percent lower than in Nevada constitute[d] 'the same or similar conduct' as driving under the influence of intoxicating liquor in Nevada." *Id.* at 475, 915 P.2d at 284 (quoting *Jones v. State*, 105 Nev. 124, 126-27, 771 P.2d 154, 155 (1989)).

Here, the prohibited conduct is essentially the same in Nevada's law and Utah's law. Utah prohibits driving while incapable of safely operating a vehicle due to alcohol consumption. Utah Code Ann. § 41-6-44(2)(a) (LexisNexis 1998). Nevada prohibits driving under the influence of intoxicating liquor. NRS 484C.110(1). Both states prohibit driving with a blood-alcohol concentration at or above 0.08. *Id*.; Utah Code Ann. § 41-6-44(2)(a) (LexisNexis 1998). Additionally, both states classify a third offense within a statutorily prescribed recidivism window as a felony, the only difference being that Nevada's recidivism window is seven years, NRS 484C.400(1)(c), while Utah's recidivism window is ten years, Utah Code Ann. § 41-6-44(6)(a)(i) (LexisNexis 1998). The length of the recidivism window, however, does not change the offending conduct. Because Utah's DUI recidivism statute prohibits the same or similar conduct as NRS 484C.110(1) and NRS 484C.400(1)(c), Sindelar's Utah felony conviction satisfies NRS 484C.410(1)'s mandate that the instant offense be deemed a category B felony. Accordingly, the district court correctly adjudicated Sindelar's instant offense as a felony.

Sindelar's prosecutorial misconduct claims are without merit

Sindelar argues that the prosecutor committed misconduct by objecting to the defense's cross-examination of a prosecution witness regarding Sindelar's liberty interests and by arguing that defense counsel "leashed in" witnesses during cross-examination and wanted the jury to focus on irrelevant facts, draw fancy inferences, and imagine doubt based on speculation. We disagree.

[Headnotes 2-4]

Sindelar did not object to any of the alleged instances of prosecutorial misconduct at trial. Accordingly, we review for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) ("When an error has not been preserved, this court employs plain-error review."). Under plain-error review, "an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *Id.* (internal quotations omitted). We begin by "determin[ing] whether the prosecutor's conduct was improper." *Id.* at 1188, 196 P.3d at 476 (footnotes omitted).

[Headnotes 5, 6]

The first challenged conduct—the State's objection to defense counsel's line of questioning during cross-examination of the arresting officer—was not improper. At trial, defense counsel asked the arresting officer if he understood that the case was important because it affected Sindelar's "liberty interests." The State objected, arguing that considering the defendant's "liberty interests" was not within the jury's function. The trial court sustained the objection. A jury is tasked with finding whether, as a mtter of fact, the State has proven each element of the charged offense(s) beyond a reasonable doubt. *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). In doing so, a jury may "assess the weight of the evidence and determine the credibility of witnesses." *Id.* at 202-03, 163 P.3d at 414 (internal quotation marks omitted). Discussion of Sindelar's "liberty interests" is irrelevant to whether she committed the offense and would only serve to confuse or inflame the jury. NRS 48.035. Therefore, questions regarding Sindelar's "liberty interest" should not have been asked in front of the jury. As such, the State was well within its right to object to defense counsel's line of questioning regarding "liberty interests." Moreover, Sindelar fails to demonstrate that her inability to question witnesses regarding her "liberty interests" prejudiced her substantial rights.

[Headnote 7]

The challenged comments during closing argument also were not improper. The State argued that certain witnesses were prevented from giving full answers on cross-examination because defense counsel prevented them from answering beyond the scope of his questions. Although the State used the phrase "leashed in" when describing how defense counsel handled the two witnesses, the State did not compare defense counsel to a dog handler, as Sindelar alleges. Although the State could have as easily said something like "prevented" or "reigned in," its choice of words is not plainly prejudicial, nor does Sindelar indicate how those words prejudiced her substantial rights.

[Headnote 8]

Finally, Sindelar's allegation that the State committed misconduct when it argued that the defense wanted the jury to focus on the arresting officer's conduct, rather than the elements of the charged offense, is unpersuasive. Defense counsel sought to discredit the arresting officer by arguing that he never had the requisite reasonable suspicion to stop Sindelar, let alone probable cause to arrest her. Those issues of law were decided before trial and were not for the jury to consider. *See Rose*, 123 Nev. at 202, 163 P.3d at 414. Because the issue of reasonable suspicion to stop Sindelar was outside the jury's scope, the State was well within its right to try to refocus the

jury on the elements of the offense and whether the State proved those elements beyond a reasonable doubt. Therefore, Sindelar has not demonstrated plain error affecting her substantial rights. Accordingly, we order the judgment of conviction affirmed.

DOUGLAS and GIBBONS, JJ., concur.

CASHMAN EQUIPMENT COMPANY, A NEVADA CORPORATION, APPELLANT, *v.* WEST EDNA ASSOCIATES, LTD., DBA MOJAVE ELECTRIC, A NEVADA CORPORATION; WESTERN SURETY COMPANY, A SURETY; AND THE WHITING TURNER CONTRACTING COMPANY, A MARYLAND CORPORATION, RESPONDENTS.

