REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

AND THE

COURT OF APPEALS

OF THE

STATE OF NEVADA

Volume 134

HEAT & FROST INSULATORS AND ALLIED WORKERS LOCAL 16, APPELLANT, *v.* LABOR COMMISSIONER OF THE STATE OF NEVADA; UNIVERSITY OF NEVADA, RENO; AND CORE CONSTRUCTION, RESPONDENTS.

No. 71848

January 4, 2018 408 P.3d 156

Appeal from a district court order dismissing a petition for judicial review of an administrative decision. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reversed and remanded.

McCracken, Stemerman & Holsberry and *Eric B. Myers, Sarah O. Varela*, and *David L. Barber*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, and *Melissa L. Flatley*, Deputy Attorney General, Carson City, for Respondent Labor Commissioner of the State of Nevada.

Dickinson Wright PLLC and *Eric D. Hone* and *Gabriel A. Blumberg*, Las Vegas, for Respondent CORE Construction.

Bryan L. Wright, Assistant General Counsel, University of Nevada, Reno, for Respondent University of Nevada, Reno.

Before the Supreme Court, HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

NRS 233B.130(2)(c)(1) provides that a petition for judicial review of an administrative decision must be served upon the "Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City." NRS 233B.130(5) provides that a petition for judicial review must be served "within 45 days after the filing of the petition, unless, upon a showing of good cause, the district court extends the time for such service." In this appeal, we are asked to determine whether untimely service of a petition for judicial review on the Attorney General mandates dismissal of the petition. We conclude that while service of a petition for judicial review on the Attorney General under NRS 233B.130(2)(c)(1) is mandatory and jurisdictional, and must be effected within the statutorily prescribed 45-day period, that time period can be extended when good cause is shown under NRS 233B.130(5). We further conclude that NRS 233B.130(5) does not preclude a petitioner from moving for an extension of time after the 45-day period has passed. Thus, the district court may exercise its authority to extend the service period either before or after the 45-day period has run. The district court in this case did not determine whether good cause to extend the time to serve the Attorney General exists, and we therefore remand for that purpose.

FACTS AND PROCEDURAL HISTORY

Respondent the University of Nevada, Reno awarded a construction contract to respondent CORE Construction with respect to the University's West Stadium Utility Trench project (Project). CORE then hired Reno-Tahoe Construction, Inc. (RTC) as a subcontractor for the Project.[1]

Appellant Heat & Frost Insulators and Allied Workers Local 16 filed a verified wage complaint with respondent Office of the Labor Commissioner for prevailing wage violations with respect to the Project, alleging that RTC had underpaid its employees. As requested by the Labor Commissioner, the University investigated the complaint and subsequently issued a determination concluding that

[1]RTC was removed as a respondent to this appeal by this court's August 1, 2017, order.

RTC had not violated Nevada prevailing wage laws. Appellant timely objected, and the Labor Commissioner affirmed the University's determination.

Appellant filed a petition for judicial review challenging the Commissioner's ruling pursuant to NRS 233B.130(1).[2] The petition was timely filed, filed in the proper venue, and named all necessary parties. *See* NRS 233B.130(2)(a), (b) & (d). The petition was also timely served on the Labor Commissioner and all named parties. *See* NRS 233B.130(5). However, the petition was not initially served on the Attorney General. Consequently, the Labor Commissioner moved to dismiss appellant's petition on the ground that it did not comply with NRS 233B.130(2)(c)(1).[3] The Labor Commissioner argued that the statute, which requires a petition for judicial review be served on the Attorney General, is jurisdictional and therefore the district court lacked jurisdiction over appellant's petition.

After receiving the Labor Commissioner's motion, appellant served the petition on the Attorney General and moved to extend the time for service pursuant to NRS 233B.130(5), which permits a district court to extend the time for service "upon a showing of good cause." The district court declined to consider appellant's motion to extend the time for service and concluded that failure to serve the petition upon the Attorney General within 45 days of filing the petition rendered the petition jurisdictionally defective, such that dismissal was mandatory. This appeal follows.

DISCUSSION

The Labor Commissioner argues that NRS 233B.130(2)(c)(1) sets forth a mandatory jurisdictional requirement, and because service upon the Attorney General was effected outside of NRS 233B.130(5)'s 45-day period, the district court did not have jurisdiction to consider the petition. Whether NRS 233B.130(2)(c)(1) establishes a jurisdictional requirement is a matter of first impression.

"We review questions of law, such as statutory interpretation, de novo." *Liberty Mut. v. Thomasson*, 130 Nev. 27, 30, 317 P.3d 831, 833 (2014). Nevada's Administrative Procedure Act (APA), codified at NRS Chapter 233B, governs judicial review of administrative decisions. *Id.* at 30, 317 P.3d at 834. NRS 233B.130, which sets forth procedural requirements for petitioning for judicial review of a final administrative decision, was amended in 2015 to include the requirement that a petition for judicial review be served upon

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[2]NRS 233B.130(1) provides, in part, that "[a]ny party who is . . . [a]ggrieved by a final decision in a contested case, is entitled to judicial review of the decision." NRS 233B.130(1)(b).

[3]NRS 233B.130(2)(c)(1) requires that a petition for judicial review "[b]e served upon . . . [t]he Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City."

the Attorney General. 2015 Nev. Stat., ch. 160, § 9, at 709. NRS 233B.130(2) now provides, in pertinent part, as follows:

> Petitions for judicial review must:
>
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
>
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred;
>
> *(c) Be served upon:*
>
> *(1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and*
>
> *(2) The person serving in the office of administrative head of the named agency;* and
>
> (d) Be filed within 30 days after service of the final decision of the agency.

(Emphasis added.) A petitioner's obligation to name the agency (paragraph (a)), file the petition in the proper venue (paragraph (b)), and initiate the petition within 30 days of the administrative decision (paragraph (d)) have been deemed mandatory and jurisdictional.[4] *See Washoe Cty. v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012) (construing paragraph (a)); *see also Thomasson*, 130 Nev. 27, 317 P.3d 831 (addressing paragraph (b)); *Civil Serv. Comm'n v. Second Judicial Dist. Court*, 118 Nev. 186, 42 P.3d 268 (2002) (construing paragraph (d)), *overruled on other grounds by Otto*, 128 Nev. at 433 n.9, 282 P.3d at 725 n.9. Whether service of a petition for judicial review on the Attorney General under paragraph (c) is mandatory and jurisdictional is an issue of first impression. Nonetheless, this court's precedent provides a straightforward answer to this question.

In *Otto*, this court held that NRS 233B.130(2)'s naming requirement is mandatory and jurisdictional. 128 Nev. at 432, 282 P.3d at 725. There, we stated that "[n]othing in the language of [NRS 233B.130(2)] suggests that its requirements are anything but mandatory and jurisdictional," explaining that "[t]he word 'must' generally imposes a mandatory requirement." *Id.* In *Thomasson*, we reiterated that because the word "must" qualifies NRS 233B.130(2)'s requirements, these requirements are mandatory and jurisdictional. 130 Nev. at 31, 317 P.3d at 834. In light of this precedent, we conclude that NRS 233B.130(2)(c)(1) is mandatory and jurisdictional. Thus, failure to strictly comply with NRS 233B.130(2)(c)(1) requires dismissal absent a demonstration of good cause. *See* NRS 233B.130(5) (providing that a petition for judicial review must be served within

[4]This opinion uses the paragraph numbering of the current version of NRS 233B.130, as revised in 2015, in referencing the cases cited herein.

45 days of filing the petition, but permitting the district court to extend the 45-day period "upon a showing of good cause").

In this case, appellant effected service upon the Attorney General outside of NRS 233B.130(5)'s 45-day period. Appellant also moved for an extension of time for service under NRS 233B.130(5), which permits an extension of time for service "upon a showing of good cause." However, the district court concluded it lacked jurisdiction to consider appellant's motion and declined to consider whether good cause existed. We conclude the district court had jurisdiction to consider appellant's motion and make a good cause determination. *See Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 513, 998 P.2d 1190, 1193-94 (2000) (explaining that in the context of untimely NRCP 4 service, "[t]he determination of good cause is within the district court's discretion"); *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) (stating, when addressing an untimely filing, that "[t]his court is not a fact-finding tribunal" and "that function is best performed by the district court").

Finally, we reject the Labor Commissioner's argument that appellant was required to move for an extension of time under NRS 233B.130(5) prior to the running of the 45-day period. NRS 233B.130(5) permits a district court to extend the time for service of a petition for judicial review "upon a showing of good cause." NRS 233B.130(5), by its own terms, does not place a limit on when that power may be exercised, i.e., either before or after the 45-day period has run and therefore does not bar extending the time for service if the request is made after the 45-day period has lapsed.

CONCLUSION

We conclude that NRS 233B.130(2)(c)(1)'s service requirement is mandatory and jurisdictional. We further conclude that unless the district court extends the time for service as permitted by NRS 233B.130(5), service upon the Attorney General under NRS 233B.130(2)(c)(1) must occur within 45 days. Finally, we conclude that the district court may exercise its power to extend the time for service either before or after the 45-day service period has run. Thus, we reverse and remand this matter to the district court to consider whether good cause existed to extend the time for service upon the Attorney General as required by NRS 233B.130(2)(c)(1).

Hardesty and Stiglich, JJ., concur.

KAZUO OKADA; ARUZE USA, INC.; UNIVERSAL ENTERTAINMENT CORPORATION; AND ELAINE P. WYNN, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND WYNN RESORTS, LIMITED; AND ROBERT J. MILLER, REAL PARTIES IN INTEREST.

No. 74326

January 11, 2018 408 P.3d 566

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to compel discovery.

Petition granted.

Morris Law Group and *Steve L. Morris, Akke Levin*, and *Rosa Solis-Rainey*, Las Vegas, for Petitioners Aruze USA, Inc.; Kazuo Okada; and Universal Entertainment Corporation.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Greenberg Traurig, LLP*, and *Mark E. Ferrario* and *Tami D. Cowden*, Las Vegas; *Sidley Austin, LLP*, and *James M. Cole*, Washington, D.C., and *Scott D. Stein*, Chicago, Illinois, for Petitioner Elaine P. Wynn.

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli*, and *Debra L. Spinelli*, Las Vegas, for Real Parties in Interest Wynn Resorts, Limited, and Robert J. Miller.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this opinion, we consider whether the gaming privilege in NRS 463.120(6), which protects certain information and data provided to the gaming authorities, applies to information requested before the effective date of the statute. NRS 463.120(6) was enacted in 2017 through Senate Bill 376, which provides that the privilege applies to "any request made on or after the effective date of this act." We

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, and THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused themselves from participation in the decision of this matter.

conclude from the plain language of the act that the privilege applies prospectively only and does not apply to any request made before the effective date of this act. Here, the district court applied the privilege to deny a motion to compel discovery where the information was requested through discovery before the effective date of NRS 463.120(6), but the motion to compel was filed after that date. This was erroneous, as the pertinent inquiry for determining whether the privilege applied to the information was the date of the initial discovery request seeking that information, not the date the requesting party sought an order from the court to compel the opposing party to comply with that discovery request. Because the discovery requests in this case were made before the statute became effective, the gaming privilege in NRS 463.120(6) did not apply to the information sought by those discovery requests. Accordingly, we grant the petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

This writ petition arises from litigation between real party in interest Wynn Resorts, Limited, and petitioners Kazuo Okada, Aruze USA, Inc., and Universal Entertainment Corporation (collectively, the "Okada Parties"), pertaining to the removal of Okada from Wynn Resorts' board of directors and the forced redemption of his ownership in the stock of Wynn Resorts in February 2012. Before Okada's removal and forced redemption, Wynn Resorts investigated Okada's business dealings in the Philippines to determine whether those dealings rendered him unsuitable to be on the board of directors. In November 2011, Wynn Resorts' board of directors hired former federal judge and FBI director Louis J. Freeh and his firm (the Freeh Group) to investigate Okada's alleged misconduct and report their findings to the board of directors. The board of directors was advised of the results of the Freeh Group's investigation and made the decision to redeem all of the stock shares owned by Okada (through Aruze and its parent company Universal) on February 18, 2012. The next day, Wynn Resorts filed a complaint against the Okada Parties for declaratory relief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. The Okada Parties filed counterclaims seeking declaratory relief and a permanent injunction rescinding the redemption of the stock and alleged claims for breach of contract, breach of Wynn Resorts' articles of incorporation, and various other tort-based causes of action.

In August 2014, the Okada Parties served on Wynn Resorts a request for production of documents concerning communications by Wynn Resorts with the Nevada Gaming Control Board (NGCB) about Okada. These communications were alleged to have taken place during Wynn Resorts' investigation into Okada's alleged

misconduct, sometime between November 2011 and February 13, 2012. The Okada Parties sought these communications to show that Wynn Resorts' justification for the redemption—that Wynn Resorts' gaming license was at imminent risk with the Nevada gaming authorities based on the Freeh Group's report about Okada's illegal conduct—was false. In February 2016, the Okada Parties deposed Wynn Resorts' director Robert Miller and sought details regarding the communications he had with the NGCB in late 2011 and early 2012, but Miller's counsel claimed that information was privileged and instructed Miller not to provide specifics about the communications. Miller's deposition was not completed, the Okada Parties sought and were granted additional time to complete it, and the deposition was scheduled to resume in October 2017.