No. 61715

CASHMAN EQUIPMENT COMPANY, A NEVADA CORPORATION, APPELLANT, *v.* WEST EDNA ASSOCIATES, LTD., DBA MOJAVE ELECTRIC, A NEVADA CORPORATION; WESTERN SURETY COMPANY, A SURETY; THE WHITING TURNER CONTRACTING COMPANY, A MARYLAND CORPORATION; QH LAS VEGAS LLC, A FOREIGN LIMITED LIABILITY COMPANY; PQ LAS VEGAS, LLC, A FOREIGN LIMITED LIABILITY COMPANY; LWTIC SUCCESSOR LLC, AN UNKNOWN LIMITED LIABILITY COMPANY; AND FC/LW VEGAS, A FOREIGN LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 65819

CASHMAN EQUIPMENT COMPANY, A NEVADA CORPORATION, APPELLANT, *v.* WEST EDNA ASSOCIATES, LTD., DBA MOJAVE ELECTRIC, A NEVADA CORPORATION; WESTERN SURETY COMPANY, A SURETY; THE WHITING TURNER CONTRACTING COMPANY, A MARYLAND CORPORATION; QH LAS VEGAS LLC, A FOREIGN LIMITED LIABILITY COMPANY; PQ LAS VEGAS, LLC, A FOREIGN LIMITED LIABILITY COMPANY; LWTIC SUCCESSOR LLC, AN UNKNOWN LIMITED LIABILITY COMPANY; AND FC/LW VEGAS, A FOREIGN LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 66452

September 29, 2016 380 P.3d 844

Consolidated appeals from a district court injunction, final judgment, and post-judgment attorney fees and costs order in a construction contract dispute. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Bottom-tiered subcontractor, which held mechanic's lien for labor and services that it provided for city hall construction contract, brought action against general contractor and top-tiered subcontractor for foreclosure of security interest. Following bench trial, the district court awarded bottom-tiered subcontractor reduced damages for foreclosure of security interest. Bottom-tiered subcontractor appealed. The supreme court, CHERRY, J., held that: (1) as a matter of apparent first impression, unconditional waiver and release, under which bottom-tiered subcontractor received payment in the form of a check from middle-tiered subcontractor in exchange for release of bottom-tiered subcontractor's mechanic's lien, were void pursuant to statutory provision voiding waivers and releases of mechanics' liens when payment fails; (2) as a matter of apparent first impression, equitable fault analysis could not be used to reduce award in favor of bottom-tiered subcontractor for foreclosure of security interest; and (3) top-tiered subcontractor did not present substantial evidence that paying bottom-tiered subcontractor was impossible or impracticable, and thus, the district court's finding that impossibility defense was available would be set aside.

Reversed and remanded with instructions.

Howard & Howard Attorneys PLLC and *Jennifer R. Lloyd, Brian J. Pezzillo*, and *Marisa L. Maskas*, Las Vegas, for Appellant.

Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson and *Brian W. Boschee* and *William N. Miller*, Las Vegas, for Respondents.

1. MECHANICS' LIENS.
   Statutory provision, voiding waiver and release of mechanic's lien if payment given in exchange for waiver and release fails to clear the bank, precludes enforcement of the release when the check given in exchange for the release is not honored by the payor's bank. NRS 108.2457(5)(e).
2. MECHANICS' LIENS.
   Unconditional waiver and release, under which bottom-tiered subcontractor received payment in the form of a check from middle-tiered subcontractor in exchange for release of bottom-tiered subcontractor's mechanic's lien against middle-tiered and top-tiered subcontractors, were void under statutory provision voiding waivers and releases of mechanics' liens when payment fails; although top-tiered subcontractor's check to middle-tiered subcontractor for work on city hall construction project provided by bottom-tiered subcontractor cleared the bank, middle-tiered subcontractor's check to bottom-tiered subcontractor failed to clear the bank. NRS 108.2457(5)(e).
3. APPEAL AND ERROR.
   The supreme court reviews a lower court's interpretation of a contract de novo when the facts in a case are not disputed.
4. APPEAL AND ERROR.
   The supreme court reviews questions of statutory construction de novo.

5. Mechanics' Liens.
   Public policy favors the statutory right to a mechanic's lien. NRS 108.221 *et seq.*
6. Mechanics' Liens.
   Mechanic's lien statutes are remedial in character and should be liberally construed. NRS 108.221 *et seq.*
7. Mechanics' Liens.
   Even though Nevada prefers to enforce mechanics' liens, the statutory rights to mechanics' liens may be waived. NRS 108.2457(5)(e).
8. Mechanics' Liens.
   The purpose of the mechanic's lien statutes is to ensure payment to those who supply materials and labor on a project. NRS 108.221 *et seq.*
9. Mechanics' Liens.
   Equitable fault analysis could not be used to reduce award in favor of bottom-tiered subcontractor, which held mechanic's lien for labor and supplies that it provided on city hall construction project, for foreclosure of security interest in action against top-tiered subcontractor; although top-tiered subcontractor already paid middle-tiered subcontractor for services provided by bottom-tiered subcontractor and did not have contract with bottom-tiered subcontractor, top-tiered subcontractor benefited from bottom-tiered subcontractor's services, and bottom-tiered subcontractor derived its rights as lienholder through statutory law, which did not protect top-tiered subcontractor. NRS 108.221 *et seq.*
10. Public Contracts.
    Top-tiered subcontractor did not present substantial evidence that paying bottom-tiered subcontractor, which held mechanic's lien, for services it provided on city hall construction project was impossible or impracticable, and thus, the district court's finding that the impossibility defense was available would be set aside on appeal in action brought by bottom-tiered subcontractor for foreclosure of security interest; although top-tiered subcontractor raised defense in its answer, it did not present any evidence at trial that issuing payment was impossible or that middle-tiered subcontractor's failure to tender proper payment to bottom-tiered subcontractor was unforeseen.
11. Appeal and Error; Evidence.
    The supreme court will not set aside a district court's factual findings unless the findings are not supported by substantial evidence, which is evidence that a reasonable mind might accept as adequate to support a conclusion.
12. Action.
    The supreme court will generally not decide moot cases.
13. Action.
    A case is moot if it seeks to determine an abstract question that does not rest upon existing facts or rights.
14. Action.
    Mootness is a question of justiciability.
15. Action.
    A dispute must continue through all of the controversy's phases or the case will become moot.
16. Action.
    A case may become moot due to successive occurrences despite the existence of a live controversy at the beginning of the litigation; however,

the supreme court may consider an issue that involves a matter of widespread importance that is capable of repetition, yet evading review.