In September 2017, the Okada Parties filed a motion to compel Miller's testimony and for production of documents regarding Miller's pre-redemption communications with the NGCB. In opposition, Wynn Resorts claimed that the discovery sought by the Okada Parties was protected by the "absolute privilege" in NRS 463.120(6), which grants licensees and applicants the privilege to refuse to disclose any information or data communicated to the NGCB in connection with its regulatory, investigative, or enforcement authority. The Okada Parties argued that the privilege in NRS 463.120(6) did not apply because the requests for testimony and documents had been made over a year before the statute's effective date of June 12, 2017, and the statute was not retroactive. Specifically, they asserted that they had requested the production of documents in August 2014, they had attempted to depose Miller and obtain documents in February 2016, and they had served Wynn Resorts with interrogatories in April 2017 requesting information on the communications. The district court held a hearing on the motion to compel and denied it, determining that NRS 463.120(6) applied to the motion to compel because the motion was being heard after the effective date of the statute, and that the documents and testimony were confidential and privileged pursuant to NRS 463.120(6). The Okada Parties then filed this petition challenging the district court's order denying the motion to compel discovery.[2]

DISCUSSION

The decision to entertain a writ petition lies solely within the discretion of this court. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a

[2]Elaine P. Wynn, a party to the underlying litigation, joins in this writ petition.

manifest abuse or an arbitrary or capricious exercise of discretion."[3] *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks omitted). Mandamus is an extraordinary remedy, available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see also D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007). Because discovery orders may be challenged on direct appeal from any adverse judgment, we ordinarily will decline to review such orders through writ petitions. However, we have recognized on occasion that the availability of a direct appeal from a final judgment may not always be an adequate and speedy remedy. *D.R. Horton*, 123 Nev. at 474-75, 168 P.3d at 736 ("Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented."). Thus, consideration of a writ petition may be appropriate "when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. 784, 788, 383 P.3d 246, 248 (2016) (internal quotation marks omitted); *see also Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 878, 882, 313 P.3d 875, 878 (2013) (exercising discretion to entertain a discovery-related writ petition because it "provides a unique opportunity to define the precise parameters of a statutory privilege that this court has not previously interpreted" (internal quotation marks omitted)).

Further, we have exercised our discretion to review a discovery order where the district court failed to apply a privilege and required the production of privileged information. *See, e.g.*, *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171-72, 252 P.3d 676, 679 (2011) (explaining that a writ may issue to prevent improper discovery that would result in irreparable harm). We recognize that this petition presents the opposite situation—here, the challenged order *applied* a privilege to *prevent* the disclosure of allegedly privileged information. Nevertheless, we conclude that the circumstances of this case warrant a departure from our usual policy of declining to review a discovery order by extraordinary writ. Notably, the discovery inquiries were made early in the litigation, well before the set trial date, and are "reasonably calculated to lead to

[3]The Okada Parties alternatively seek a writ of prohibition; however, a writ of mandamus is more appropriate in this case because the district court did not exceed its jurisdiction in declining to order the production of discovery. *See* NRS 34.320 (providing that a writ of prohibition may issue when the district court acts "without or in excess of [its] jurisdiction").

the discovery of admissible evidence" on an important issue in this case. NRCP 26(b)(1). Given these factors and particularly the impact the challenged discovery order may have on the Okada Parties' ability to prove or defend against claims at trial, we conclude that consideration of the writ petition is necessary so that the discovery dispute may be addressed in a timely manner. Moreover, this petition presents us with the first opportunity to consider the application of the new gaming privilege in NRS 463.120(6), which is an important issue of law that could potentially affect other litigants statewide. We emphasize that generally this court will not consider writ petitions challenging orders denying discovery, as such discretionary rulings typically may be adequately redressed on direct appeal from an adverse final judgment. But, here, we choose to exercise our discretion to consider the narrow issue presented in this petition in the interest of sound judicial economy and to provide clarification on an important legal issue.

The issue presented in the petition is whether the district court properly applied the gaming privilege in NRS 463.120(6) when discovery requests were made before the effective date of the statutory privilege but a motion to compel the discovery was filed after the effective date of the statute. This issue involves statutory interpretation, which is a question of law that we review de novo. *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 650, 331 P.3d 905, 909 (2014). Where a statute is clear on its face, this court must give effect to the plain language without resorting to rules of statutory construction. *Jones v. Nev. State Bd. of Med. Exam'rs*, 131 Nev. 24, 27, 342 P.3d 50, 52 (2015). This court "presume[s] that the Legislature intended to use words in their usual and natural meaning." *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007).

The gaming privilege codified in NRS 463.120(6) was enacted by the 2017 Legislature through Senate Bill (SB) 376. The statute reads:

> Notwithstanding any other provision of state law, if any applicant or licensee provides or communicates any information and data to an agent or employee of the Board or Commission in connection with its regulatory, investigative or enforcement authority:
>
> (a) All such information and data are confidential and privileged and the confidentiality and privilege are not waived if the information and data are shared or have been shared with an authorized agent of any agency of the United States Government, any state or any political subdivision of a state or the government of any foreign country in connection with its

> regulatory, investigative or enforcement authority, regardless of whether such information and data are shared or have been shared either before or after being provided or communicated to an agent or employee of the Board or Commission; and
>
> (b) The applicant or licensee has a privilege to refuse to disclose, and to prevent any other person or governmental agent, employee or agency from disclosing, the privileged information and data.

2017 Nev. Stat., ch. 567, § 1.4, at 4065. The effective date of SB 376 is June 12, 2017—the date of "passage and approval" of the act. 2017 Nev. Stat., ch. 567, § 3, at 4066. Though not included in the codified statute, language in Section 2 of SB 376 expressly provides that the privilege is to be applied prospectively from the act's effective date:

> The confidentiality and privilege set forth in the amendatory provisions of this act *apply to any request made on or after the effective date of this act* to obtain any information or data, as defined in section 1.4 of this act, that is or has been provided or communicated by an applicant or licensee to an agent or employee of the Nevada Gaming Control Board or the Nevada Gaming Commission in connection with its regulatory, investigative or enforcement authority.

2017 Nev. Stat., ch. 567, § 2, at 4066 (emphasis added).

The parties acknowledge that the plain language of the act demonstrates that the privilege set forth in NRS 463.120(6) applies prospectively to any request made on or after June 12, 2017, the effective date of the act. However, they disagree as to the meaning of "any request."[4] The Okada Parties interpret "any request" as including any *discovery request* and contend that because they made their discovery requests for specific information and documents to Miller before the gaming privilege became effective, the privilege did not apply to the information they sought. In contrast, Wynn Resorts contends that the language "any request" means any attempt to obtain the privileged information. Thus, argues Wynn Resorts, when the Okada Parties attempted to obtain the information in September 2017 by filing a motion to compel with the district court, the privilege applied to bar the district court from ordering disclosure of the information.

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[4]The parties also argue about whether NRS 463.120(6) may be applied retroactively. We do not consider the issue of retroactivity because SB 376 provides clear legislative intent that the statute be applied prospectively. *See Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 828, 313 P.3d 849, 858-59 (2013) (explaining that legislative intent controls whether a statute may be applied retroactively).

The term "request" is not defined in SB 376 or elsewhere in NRS Chapter 463. In determining the plain meaning of "request," we may consult dictionary definitions. "Request" is commonly defined as "[a]n act of asking for something." *The American Heritage Dictionary of the English Language* 1492 (5th ed. 2011); *see also Merriam-Webster's Collegiate Dictionary* 1058 (11th ed. 2014) (defining "request" as "the act or an instance of asking for something"). A discovery request, whereby one party uses NRCP 26(a)'s discovery methods to ask for information from another party or person, falls within this definition. *See* NRCP 26(a) (setting forth the various discovery methods). Given this common understanding of "request," we conclude that the Legislature intended the term to encompass a request for discovery.