17. ACTION.

A party seeking to overcome mootness must prove that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

[Headnote 1]

In this matter, we consider whether an unconditional release from a bottom-tiered contractor (Cashman) to a higher-tiered contractor (Mojave) is enforceable when the higher-tiered contractor properly paid the middle-tiered contractor (Cam) but the middle-tiered contractor failed to pay the bottom-tiered contractor. We conclude that NRS 108.2457(5)(e) precludes enforcement of the release when the check given in exchange for the release is not honored by the payor's bank. Although the check that Mojave gave to Cam for payment to Cashman cleared the bank, the check that Cam gave to Cashman did not clear the bank. Therefore, the unconditional release that Cashman gave to Cam and Mojave is void.

We also consider whether equitable fault analysis may be used to reduce an award in a mechanic's lien case. Based on this court's decision in *Lamb v. Goldfield Lucky Boy Mining Co.*, 37 Nev. 9, 16, 138 P. 902, 904 (1914) (holding that "equity jurisprudence" "ha[s] no place" in determining the rights of a mechanic's lienholder), we conclude that it may not.

Therefore, we reverse the decision of the district court and remand this case to the district court to recalculate Mojave's liability to Cashman with instructions that the unconditional release is void. Following recalculation, the parties may move the district court for attorney fees and costs as Nevada law permits.

FACTS

This case stems from the new Las Vegas City Hall construction project. Respondent Mojave was chosen to be the electrical subcontractor for the project. Mojave contracted with Western Surety to provide a payment bond and, later, a mechanic's release bond for this project. Mojave accepted a bid from appellant Cashman to

[1]THE HONORABLE NANCY M. SAITTA, Justice, having retired, this matter was decided by a six-justice court.

provide specialty materials for the emergency standby power for the building. The general contractor, respondent Whiting Turner, required that Mojave involve disadvantaged business entities (DBE) in the project. Therefore, instead of contracting directly with Cashman for the services and materials, Mojave contracted with Cam and Cam contracted with Cashman. Mojave also paid Cam for the labor and supplies that Cashman provided.

In exchange for an unconditional release from Cashman to Cam and Mojave, Cashman received payment via a check from Cam, but Cam stopped payment on the check. Cam gave Cashman a second check for payment, but the check was returned for insufficient funds. Cashman made additional attempts to secure payment from Cam to no avail. Upon realizing that payment was not forthcoming, Cashman filed a mechanic's lien for $755,893.89, ceased working on the project, and then filed suit. Cashman and Mojave later learned that Angelo Carvalho, Cam's owner, absconded with the funds from Mojave, which should have been forwarded to Cashman. The parties proceeded to a bench trial, and the district court awarded Cashman $197,051.87 for foreclosure of security interest and $86,600 for unjust enrichment, to be paid once Cashman enters the codes for the electrical systems to communicate with each other. Following trial, the district court denied both parties' motions for fees and costs. Cashman's appeal followed.

On appeal, Cashman argues that the district court erred (1) when it declined to enforce Cashman's mechanic's lien and upheld the unconditional waiver despite lack of payment; (2) when it denied Cashman's claim for recovery through the payment bond because the court applied the defense of impossibility despite Mojave's failure to prove that its performance was impossible, or that Cam's failure to pay was not an unforeseen contingency; (3) in reducing Cashman's award based on equitable fault and by requiring completed performance to receive the award; (4) when it issued a preliminary injunction for Cashman to input codes for the electrical system, even though the district court found that Cashman was likely to prevail on the merits; and (5) when it denied Cashman's motions for attorney fees and costs, even though Cashman prevailed at trial.[2]

[2]In their answering brief, but without cross-appealing, the respondents seek affirmative relief on multiple claims. NRAP 3(a)(1) dictates that "an appeal permitted by law from a district court may be taken *only by filing a notice of appeal* with the district court clerk within the time allowed by Rule 4." (Emphasis added.) This court has clarified that cross-appeals are not exempt from NRAP 3(a)(1). *See Mahaffey v. Investor's Nat'l Sec. Co.*, 102 Nev. 462, 463-64, 725 P.2d 1218, 1219 (1986) (noting "that every appeal, including a cross-appeal, must be commenced by the filing of a timely notice of appeal"). We therefore decline to consider the issues they raised in their answering brief.

DISCUSSION

Whether the district court erred in denying recovery to Cashman on its mechanic's lien claim by enforcing an unconditional waiver

[Headnote 2]

In its findings of fact and conclusions of law following the bench trial, the district court enforced the unconditional waiver and release that Cashman executed, determining that Mojave's payment to Cam constituted payment to Cashman and made Cashman's waiver enforceable. Cashman argues that the district court erred when it enforced the waiver and release of the mechanic's lien because the plain language of NRS 108.2457(5)(e) states that when a payment fails, the waiver and release are void.

[Headnotes 3, 4]

We review a lower court's interpretation of a contract de novo when the facts in a case are not disputed. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008). In the instant case, the parties do not dispute the relevant facts. We also review questions of statutory construction de novo. *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013).

[Headnotes 5, 6]

"Nevada's public policy favor[s] the statutory right [in NRS Chapter 108] to a mechanic's lien." *Lehrer*, 124 Nev. at 1106, 197 P.3d at 1035. This court has explained that the lien statutes' purpose is to ensure "payment to those who perform labor or furnish material to improve the property of the owner." *Id.* at 1115, 197 P.3d at 1041 (internal quotations omitted). "[M]echanic's lien statutes are remedial in character and should be liberally construed." *Id.* (internal quotations omitted). This court has also explained the reasoning for Nevada's policy supporting mechanic's liens:

> Underlying the policy in favor of preserving laws that provide contractors secured payment for their work and materials is the notion that contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment.

Id. at 1116, 197 P.3d at 1041.

[Headnote 7]

Even though Nevada prefers to enforce mechanics' liens, these statutory rights may be waived. *Id.* However, this court has held that the district court must "engage in a public policy analysis particular to each lien waiver provision that the court is asked to enforce." *Id.*

NRS 108.2457(5)(e) states as follows:

> Notwithstanding *any* language in *any* waiver and release form set forth in this section, if the payment given in exchange for *any* waiver and release of lien is made by check, draft or other negotiable instrument, and the same fails to clear the bank on which it is drawn *for any reason*, then the waiver and release *shall* be deemed *null, void and of no legal effect whatsoever* and all liens, lien rights, bond rights, contract rights or *any other right* to recover payment afforded to the lien claimant in law or equity will not be affected by the lien claimant's execution of the waiver and release.