Wynn Resorts asks us to disregard the discovery requests made by the Okada Parties and instead focus only on the motion to compel discovery, which Wynn Resorts contends was the sole "request" at issue before the district court. Because that motion was filed after the effective date of NRS 463.120(6), Wynn Resorts claims that the statutory privilege applied and barred the district court from compelling discovery of the privileged information. We reject Wynn Resorts' characterization of a motion to compel discovery as a "request . . . to obtain any information or data," 2017 Nev. Stat., ch. 567, § 2, at 4066. A motion to compel discovery is an enforcement mechanism used when someone fails to comply with a discovery request. *See generally* NRCP 37 (providing procedure for failure to cooperate in discovery). It is clear from the language in NRCP 37(a) that a motion to compel discovery is not a separate, independent "request" for information but rather is an application to the court for an order compelling cooperation with a preexisting "request." Significantly, though the word "request" may be found in NRCP 37(a), it is used only in the context of a discovery request. *See, e.g.*, NRCP 37(a)(2)(B) (setting forth procedure for when a party fails to respond to a "request for inspection" or fails to "permit inspection as requested"); NRCP 37(a)(4) (setting forth sanctions where the "requested discovery is provided after the motion [to compel] was filed").

Thus, under the plain language of SB 376, the gaming privilege in NRS 463.120(6) does not apply to information that was requested through discovery before the statute became effective. And the date a motion to compel is filed is irrelevant to the question of whether the statutory privilege applies; rather, the germane date is that of the original discovery request for the information, which in this case was before the statute became effective. Because the Okada Parties made the discovery requests before the privilege became effective, the privilege does not apply to the information sought in those discovery requests.

We therefore conclude that the district court erred in applying the statutory privilege and denying the motion to compel discovery on this basis. Accordingly, we grant the petition for writ relief and direct the clerk of this court to issue a writ of mandamus directing the district court to set aside the order denying the motion to compel testimony and documents relating to communications with the Nevada Gaming Control Board on the basis that the information was protected by NRS 463.120(6).[5]

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

LUCIA CASTILLO, an Individual, Appellant, *v.* UNITED FEDERAL CREDIT UNION, a Federal Credit Union, Respondent.

No. 70151

February 1, 2018 409 P.3d 54

Appeal from a district court order granting a motion to dismiss in an action under the Uniform Commercial Code. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reversed and remanded.

Robert W. Murphy, Ft. Lauderdale, Florida; *Michael Lehners*, Reno; *Nathan R. Zeltzer*, Reno, for Appellant.

Howard & Howard Attorneys PLLC and *James A. Kohl* and *Robert Hernquist*, Las Vegas, for Respondent.

Before the Supreme Court, Douglas, C.J., Gibbons and Pickering, JJ.

OPINION

By the Court, Douglas, C.J.:

The issue in this appeal concerns whether the justice court or the district court had original jurisdiction over this matter, and thus, we

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[5]Wynn Resorts argues that other privileges or grounds for nonproduction exist to preclude discovery of the information sought by the Okada Parties and also that the information sought is not relevant to any claims or defenses. Because the district court did not consider the relevancy of the information or any privilege or ground other than NRS 463.120(6)'s gaming privilege in denying the motion to compel, we decline to consider those arguments in the first instance. We note that nothing precludes the district court from considering other bases raised by Wynn Resorts for denying the motion to compel.

are asked whether the district court erred in granting respondent's motion to dismiss based on lack of subject matter jurisdiction. In particular, we consider (1) whether aggregation of putative class member claims is permitted to determine jurisdiction, (2) whether a claim for statutory damages can be combined with a claim for the elimination of the deficiency amount asserted to determine jurisdiction, and (3) whether an assertion of injunctive relief establishes jurisdiction. First, we conclude that in Nevada, aggregation of putative class member claims is not permitted to determine jurisdiction. Second, we conclude that a claim for statutory damages can be combined with a claim for the elimination of the deficiency amount demanded by respondent to determine jurisdiction. Finally, we conclude that because appellant sought appropriate injunctive relief, the district court possessed original jurisdiction. We therefore reverse the district court's order granting respondent's motion to dismiss based on lack of subject matter jurisdiction.

FACTS AND PROCEDURAL HISTORY

On March 11, 2014, appellant Lucia Castillo and a co-buyer entered into a vehicle and security agreement with respondent United Federal Credit Union.[1] After respondent repossessed and sold the vehicle, respondent notified appellant that she owed a deficiency balance in the amount of $6,841.55.

On March 3, 2015, appellant and the co-buyer, as individuals, filed a complaint against respondent, alleging that respondent's notice of sale violated the Uniform Commercial Code (UCC). In the complaint, appellant further alleged that her case met the prerequisites for a class action under NRCP 23(a) and that the class was maintainable under NRCP 23(b). Although appellant sought an order for class action certification pursuant to the complaint, appellant never subsequently requested that the court certify the class due to the anticipation of discovery.

Appellant amended her complaint by reducing the number of causes of action. In her amended complaint, appellant asserted that the district court had jurisdiction because "each [c]lass [m]ember is entitled to the elimination of the deficiency balance and the statutory damages [pursuant to NRS 104.9625(3)(b)]," and thus, "the amount in controversy exceeds $10,000.00." Accordingly, appellant sought statutory damages under the UCC for each putative class member.

[1]We note that the co-buyer died during the pendency of this appeal, and because no personal representative was timely submitted, Castillo is the sole appellant. *See Castillo v. United Fed. Credit Union*, Docket No. 70151 (Order Partially Dismissing Appeal, April 11, 2017).

Appellant also sought injunctive relief to eliminate appellant's deficiency balance and "to remove any adverse credit information which may have been wrongfully reported on the consumer reports of the class members."

Respondent filed a motion to dismiss appellant's amended complaint, contending that the district court lacked subject matter jurisdiction because appellant and the co-buyer failed to demonstrate that they were individually entitled to damages in excess of $10,000. At the hearing for respondent's motion to dismiss, the parties additionally argued about whether appellant's request for injunctive relief divested the justice court of jurisdiction. Although the district court never reached a determination on this additional issue, the court ultimately granted respondent's motion by finding that (1) appellant could not aggregate the putative class member claims because the court did not order that the class action could be maintained, and (2) NRS 104.9625(4) precluded appellant from combining the deficiency amount she sought to eliminate with her statutory damages. This appeal followed.

DISCUSSION

Appellant argues that the district court erred in dismissing the action based on lack of subject matter jurisdiction because (1) the damages of each individual class member should have been aggregated to determine the amount in controversy, (2) appellant's claim for statutory damages should have been combined with the deficiency amount she owed respondent to determine jurisdiction, and (3) the court had original jurisdiction due to the injunctive relief appellant requested. Although we disagree with appellant's first contention, we agree with her two latter contentions.

Standard of review

This court reviews an order dismissing a complaint rigorously. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 323, 130 P.3d 1280, 1284 (2006). Accordingly, we accept all factual allegations in the complaint as true and construe all inferences in the complainant's favor. *Id.*

Additionally, a lower court's decision concerning subject matter jurisdiction is subject to de novo review. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). The plaintiff has the burden of proving subject matter jurisdiction. *See Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982, 983 (2000). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." NRCP 12(h)(3).

Whether the district court erred in granting respondent's motion to dismiss based on lack of subject matter jurisdiction

The district court did not err in declining to aggregate putative class member claims to determine subject matter jurisdiction

Appellant argues that the amount in controversy should be determined based on the class as a whole rather than individual class member claims.[2] Appellant also asserts that aggregation of claims promotes the purpose of class action litigation. Conversely, respondent argues that the district court properly declined to aggregate appellant's claims with potential class member claims to satisfy its jurisdictional threshold. We agree with respondent.

Justice courts only have original jurisdiction as specified by statute, whereas district courts "have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6, § 6(1); *see also* NRS 4.370(1) (2017). In pertinent part, justice courts have original jurisdiction in actions where "the damage claimed does not exceed $10,000." NRS 4.370(1)(b) (2013); 2013 Nev. Stat., ch. 172, § 2(1)(b), at 597.[3]

The novel issue before this court is whether the district court should aggregate putative class member claims to effectively divest the justice court of jurisdiction for class actions. Other jurisdictions have allowed for aggregation; however, we are not persuaded by such distinguishable authority. Notably, those courts have recognized the lack of an adequate forum for class actions in their respective jurisdictions if aggregation was not permitted. *See Thomas v. Liberty Nat'l Life Ins. Co.*, 368 So. 2d 254, 257 (Ala. 1979) ("There is no plain and adequate remedy for numerous small claims involving similar questions of law and fact in the district court."); *Judson Sch. v. Wick*, 494 P.2d 698, 699 (Ariz. 1972) ("Were we to hold that claims of less than $200.00 cannot be aggregated in Arizona, there would be no forum where class actions potentially involving millions of dollars and hundreds, possibly thousands of parties could find effective relief."); *Galen of Fla., Inc. v. Arscott*, 629 So. 2d 856, 857 (Fla. Dist. Ct. App. 1993) ("Our circuit courts are designed to hear such complex cases; our county courts are not."); *Dix. v. Am.*

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[2]Appellant contends that aggregation is appropriate in this case because "plaintiffs are 'claimants under a common right.'" Although appellant failed to raise this particular argument below, this point goes to the jurisdiction of the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, *unless it goes to the jurisdiction of that court*, is deemed to have been waived and will not be considered on appeal." (emphasis added)). Upon consideration of appellant's argument, we decline her invitation to adopt the common interest exception to allow aggregation in class actions.

[3]The Legislature raised the jurisdictional amount to $15,000, effective June 8, 2017. *See* 2017 Nev. Stat., ch. 484, § 7(1)(b), at 3023. The 2013 version of NRS 4.370 is the statute at issue in this case.

Bankers Life Assurance Co. of Fla., 415 N.W.2d 206, 210-11 (Mich. 1987) (holding "that class actions may be maintained in the circuit court, and only in the circuit court, without regard to the amount in controversy" because "[t]he circuit court is the trial court of general jurisdiction in this state and is better equipped to adjudicate class actions than is the district court").

Nevada, unlike other jurisdictions, recognizes that justice courts have the ability to hear class actions. *See* JCRCP 23. Accordingly, because class action members with small claims still have a forum to litigate, we distinguish our state from other jurisdictions and decline to aggregate individual class member claims to determine the amount necessary for the district court to establish subject matter jurisdiction. Therefore, we conclude that the district court did not err by rejecting this claim.

The district court erred in precluding appellant from combining her claim for statutory damages with the deficiency amount demanded by respondent to determine subject matter jurisdiction

Appellant argues that the district court erred by not combining the amount she sought for statutory damages with the deficiency amount she sought to prohibit respondent from collecting. Conversely, respondent argues that appellant may not recover for damages *and* a claim for a release of the deficiency. Respondent further argues that the deficiency is an anticipated counterclaim appellant is prohibited from combining with her claim for statutory damages. We agree with appellant.

Appellant sought statutory relief under NRS 104.9625(3)(b), which states as follows:

> If the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus 10 percent of the principal amount of the obligation or the time-price differential plus 10 percent of the cash price.

Accordingly, appellant could potentially recover $6,330.28 or $6,140.59, respectively. Appellant combined her higher statutory claim for $6,330.28 with the deficiency amount of $6,841.55 demanded by respondent to assert that the amount in controversy was $13,171.83. The district court determined that NRS 104.9625(4) precluded appellant from adding the statutory damages she sought with the deficiency amount respondent claimed.

NRS 104.9625(4) states in part that "a debtor or secondary obligor whose deficiency is eliminated or reduced under [NRS 104.9626] may not otherwise recover under [NRS 104.9625(2)]." Notably,

NRS 104.9626 does not apply to consumer transactions. *See* NRS 104.9626(1).

In this case concerning consumer transactions, appellant never sought recovery under NRS 104.9625(2); rather, appellant sought recovery under NRS 104.9625(3). Therefore, the district court erred in determining that appellant could not seek elimination of the deficiency and statutory damages. Accordingly, appellant could combine her higher statutory claim with the deficiency amount asserted to determine the jurisdictional amount. Moreover, irrespective of whether the monetary threshold was met to establish jurisdiction with the district court, the court independently acquired jurisdiction due to appellant's request for injunctive relief.

The district court erred in declining to assert original jurisdiction on the basis that appellant sought injunctive relief

Appellant argues that regardless of whether her alleged monetary damages exceeded $10,000, because she requested injunctive relief in her complaint, the district court erred in not asserting original jurisdiction. Conversely, respondent argues that appellant's claim for injunctive relief was improper. We agree with appellant.

In her complaint, appellant asserted that "[she] and the class members will suffer irreparable injury if [respondent] is not enjoined from the future wrongful collection and reporting of adverse information to the [consumer reporting agencies, i.e., Equifax, Experian, and TransUnion]." Thus, appellant sought injunctive relief to prevent respondent from collecting any deficiency and she also sought to expunge any adverse credit information that may have been wrongfully reported.

"The district court possesses original jurisdiction . . . over claims for injunctive relief." *Edwards*, 122 Nev. at 324, 130 P.3d at 1284. When monetary damages *and* injunctive relief are sought, "the district court has jurisdiction over all portions of the complaint, even if the damages sought fail to meet the district court's monetary jurisdictional threshold." *Id.* at 321, 130 P.3d at 1282. An injunction is appropriate when monetary damages are inadequate. *See Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971). However, "injunctive relief is not available in the absence of actual or threatened injury, loss or damage." *Berryman v. Int'l Bhd. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388 (1966). "There should exist the reasonable probability that real injury will occur if the injunction does not issue." *Id.* at 280, 416 P.2d at 389.

In appellant's amended complaint, she sought an injunction based on the following allegations:

> Since the repossession of the vehicles of [appellant] and the class members, [respondent] has wrongfully collected and/or reported credit information to the [consumer reporting

> agencies] with respect to the consumer reports of [appellant] and the class members.
>
> . . . .
>
> [Appellant] and the class members will suffer irreparable injury if [respondent] is not enjoined from the future wrongful collection and reporting of adverse information to the [consumer reporting agencies].

Because we must accept all factual allegations in the complaint as true and construe all inferences in the complainant's favor, *Edwards*, 122 Nev. at 323, 130 P.3d at 1284, appellant alleged actual and threatened injury. Therefore, in light of pleading injunctive relief, we conclude that the district court erred in granting respondent's motion to dismiss based on lack of subject matter jurisdiction. Accordingly, we reverse the district court's order and remand this matter to the district court for further proceedings consistent with this opinion.

Gibbons and Pickering, JJ., concur.

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Appellant, *v.* FIRST HORIZON HOME LOANS, a Division of FIRST TENNESSEE BANK, N.A., a National Association, Respondent.