(Emphases added.)

We have not yet specifically decided whether an unconditional release can be used to waive the statutory rights in NRS 108.2457(5)(e), but our reasoning in *Lehrer*, where we determined that a "pay-if-paid" provision in a contract was unenforceable because such provisions "violate public policy," 124 Nev. at 1117-18, 197 P.3d at 1042, applies here. At the time the *Lehrer* parties entered into the contract containing the pay-if-paid provision, the Legislature had not yet made such provisions unenforceable. *Id.* at 1117, 197 P.3d at 1042. Nonetheless, we concluded that pay-if-paid provisions could preclude a subcontractor from being "paid for work already performed." *Id.*

[Headnote 8]

The purpose of the mechanic's lien statutes is to ensure payment to those who supply materials and labor on a project, *see id.* at 1115, 197 P.3d at 1041, so Nevada's public policy disfavors the enforcement of the unconditional release in this case. Like in *Lehrer*, Cashman signed a waiver that could potentially leave Cashman unpaid even though it had performed pursuant to its contract with Cam.[3]

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[3]The unconditional waiver and release upon final payment states, in pertinent part, as follows:

> The undersigned has been paid in full for all work, materials and equipment furnished to his Customer for the above-described Property and does hereby waive and release any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above-described Property, except for the payment of Disputed Claims, if any, noted above. The undersigned warrants that he either has already paid or will use the money he receives from this final payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials and equipment that are the subject of this waiver and release.
>
> **NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR**

Enforcing the unconditional waiver here would violate Nevada's public policy, just like the pay-if-paid provision in the contract at issue in *Lehrer* violated public policy. And the very clear language of NRS 108.2457(5)(e) dictates that the waiver is void and unenforceable because Cashman never received payment. Here, Cashman's agent testified at trial that he executed the lien release believing, despite the waiver language contained in the release, Nevada law would protect Cashman if Cam's check did not clear the bank. The parties do not dispute that Cam's check to Cashman did not clear the bank. Therefore, the waiver is void. Just as we refused to enforce the pay-if-paid provision in *Lehrer*, we likewise refuse to enforce Cashman's release.

We also conclude that the district court erred in finding that Mojave's payment to Cam constituted payment to Cashman. The district court reasoned that because Mojave's check to Cam cleared, the unconditional release is enforceable. Yet the district court's reasoning completely subverts Nevada's public policy of ensuring that lower-tiered subcontractors are paid. Cashman's agent certainly did not execute the release because Mojave paid Cam. Cashman's agent testified that he executed the release because Cashman received a check from Cam. The agent further testified that he executed the release with the understanding that if the check failed to clear, the release would be unenforceable pursuant to NRS 108.2457(5)(e).

The statute specifically precludes enforcing a waiver when, in exchange for the release, payment "is made by check, draft or other such negotiable instrument, and the same fails to clear the bank on which it is drawn *for any reason*." NRS 108.2457(5)(e) (emphasis added). When the payment fails, "the waiver and release *shall* be deemed *null, void and of no legal effect whatsoever*." *Id.* (emphases added). Because Cashman executed the release in exchange for the payment it received from Cam (and not the payment that Cam received from Mojave), and because Cam's payment failed to clear the bank, the release is void and we reverse the district court's decision and remand this case for a new trial consistent with this opinion.

Whether the district court erred in reducing Cashman's award on its mechanic's lien and resulting security interest claim using an equitable fault analysis

[Headnote 9]

The district court ruled in favor of Cashman on its claim for foreclosure of security interest. The court ordered that "Cashman is *in a position* to collect the amount owed, as provided in its lien,

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GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

$683,726.89, less any amount Cashman would receive from the escrow account for finalizing the codes." (Emphasis added.) However, the court conducted an equitable fault analysis and found that, although "both Mojave and Cashman are innocent victims here, . . . Cashman is sixty-seven percent (67%) responsible and Mojave is thirty-three percent (33%) responsible for Cam and Mr. Carvalho's actions" that resulted in Cashman not being paid. Based on its findings, the district court reduced Cashman's award to $197,051.87.

Cashman argues that the district court should not have conducted an equitable fault analysis in calculating contract damages. It further contends that the district court erred when it conditioned payment to Cashman on Cashman completing work on the project because it had already earned the amount set by contract.

Whether equitable fault can be used to reduce a security interest or a mechanic's lien appears to be an issue of first impression in Nevada. However, our opinion in *Lamb v. Goldfield Lucky Boy Mining Co.*, 37 Nev. 9, 138 P. 902 (1914), is instructive. There, this court considered whether "the mining property of a lessor [can] be held liable for materials furnished and labor performed on the property at the instance or request of the lessee." *Id.* at 12, 138 P. at 903. A lien claimant, the appellant, sought to enforce his mechanic's lien against the owner of a mine. *Id.* at 10, 138 P. at 902. The lien claimant contracted with the lessee of the mine to provide materials that benefited the mine. *Id.* The owner of the mine was not a party to the contract, but the owner was aware that the lien claimant was providing materials. *Id.* at 11, 138 P. at 902. Because neither the lessee nor the lessor would pay for the materials provided, the lien claimant sued the mine owner, the lessor, in district court. *Id.* The district court declined to enforce the lien and held "that, in order to make the owner of the property responsible personally for the indebtedness, the work must have been done for that owner himself." *Lamb*, 37 Nev. at 11, 138 P. at 903.

This court reversed the district court's order and explained that "equity jurisprudence" "ha[s] no place" in determining the rights of a mechanic's lienholder. *Id.* at 16, 18, 138 P. at 904, 905. The *Lamb* court favorably cited to a California Supreme Court case, which noted as follows:

> The purpose of the [lien] statute obviously is to allow a lien for mining work done upon a mine against the estate or interest therein of the person who is to be benefited thereby, whether done directly for him and at his request, or indirectly for his benefit, at the request of some other person operating in pursuance of some express or implied contract with him.