No. 71325

February 1, 2018 409 P.3d 891

Appeal from summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

Kim Gilbert Ebron and *Howard C. Kim, Diana S. Cline Ebron*, and *Jacqueline A. Gilbert*, Las Vegas, for Appellant.

Akerman LLP and *Ariel E. Stern, Melanie D. Morgan*, and *Brett M. Coombs*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

This dispute seeks clarification of how the notice provisions of NRS 116.31162 apply amidst competing foreclosure sales by a

bank and a homeowner's association. Two days after Silver Springs Homeowner's Association recorded a notice of foreclosure sale, First Horizon Home Loans recorded its own notice of foreclosure sale. First Horizon was the first to hold its foreclosure sale and bought the property on a credit bid. However, before First Horizon recorded its trustee's deed, Silver Springs held its own foreclosure sale, at which SFR Investments purchased the same property. SFR Investments then filed suit against First Horizon to quiet title.

Both parties filed motions for summary judgment. The district court granted First Horizon's motion, finding that Silver Springs' foreclosure sale was invalid because Silver Springs had not provided the statutorily required notices pursuant to NRS 116.31162 and NRS 116.311635. Because NRS 116.31162 requires a homeowner's association ("HOA") foreclosing on its interest to record its notice of foreclosure sale, we conclude that any subsequent buyer purchases the property subject to that notice that a foreclosure may be imminent. Therefore, an HOA need not re-start the entire foreclosure process each time the property changes ownership so long as the HOA has provided the required notices to all parties who are entitled. Accordingly, the district court erred in finding Silver Springs' foreclosure sale invalid, and we reverse the resulting entry of summary judgment.

BACKGROUND

The former homeowner in this matter purchased the subject property for approximately $140,000, having financed the property with a loan from First Horizon Home Loans and executed a deed of trust in favor of First Horizon. The property was part of a planned unit development governed by Silver Springs Homeowner's Association.

In 2011, the homeowner became delinquent on both her mortgage and her HOA dues. Silver Springs tendered a notice of delinquent assessment lien and on April 20, 2012, recorded a notice of default and election to sell. Silver Springs then recorded a notice of foreclosure sale on February 5, 2013. Both the notice of default and the notice of foreclosure sale were mailed to First Horizon in its capacity as mortgagee. First Horizon does not dispute that it received the notices *in its capacity as mortgagee* and was aware of the delinquent assessments. Nevertheless, on October 30, 2012, First Horizon recorded its own notice of default and election to sell, and on February 7, 2013, two days after Silver Springs recorded its notice of foreclosure sale, First Horizon recorded its own notice of foreclosure sale.

First Horizon completed the foreclosure sale with respect to First Horizon's deed of trust on February 26, 2013. First Horizon pur-

chased the property for a credit bid of $151,283.09, and recorded the deed on March 7, 2013. One day before First Horizon recorded its deed, Silver Springs conducted the foreclosure sale with respect to its superpriority HOA lien. Appellant SFR Investments Pool 1, LLC, purchased the property for $7,000, and on March 18, 2013, SFR recorded its deed.

SFR filed suit against First Horizon to quiet title, and both parties moved for summary judgment.[1] The district court granted First Horizon's motion for summary judgment and denied SFR's cross-motion. The district court determined that Silver Springs failed to provide First Horizon, *in its capacity as owner*, with copies of the notice of delinquent assessment, notice of default, and notice of sale, as required by NRS 116.31162 and NRS 116.311635. Furthermore, the district court found that Silver Springs failed to comply with its own CC&Rs, which required the HOA to provide an owner with 30 days' written notice prior to any foreclosure. Accordingly, the district court deemed Silver Springs' foreclosure sale void and entered summary judgment in favor of First Horizon.

DISCUSSION

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, the pleadings and other evidence on file demonstrate that there is no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. *Id*.

NRS 116.3116 provides HOAs a superpriority lien on up to nine months of unpaid HOA dues. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, this court concluded that a lien pursuant to NRS 116.3116 is a "true priority lien such that its foreclosure extinguishes a first deed of trust on the property." 130 Nev. 742, 743, 334 P.3d 408, 409 (2014). The primary question presented by this case is whether the foreclosure sale by Silver Springs was valid when First Horizon acquired title to the property at its own foreclosure sale shortly before the HOA sale.

The HOA foreclosure sale did not violate the notice provisions of NRS Chapter 116

Prior to foreclosing on a superpriority lien, an HOA is first required to send a homeowner a notice of delinquent assessment by way of registered mail. NRS 116.31162(1)(a). "Not less than 30 days

[1]SFR filed additional claims not relevant to this opinion.

after mailing the notice of delinquent assessment," the HOA must record a "notice of default and election to sell," specifically detailing the amounts owing and warning the property owner that failure to pay could result in the loss of the home. NRS 116.31162(1)(b). At least 90 days after recording the notice of default and election to sell, the HOA must also publish notice of the time and place of the sale in a newspaper of record, post the notice of sale in a public place, and serve the notice upon "the unit's owner or his or her successor in interest." NRS 116.311635(1).

In many respects, this case is factually similar to that addressed in this court's recent decision: *Shadow Wood Homeowners Ass'n v. New York Community Bancorp*, 132 Nev. 49, 366 P.3d 1105 (2016). In *Shadow Wood*, the bank holding the first deed of trust on a parcel of property foreclosed and acquired the property. *Id*. at 52, 366 P.3d at 1107. The property was subject to both a superpriority lien by the Shadow Wood HOA and a subpriority lien. *Id*. This court concluded that the bank's foreclosure of the property eliminated the subpriority portion of Shadow Wood's lien, but that the bank took the property subject to the superpriority portion of the lien. *Id*. Accordingly, this court found that a subsequent foreclosure sale by Shadow Wood to a third-party purchaser could be valid. *Id*. at 65, 366 P.3d at 1116.

However, Shadow Wood provided a new notice of delinquent assessment, notice of default and election to sell, and notice of foreclosure sale after the bank acquired the property at the first foreclosure sale. *Id*. at 53, 366 P.3d at 1108. But, in this case, no new notices were provided after First Horizon acquired the property because Silver Springs had already provided those notices to the previous owner. First Horizon does not dispute that it received the notices *in its capacity as mortgagee* nor does it challenge the sufficiency of the notices to the previous owner. Rather, First Horizon argues that the district court properly determined that the foreclosure sale was void because Silver Springs did not provide First Horizon the required notices *in its capacity as owner*.

The very purpose of recording statutes is to impart notice to a subsequent purchaser. The statutory language of NRS 111.320 is instructive:

> Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

Considering the purpose of recording statutes, we conclude that a foreclosing party need not start the entire foreclosure process anew

each time the subject property transfers ownership. Imposing such a requirement could incentivize the transfer of title to a given property simply in order to avoid a foreclosure sale. Therefore, while a new owner is entitled to statutory notices from a foreclosing entity that had not previously been served, the foreclosing party is not required to re-serve any notices that were properly recorded and served on the previous owner.[2]

Silver Springs' foreclosure sale did not violate the HOA CC&Rs

The district court determined that Silver Springs conducted its foreclosure sale in violation of its own HOA guidelines, specifically, section 7.7 of the CC&Rs. Section 7.7 of the CC&Rs for Silver Springs provides:

> The failure of the Association to send a bill to a Member shall not relieve any member of his liability for any Assessment or charge under this Declaration, but the Assessment Lien therefor shall not be foreclosed as set forth in Section 7.10 below until the Member has been given not less than thirty (30) days written notice prior to such foreclosure that the Assessment or any installation thereof is or will be due and of the amount owing.

Regarding compliance with this section, the district court relied on the deposition testimony of David Alessi, a representative of the agent for Silver Springs. When asked if Silver Springs would have pursued the HOA foreclosure if it was aware that First Horizon had recently foreclosed, Alessi responded that "in general, we would not." He further clarified that Silver Springs "probably would have restarted the collection process *if there had been a trustee's deed recorded into the bank's name*." (Emphasis added.) The district court failed to note that Silver Springs' foreclosure sale was conducted one day before First Horizon recorded the trustee's deed following its purchase of the property. Alessi's testimony was inapplicable to the circumstances present here because the trustee's deed was not recorded into the bank's name at the time of the HOA foreclosure sale.

First Horizon does not allege that the prior owner was improperly noticed pursuant to either statute or the CC&Rs. When First Horizon purchased the property, it stepped into the shoes of the prior

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[2]First Horizon also complains that the notices had become "meaningless or stale" once First Horizon's own foreclosure extinguished the subpriority portion of Silver Springs' lien. This argument is unavailing. First Horizon could have made efforts to determine the remaining (superpriority) amount or paid the entire amount and requested a refund. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 757, 334 P.3d 408, 418 (2014).

owner.[3] For the same reason that Silver Springs was not statutorily required to re-start the foreclosure process once ownership changed, we conclude that the CC&Rs did not require Silver Springs to re-notice or postpone the HOA foreclosure sale.[4]

Silver Springs' foreclosure sale was not void as commercially unreasonable

First Horizon offers alternative bases to invalidate Silver Springs' foreclosure sale, but our caselaw regarding similar HOA foreclosures undermines each of the proffered bases. First Horizon contends that Silver Springs' sale for $7,000 was commercially unreasonable. During the pendency of this appeal, this court unequivocally held that inadequacy of price alone is not sufficient to set aside a foreclosure sale. *See Nationstar Mortg. LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 747-50, 405 P.3d 641, 647-49 (2017) (discussing cases and reaffirming that inadequate price alone is insufficient to set aside a foreclosure sale). To set aside a foreclosure sale, a party must demonstrate some element of fraud, unfairness, or oppression. *Id.*

A grossly inadequate price may require only slight evidence of fraud, unfairness, or oppression to set aside a foreclosure sale, *id.*, and First Horizon argues that $7,000 should be deemed "grossly inadequate." Before the district court, First Horizon argued that it had not received adequate notice as the new homeowner, that the first foreclosure sale rendered the prior HOA notices "meaningless or stale," and that Alessi's testimony demonstrated that Silver Springs had violated their own policy.[5] In accordance with our foregoing analysis, we reject First Horizon's arguments.

In light of our recent opinion in *Nationstar Mortgage*, and considering that First Horizon had actual and constructive notice of the HOA foreclosure sale while it was pending, we conclude that First Horizon fails to provide sufficient evidence of fraud, unfairness, or oppression.[6] Therefore, we have no basis to conclude that the Silver Springs' foreclosure sale should be set aside.

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[3]We recognize that First Horizon, as successor in interest, did not have a *personal* obligation to pay the previous owner's past due assessments.

[4]The parties submitted arguments regarding SFR's position as a bona fide purchaser, but our determination that Silver Springs' foreclosure sale was valid renders SFR's status as a bona fide purchaser a moot point.

[5]To the extent First Horizon raises new arguments on appeal to support a finding of "fraud, unfairness, or oppression," we decline to address them in the first instance. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

[6]As an alternative basis to uphold the district court order, First Horizon contends that the application of NRS 116.3116 should be preempted in the instant case because the underlying loan by First Horizon was insured through the FHA insurance program. We recently rejected this argument in *Renfroe v. Lakeview Loan Servicing, LLC*, 133 Nev. 358, 398 P.3d 904 (2017).

CONCLUSION

Based on the foregoing, we hold that a foreclosing party is not required to re-serve any notices that were properly served prior to a transfer of ownership. Furthermore, the district court erred in finding that Silver Springs had violated section 7.7 of the CC&Rs. We conclude there was no basis to invalidate the HOA foreclosure sale. Accordingly, we reverse the entry of summary judgment in this matter, direct the district court to enter summary judgment in favor of SFR regarding its quiet title claim, and remand for further proceedings consistent with this opinion.

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

JOHN B. QUINN, an Individual; MICHAEL T. ZELLER, an Individual; MICHAEL L. FAZIO, an Individual; and IAN S. SHELTON, an Individual; and ELAINE P. WYNN, an Individual, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GOFF GONZALEZ, District Judge, Respondents, and KIMMARIE SINATRA, an Individual; WYNN RESORTS, LIMITED, a Nevada Corporation, Real Parties in Interest.

No. 74519

February 8, 2018 410 P.3d 984

Original petition for a writ of prohibition or mandamus challenging a district court order granting a motion to compel depositions.

Petition granted.

McDonald Carano LLP and *Pat Lundvall*, Las Vegas, for Petitioners John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Greenberg Traurig, LLP*, and *Mark E. Ferrario* and *Tami D. Cowden*, Las Vegas; *Sidley Austin, LLP*, and *James M. Cole*, Washington, D.C.; *Sidley Austin, LLP*, and *Scott D. Stein*, Chicago, Illinois, for Petitioner Elaine P. Wynn.

Brownstein Hyatt Farber & Schreck LLP and *Mitchell J. Langberg*, Las Vegas; *Pisanelli Bice PLLC* and *Todd L. Bice, James J. Pisanelli*, and *Debra L. Spinelli*, Las Vegas; *Glaser Weil Fink How-*

ard Avchen & Shapiro LLP and *Robert L. Shapiro*, Los Angeles, California, for Real Parties in Interest.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this writ petition, we consider whether a Nevada district court has authority to compel an out-of-state[2] attorney to appear in Nevada for a deposition as a nonparty witness in a civil action pending in Nevada state court where the attorney has appeared pro hac vice in the action. We conclude that it does not. Because the district court lacked authority to compel the out-of-state nonparty witnesses to be deposed, we grant the writ petition and vacate the district court's order.

FACTS AND PROCEDURAL HISTORY

This writ petition arises from ongoing litigation in Nevada state court involving Wynn Resorts, Ltd., and Elaine Wynn. Petitioners John B. Quinn, Michael T. Zeller, Michael L. Fazio, and Ian S. Shelton (collectively, Quinn Emanuel attorneys) are attorneys at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, a firm based in California, who represented Elaine in the Wynn Resorts litigation from January 2016 to March 2017. All four attorneys are California residents and were granted pro hac vice admission in Nevada for the purpose of that litigation. While represented by Quinn Emanuel, Elaine asserted claims against real parties in interest Kimmarie Sinatra (general counsel for Wynn Resorts) and Wynn Resorts.