Id. at 15, 138 P. at 904 (internal quotations omitted).

This case is similar to *Lamb*, and we conclude that its holding applies. Just as the appellant and the respondent in *Lamb* did not have a contract, Cashman does not have a contract with any of the respondents in this matter. However, Cashman's work and materials benefited the respondents, like the lien claimant's work benefited the mine owner in *Lamb*. *See id.* at 15-16, 138 P. at 904. The record before us reveals that Mojave accepted Cashman's bid for the City Hall project, and Mojave and Cashman originally intended to contract for the project. Cam was only inserted between Mojave and Cashman as an afterthought to fulfill the City's DBE requirement. Cashman and Mojave had a relationship respecting this project several months before a DBE was injected into the equation. Mojave expected to benefit from Cashman's materials and services, and did benefit, so the relationship between Cashman and Mojave is even less tenuous than the relationship between the appellant and the respondent in *Lamb*. As Cashman derives its rights as a lienholder through Nevada statutory law, not the common law, equitable considerations are inappropriate. *See id.* at 16, 138 P. at 904.

We conclude that this court's holding in *Lamb* applies here and that equity jurisprudence (i.e., equitable fault analysis) was inappropriate to reduce the amount due under the mechanic's lien. We further conclude that equity jurisprudence provides no basis for offsetting a security interest foreclosure. A security interest is created through the lien document, so the amount awarded through foreclosure of a security interest necessarily follows the amount awarded through a mechanic's lien.

Had the Legislature wished to protect a higher-tiered contractor who fully and faithfully performs its contractual obligations to a middle-tiered contractor, the Legislature could have done so. It did not. Instead, the Legislature unambiguously elected to protect bottom-tiered contractors who provide labor and material to improve property and then perfect their security interests by properly recording a lien. This court can neither supplement a higher-tiered contractor's rights under NRS Chapter 108 nor limit a bottom-tiered contractor's rights under NRS Chapter 108—even when both contractors are innocent parties, as are the parties here. The remedy that Mojave seeks, enforcement of the unconditional lien release that Cashman executed without requiring that Cashman be paid, goes beyond mere interpretation of a statute. Such a remedy would require this court to legislate. However, that authority resides solely with the Legislature.

We note that a higher-tiered contractor may protect itself against losses of the type that Mojave sustained by contractually requiring the middle-tiered contractor to obtain a security bond for the payments that the middle-tiered contractor will make to the bottom-

tiered contractor. By requiring the middle-tiered contractor to post a security bond, the higher-tiered contractor would be protected against outstanding liens on the project and payment to the bottom-tiered contractor would be ensured.

In the instant case, Whiting Turner required Mojave to acquire a security bond to protect Whiting Turner from any liens that Mojave's subcontractors might file. Had Mojave required Cam to acquire a security bond to protect Mojave from any liens that Cam's subcontractors, i.e., Cashman, might file, the losses the parties incurred would have been prevented. If Cam could not have posted a bond in accordance with NRS 108.2415, then Mojave would obviously have been on notice that it was unprotected against any subcontractor's liens. Additionally, requiring Cam to post a bond would have completely de-incentivized Cam from absconding with the funds due to Cashman. While NRS Chapter 108 does not mandate that higher-tiered contractors require lower-level contractors to obtain security bonds, we believe that such a practice would protect contractors from losses like those that the parties incurred.

Other jurisdictions likewise require higher-tiered contractors to pay twice when a lower-tiered contractor takes a lien against a project. Connecticut originally addressed this issue over a hundred years ago. *Barlow Bros. Co. v. John W. Gaffney & Co.*, 55 A. 582 (Conn. 1903). In *Barlow*, an ecclesiastical corporation contracted with Gaffney to construct a building on the corporation's land. *Id.* at 583. Thereafter, Gaffney subcontracted the plumbing work to the Seeley & Upham Company. *Id.* Seeley & Upham then sub-subcontracted with Barlow to perform the work. *Id.* Gaffney paid Seeley & Upham in full, but Seeley & Upham failed to make any payment to Barlow. *Id.* Barlow filed a lien against the project and filed suit against Gaffney. *Id.* Gaffney claimed that the lien should be stricken because Gaffney paid Seeley & Upham, the company with which Gaffney contracted, in full. *Id.* at 584. However, the court disagreed and explained that state law entitled Barlow to a lien even though Gaffney would have to pay twice:

> Assuming, however, without deciding, that such payment [from Gaffney to Seeley & Upham] was made, it does not, we think, defeat the plaintiff's lien. The plaintiff's right to a lien is given solely by statute, and is not made to depend in any way upon the act of the original contractor in paying or not paying his immediate subcontractor. The legislative conditions upon which the plaintiff's right to a lien is made to depend do not include such an act, and, if the court should make such an act one of these conditions, that would be an act of judicial legislation, rather than one of construction and interpretation. If the original contractor is, under the present law, unprotected,

> in that he may be compelled to pay twice for the same work and materials, the fault is not with the plaintiff, and the remedy must be sought in the Legislature, and not in the courts.

Id. The Connecticut Supreme Court has since reaffirmed its decision in *Barlow*. *Seaman v. Climate Control Corp.*, 436 A.2d 271 (Conn. 1980). The *Seaman* court relied upon *Barlow* and reasoned that "[h]ad the legislature wished to limit . . . the rights of second tier subcontractors to obtain liens against the owner, it would have been easy enough [for the legislature] to link the subcontractor's claim to the person with whom such subcontractor shall have contracted." *Id.* at 278 (internal quotation marks omitted).

Florida's statutory lien law has led its courts to similar results. *See* Fla. Stat. Ann. § 713.06 (West 2013); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Hart*, 390 So. 2d 367, 369 (Fla. Dist. Ct. App. 1980) (requiring a project owner to pay a subcontractor even though the owner had paid its contractor in full, the court explained, "We recognize that our decision requires appellant to pay twice for the same work. While this result may seem harsh, that is the law of this state, and we are bound to follow it.") Florida's most recent amendment to its lien statutes expressly requires a second payment if a subcontractor remains unpaid after an owner pays the higher-tiered contractor. *See* Fla. Stat. Ann. § 713.06(2)(c) (West 2013). The law requires the following warning in a subcontractor's lien notice:

> WARNING! FLORIDA'S CONSTRUCTION LIEN LAW ALLOWS SOME UNPAID CONTRACTORS, SUBCONTRACTORS, AND MATERIAL SUPPLIERS TO FILE LIENS AGAINST YOUR PROPERTY EVEN IF YOU HAVE MADE PAYMENT IN FULL.
>
> UNDER FLORIDA LAW, YOUR FAILURE TO MAKE SURE THAT WE ARE PAID MAY RESULT IN A LIEN AGAINST YOUR PROPERTY AND YOUR PAYING TWICE.
>
> TO AVOID A LIEN AND PAYING TWICE, YOU MUST OBTAIN A WRITTEN RELEASE FROM US EVERY TIME YOU PAY YOUR CONTRACTOR.

Id. Nevada's perfection of lien notice statute, NRS 108.226, does not command that a potential lien claimant include such direct language in a notice, but we do not believe that a different result is warranted. Therefore, we reverse the district court's decision and hold that the district court erred as a matter of law by reducing Cashman's award for its foreclosure-of-security-interest claim based upon equitable fault analysis.

Whether the district court erred in denying recovery to Cashman on its payment-bond claim by applying the defense of impossibility

[Headnote 10]

The district court found "that the defense of impossibility is available to Mojave in this situation" and determined that Cashman was not entitled to payment via Mojave's payment bond through Western Surety. The court explained that the defense applied because Mojave could not have foreseen that Cam would steal the funds from Mojave intended as payment to Cashman.

Cashman argues that the district court incorrectly applied the impossibility defense because Cam's failure to pay Cashman was not an unforeseen contingency and Mojave's performance was not impossible. It asserts that Mojave accepted the risk that Cashman would not be paid by securing a payment bond. Further, Cashman argues that Mojave did not argue impossibility at trial, nor did it present any evidence to the lower court to prove that its performance, i.e., paying Cashman, was impossible.

[Headnote 11]

This court will not set aside a district court's factual findings unless the findings are not "supported by substantial evidence." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838, 335 P.3d 211, 213 (2014). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.* at 214 (internal quotations omitted).

In *Nebaco, Inc. v. Riverview Realty Co., Inc.*, 87 Nev. 55, 57, 482 P.2d 305, 307 (1971), this court stated Nevada's rule for the defense of impossibility in contract actions:

> Generally, the defense of impossibility is available to a promisor where his performance is made impossible or highly impractical by the occurrence of unforeseen contingencies, but if the unforeseen contingency is one which the promisor should have foreseen, and for which he should have provided, this defense is unavailable to him.

(Citation omitted.) The Restatement (Second) of Contracts § 261 cmt. b (Am. Law Inst. 1981) explains that "[i]n order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a basic assumption on which both parties made the contract." (Internal quotations omitted.)

Although Mojave raised impossibility or impracticability as an affirmative defense in its answer, it did not present *any* evidence at all at trial that paying Cashman was impossible or impracticable or that Carvalho's failure to tender proper payment to Cashman was "unforeseen." *See Nebaco*, 87 Nev. at 57, 482 P.2d at 307; *see*

also Elliott v. Mallory Elec. Corp., 93 Nev. 580, 585, 571 P.2d 397, 400 (1977) (implying—in the context of a tort action where a stolen vehicle was operated negligently resulting in damages to a third party—that theft is foreseeable). Mojave obviously finds paying Cashman's lien unappealing because of the amount involved and because it previously paid Cam, which was supposed to pay Cashman. Regardless, Mojave's performance cannot be considered impossible or impracticable merely because it would be unappealing. Therefore, Mojave did not present substantial evidence that its performance was impossible or impracticable and the district court's finding must be set aside.

Whether the district court's preliminary injunction requiring Cashman to provide codes is moot and, if so, whether this court should nonetheless consider this issue pursuant to the exception to the doctrine of mootness

The respondents filed a motion for mandatory injunction to procure codes and requested that the district court order Cashman to install certain codes necessary for the backup power systems to function. Following a hearing, the district court found that the city could suffer immediate or irreparable damage if Cashman did not install the codes and ordered Cashman to do so. The district court subsequently granted Cashman's motion to stay the preliminary injunction. In its order following the bench trial, the district court awarded Cashman $86,600 for unjust enrichment "as long as Cashman provides, implements, and actually puts in the codes at issue."

Cashman argues that the district court erred when it issued a preliminary injunction for the respondents. However, Cashman argues the district court's injunction is now moot because the lower court determined that Cashman reasonably terminated its performance under the contract when Cashman was not paid. Cashman also claims that the district court did not order it to provide the codes; instead, the court ordered Cashman to provide the codes *if* it accepted the $86,600 payment from Mojave.

[Headnotes 12-17]

Generally, this court will not decide moot cases. *NCAA v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). A case is moot if it "seeks to determine an abstract question which does not rest upon existing facts or rights." *Id.* Mootness is a question of justiciability. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). The dispute must continue through all of the controversy's phases. *Id.* A case may become moot due to successive occurrences despite the existence of a "live controversy" at the beginning of the litigation. *Id.* However, this court may consider an

issue that "involves a matter of widespread importance that is capable of repetition, yet evading review." *Id.* The party seeking to overcome mootness must prove "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013).

As Cashman concedes, the district court's preliminary injunction is moot, as is its order staying the preliminary injunction. The district court's findings of fact and conclusions of law supplant the previous orders, and neither party argues that this court should review the lower court's decision based upon an exception to the mootness doctrine. Even if this court were to decide that the district court abused its discretion when it issued the preliminary injunction, neither party's rights would be affected. Accordingly, we decline to consider this issue.

Cashman's secondary argument that the district court's order only requires it to input the codes *if* it accepts the $86,600 in escrow is not persuasive. The district court specifically "award[ed] Cashman the entire amount remaining in the escrow account, $86,600, on its Fifteenth Cause of Action to be paid after Cashman installs the codes." We conclude that no ambiguity exists in the court's order and receipt of the money in exchange for entering the codes is not left to Cashman's discretion. According to the plain wording of the order, Cashman must enter the codes and, upon doing so, the amount in escrow must be released to Cashman. The order simply indicates the sequence in which the two events must take place; the order does not create an "if/then" scenario. Thus, based on the district court's order, Cashman must install the codes.

CONCLUSION

Accordingly, we reverse the district court's judgment and post-judgment order denying Cashman's motion for attorney fees and costs, and we remand this matter to the district court to recalculate Mojave's liability to Cashman in a manner consistent with this opinion.

PARRAGUIRRE, C.J., and HARDESTY, DOUGLAS, GIBBONS, and PICKERING, JJ., concur.

LISA JOHNSON, APPELLANT, *v.* WELLS FARGO BANK NATIONAL ASSOCIATION, RESPONDENT.

No. 66094

September 29, 2016 382 P.3d 914

Appeal from a final district court order in a defamation and declaratory relief action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Bank customer brought action against bank, alleging defamation, false light, and declaratory relief. Customer moved to compel production of information associated with bank's closing of her account. The district court denied the motion. Customer appealed. The supreme court, DOUGLAS, J., held that, in determining whether documents are protected by the Suspicious Activity Report (SAR) discovery privilege under the Bank Secrecy Act, key query is whether any of those documents suggest, directly or indirectly, that a SAR was or was not filed.

Affirmed.

Hutchison & Steffen, LLC, and *Michael K. Wall*, Las Vegas, for Appellant.

Smith Larsen & Wixom and *Paul M. Haire, Kent F. Larsen*, and *Michael B. Wixom*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   In general, discovery orders are reviewed for an abuse of discretion.
2. DECLARATORY JUDGMENT.
   The supreme court reviews de novo a district court's order denying declaratory relief.
3. APPEAL AND ERROR.
   The supreme court reviews questions of statutory construction de novo.
4. APPEAL AND ERROR.
   The supreme court reviews questions concerning the proper scope of a statutory privilege de novo.
5. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   In determining whether documents are protected by the Suspicious Activity Report (SAR) discovery privilege under the Bank Secrecy Act, the key query is whether any of those documents suggest, directly or indirectly, that a SAR was or was not filed. 31 U.S.C. § 5318(g)(2)(A)(i); 12 C.F.R. § 21.11(k)(1)(i).

Before the Court EN BANC.[1]

[1]THE HONORABLE NANCY M. SAITTA, Justice, having retired, this matter was decided by a six-justice court.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we are asked to examine the Suspicious Activity Report (SAR) discovery privilege under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* (2014). The Bank Secrecy Act requires financial institutions to establish an anti-money laundering program, including various internal policies, procedures, and controls. *Id.* The purpose of this program between financial institutions and federal authorities is to combat money laundering, identity theft, embezzlement, and fraud. *Id.* Regulations promulgated under this Act prohibit banks from disclosing "a SAR, or any information that would reveal the existence of a SAR." 12 C.F.R. § 21.11(k)(1)(i). We adopt the rule from *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 43 (1st Cir. 2015), indicating that the standard of whether a document falls under the SAR privilege is when the document suggests, directly or indirectly, that a SAR was or was not filed. In this case, we agree with the district court that the documents appellant sought are protected from disclosure by the SAR privilege, and we thus affirm the district court's dismissal of appellant's declaratory relief claim.

FACTS AND PROCEDURAL HISTORY

In May 2010, appellant Lisa Johnson opened three business accounts at respondent Wells Fargo Bank's place of business. One of the accounts was a joint account between appellant and her boyfriend, Michael Kaplan.

During August 2011, respondent sent three letters to appellant, advising that respondent would unilaterally close the three accounts in September 2011. The letters explained that respondent "performs ongoing reviews of its account relationships in connection with [its] responsibilities to oversee and manage risks in its banking operations." Additionally, the letters stated that respondent's "risk assessment process and the results of this process are confidential" and that the "decision to close [the accounts] is final."

On October 6, 2011, Kaplan visited one of respondent's branches located in Malibu, California. Kaplan asked to cash a check. While completing the transaction, the bank teller reviewed Kaplan's account information and recommended that he open a new savings account. In response, Kaplan inquired why he should open a new account in light of respondent closing his joint account with appellant. To clarify the matter, the bank teller spoke to another employee. Ultimately, Kaplan was informed that the reason for the closure was likely because appellant had been involved in a criminal activity. Kaplan was further advised to employ a private investigator.

On January 26, 2012, appellant filed a complaint against respondent that alleged defamation, false light, and declaratory relief. Appellant's declaratory relief claim sought a declaration that Wells Fargo must disclose to appellant the reasons why her accounts were closed and why it stated that she was involved in criminal activity.[2] During discovery, appellant requested production of documents regarding the closure of appellant's accounts, as well as the risk assessment processes and analysis for closing these accounts. Respondent objected to the requests, arguing that the requested information was irrelevant to the case and sought privileged and confidential information.

On August 31, 2012, appellant filed a motion to compel respondent to produce responsive information, contending that this information was relevant to understand respondent's defamatory statements against her. In response, respondent objected to the requests, arguing in part that the relevant information was subject to the SAR discovery privilege under the Bank Secrecy Act.

On October 5, 2012, the discovery commissioner held a hearing on these issues. Thereafter, the discovery commissioner decided that due to the Bank Secrecy Act, respondent was not required to provide any records regarding the closure of appellant's accounts.

Appellant subsequently objected to the discovery commissioner's report and recommendations, arguing that the discovery commissioner gave respondent overly broad protection. The district court held an evidentiary hearing and expressed concern regarding the scope of the evidentiary privilege. Ultimately, the district court affirmed the discovery commissioner's report and recommendations, but ordered respondent to provide a privilege log concerning the subject matter of the report and recommendations. The court remanded the matter to the discovery commissioner "for purposes of determining which privilege log [documents] . . . can be required without violating the provisions of the Bank Secrecy Act."

To comply with the district court's order, respondent submitted a privilege log to the discovery commissioner, along with the documents described therein. The privilege log included brief descriptions of five documents, referring to them as the following: (1) "Memorandum/correspondence, which Wells Fargo is legally prohibited from describing further," (2) "Memorandum and attachments, which Wells Fargo is legally prohibited from describing further," (3) "Correspondence, which Wells Fargo is legally prohibited

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[2]Only the dismissal of the declaratory relief claim has been challenged on appeal. The false light claim was dismissed prior to trial, and the defamation claim resulted in a bench trial. Appellant was awarded both special and general damages.

from describing further," (4) "Wells Fargo Bank Policies and Procedures re: Bank Secrecy Act, which Wells Fargo is legally prohibited from describing further," and (5) "Internal Memorandum and attachment regarding Bank Secrecy Act Policies and Procedures, which Wells Fargo is legally prohibited from describing further."

On March 12, 2013, the discovery commissioner held a hearing to discuss the privilege log requirement pursuant to the district court's order. The discovery commissioner agreed to review the relevant documents *in camera* to determine whether they should be protected. Upon review, the discovery commissioner recommended that the documents be deemed confidential and protected under the provisions of the Bank Secrecy Act. The district court affirmed and adopted the report and recommendations. Ultimately, appellant's cause of action for declaratory relief was dismissed by the district court. The district court based its decision partially on its interpretation of the Bank Secrecy Act, which corresponded to the discovery commissioner's interpretation. This appeal followed.

DISCUSSION

Appellant argues that the district court erred in denying basic discovery to her, which led to the dismissal of her declaratory relief claim. In particular, appellant contends that the SAR discovery privilege, as provided by the Bank Secrecy Act, is limited and does not prevent the disclosure of discoverable materials in this litigation. In opposition, respondent argues that complying with appellant's discovery requests would violate the Bank Secrecy Act. We agree with respondent.

[Headnotes 1-4]

In general, discovery orders are reviewed for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). However, this court reviews de novo a district court's order denying declaratory relief. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). Further, we review questions of statutory construction de novo. *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006). Likewise, we review questions concerning the proper scope of a statutory privilege de novo. *See Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 650, 331 P.3d 905, 910 (2014).

The Bank Secrecy Act governs requirements over financial institutions to assist governmental agencies, specifically in providing "certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence

activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. Pursuant to the Act, if a bank reports a suspicious transaction to the government, the bank may not "notify any person involved in the transaction that the transaction has been reported." 31 U.S.C. § 5318(g)(2)(A)(i). Numerous regulations have been promulgated under the Act, such as 12 C.F.R. § 21.11 *et seq.* from the Office of the Comptroller of the Currency. 12 C.F.R. § 21.11(b)(3) refers to a suspicious activity report as a "SAR." "A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed." 12 C.F.R. § 21.11(k). Further, if a bank receives a subpoena or another discovery request "to disclose a SAR, or any information that would reveal the existence of a SAR, [the bank] shall decline to produce the SAR or such information." 12 C.F.R. § 21.11(k)(1)(i).

[Headnote 5]

One of the most recent published cases regarding the SAR privilege is from the First Circuit of the United States Court of Appeals, which noted that the privilege is not all-encompassing. *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 43-44 (1st Cir. 2015). In that case, the victims of a Ponzi scheme brought claims of fraud, deceit, and conversion against a bank, asserting that the bank failed to detect and stop the scheme. *Id.* at 37. The bank claimed that 55 pages of its records were protected from discovery, pursuant to the Bank Secrecy Act. *Id.* The First Circuit conducted de novo review of the records *in camera*, which revealed that the records did not fall within the scope of the SAR privilege. *Id.* at 43-44. Thus, the court rejected the bank's argument, doubting that the Act and relevant regulations applied at all to the case. *Id.* at 37. Moreover, the court asserted that even if the Act and relevant regulations applied, the specific records in dispute would not be protected from discovery or use in litigation. *Id.* According to the court, it did not "view the 'privilege' as extending to any document that might speak to the investigative methods of financial institutions." *Id.* at 44. A blanket protection over all documents related to any type of investigation "would see the bulk of a financial institution's investigative file in a particular case shielded from discovery. Congress and/or the agencies certainly would have used broader, less specific language had that been their intent." *Id.* The court declared that pursuant to existing law and guidance, "the key query is whether any of those documents suggest, directly or indirectly, that a SAR was or was not filed." *Id.* at 43. We hereby adopt this rule of law.

Here, the discovery commissioner conducted an *in camera* review of the documents in question, ultimately concluding that they

fell under the SAR discovery privilege. The discovery commissioner reasoned that "[d]ocuments which constitute a [SAR], if any SAR exists, and/or the policies and procedures that are created to prepare a possible SAR are confidential and protected," while "[f]actual supporting documentation that accompanied a SAR, if one exists, or possible SAR, which have been prepared in the ordinary course of business are not protected." The basis of this decision does not undermine and, in fact, is bolstered by the existing law on this issue. *See id.* at 39-41; *Cotton v. PrivateBank & Tr. Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002); *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 681-82 (S.D. Tex. 2004). Having reviewed the record on appeal, we conclude that the discovery commissioner and the district court applied the correct SAR privilege standard and did not err when they applied the SAR privilege to the five documents in question.[3]

CONCLUSION

Pursuant to the Bank Secrecy Act, the SAR discovery privilege applies to any documents that suggest, directly or indirectly, that a SAR was or was not filed. The discovery commissioner and the district court did not err in concluding that the documents at issue here are protected by the SAR privilege. Accordingly, we affirm the order of the district court dismissing appellant's declaratory relief claim.

PARRAGUIRRE, C.J., and HARDESTY, CHERRY, GIBBONS, and PICKERING, JJ., concur.

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[3]Appellant also did not challenge, and appears to concede, the district court's determination that Wells Fargo had no duty to inform appellant of the reasons why her accounts were closed. This also supports affirming the district court's order dismissing the declaratory relief claim.