In September 2017, approximately six months after Quinn Emanuel had withdrawn from representing Elaine, Sinatra filed a retaliatory "abuse of legal process" counterclaim against Elaine, alleging that the abuse of process began in early 2016 when Elaine retained Quinn Emanuel to represent her. The counterclaim alleged that, through Quinn Emanuel, Elaine attempted to intimidate Sinatra into accepting a settlement proposal, filed a pleading asserting frivolous and false claims against her, and abused the discovery process. In October 2017, pursuant to California's Uniform Interstate Depositions and Discovery Act, Sinatra caused deposition subpoenas to be

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, and THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused themselves from participation in the decision of this matter.

[2]For the purposes of this opinion, "out-of-state" means a nonresident who is located outside of the state.

issued in California directing the Quinn Emanuel attorneys to appear for deposition in California in late October.

The Quinn Emanuel attorneys objected to the California subpoenas and, after unsuccessful meet and confer efforts, filed a petition to quash the subpoenas in the California superior court on October 23. The petition alleged, among other things, that service of the subpoenas was defective and that Sinatra sought information that was protected by attorney-client privilege and work-product privilege and could not satisfy the test to depose an opposing party's counsel. Sinatra filed an ex parte application in the California court to compel the depositions and shorten the time on hearing the petition so that the Quinn Emanuel attorneys could be deposed before the November 3 discovery cutoff date in the Nevada action. The attorneys opposed the application and sought sanctions. The California court denied Sinatra's request on October 27, explaining that such short notice was never appropriate and was especially not appropriate here where there were attorney-client privilege issues and where a shortened time schedule would deprive the moving parties "of due process and would certainly deprive the court of time to fully consider and prepare the motion."

On October 30, Sinatra filed in the Nevada district court a motion to compel depositions and requesting an order shortening time. Sinatra asserted that the Quinn Emanuel attorneys had attempted to evade service of the subpoenas and had filed a frivolous petition to quash the subpoenas in the California court, and, since the California court refused to hear the matter until after the discovery cutoff date, she was asking the Nevada court to hear the matter on shortened time and to order the attorneys to appear for deposition in Nevada by the discovery cutoff date. The motion further asserted that, because the Quinn Emanuel attorneys had appeared before the district court as counsel for Elaine in this case, the district court had personal jurisdiction over them. The motion also argued that the district court's power under NRCP 37(a) to enter an order compelling discovery and the court's discretion over discovery matters provided the district court with the authority to grant the motion. The Quinn Emanuel attorneys opposed the motion, arguing that the Nevada district court had no jurisdiction over the California discovery dispute. The district court granted the request to shorten time and set a hearing for November 6.

At the hearing, petitioners' counsel argued that the Quinn Emanuel attorneys all reside in California and were issued California subpoenas, and there is no rule of procedure, statute, or rule of practice that allows the Nevada district court to compel the depositions and usurp the power of the California court over this discovery dispute. Petitioners' counsel further argued that the district court did not have jurisdiction over the dispute under the Uniform Interstate Deposi-

tions and Discovery Act, which had been adopted by both California and Nevada, because the matter was pending in the California superior court, which had already exercised jurisdiction over the matter and denied a similar request by Sinatra. Petitioners' counsel asked the district court to decline hearing the motion and let it be heard in California pursuant to the uniform act and full faith and credit and comity principles. The district court found that it had jurisdiction over the attorneys because they had appeared in Nevada court in this case on a pro hac vice basis. The district court granted Sinatra's motion to compel the depositions of the attorneys and ordered the depositions to take place in Las Vegas. The district court entered a stay of its order to allow petitioners to file a writ petition with this court.

After the petitioners filed the instant writ petition, the California superior court held a hearing on the petition to quash the subpoenas and granted it. The California court concluded that it had jurisdiction over the subpoenas, applied a three-prong test identical to that used in Nevada for determining the propriety of attorney depositions,[3] and found that Sinatra failed to establish a proper basis for deposing the Quinn Emanuel attorneys. The California court also found that Sinatra's opposition to the petition to quash was without substantial justification and thus ordered Sinatra to pay sanctions in the amount of $10,000 to the attorneys. The parties stipulated not to enforce the orders until the instant writ petition is resolved, and Sinatra agreed not to appeal the California court's order quashing the subpoenas.

DISCUSSION

Writ relief is appropriate

The decision to entertain a writ petition lies solely within the discretion of this court. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus or prohibition may issue only "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.330. A writ of prohibition may be granted when the district court exceeds its jurisdiction, NRS 34.320, and may be an "appropriate remedy for the prevention of improper discovery." *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171 n.5, 252 P.3d 676, 678 n.5 (2011).

The Quinn Emanuel attorneys are not parties to the action below, NRAP 3A(a), and a pretrial order granting a motion to compel wit-

[3]A party seeking to depose an opposing party's counsel in Nevada must first "demonstrate that the information sought cannot be obtained by other means, is relevant and nonprivileged, and is crucial to the preparation of the case." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 225, 276 P.3d 246, 247 (2012).

nesses to sit for depositions is not substantively appealable, NRAP 3A(b). Therefore, an appeal is not available to them, and they do not have a plain, speedy, and adequate remedy in the ordinary course of law. Furthermore, they claim that the writ is necessary to prevent improper disclosure of privileged and confidential information and because the district court had no jurisdiction to enter its order against them. Because a writ of prohibition is an appropriate method for making these challenges to a district court order and the Quinn Emanuel attorneys have no other adequate remedy, we exercise our discretion to entertain this writ petition.

The district court did not have authority to order out-of-state nonparty witnesses to appear in Nevada for depositions

The Quinn Emanuel attorneys argue that the district court lacked jurisdiction to order them to appear in Nevada for depositions as nonparty witnesses. Because their petition challenging the validity of the discovery subpoenas was pending in the California superior court, the Quinn Emanuel attorneys contend that the California court had exclusive jurisdiction over the discovery dispute. Sinatra argues that the district court's order was proper because the district court's inherent authority over the attorneys who appear and practice in district court, combined with the court's authority over discovery matters, gave it inherent authority to compel the attorneys to comply with discovery.

The Nevada Rules of Civil Procedure provide that the attendance of a nonparty deponent at a deposition may be compelled by subpoenas as provided by NRCP 45. NRCP 30(a)(1); NRCP 45(a)(2). NRCP 45(b)(2) restricts the service of a subpoena on a nonparty to "any place within the state." Thus, as is evident from this rule, the subpoena power of Nevada courts over nonparty deponents does not extend beyond state lines. NRCP 45's intra-state limitation on Nevada courts' subpoena power is consistent with authority from other states recognizing the geographic restrictions of a state's discovery process. *See, e.g.*, *Colo. Mills, LLC v. SunOpta Grains & Foods, Inc.*, 269 P.3d 731, 732 (Colo. 2012) ("Colorado courts, as a matter of state sovereignty, have no authority to enforce civil subpoenas against out-of-state nonparties."); *Attorney Grievance Comm'n of Md. v. Mixter*, 109 A.3d 1, 9 (Md. 2015) ("[T]he subpoena powers of the State of Maryland stop at the state line." (internal quotation marks omitted)); *Craft v. Chopra*, 907 P.2d 1109, 1111-12 (Okla. Civ. App. 1995) (concluding that the reach of Oklahoma's discovery process does not extend beyond the state boundaries); *see also* Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 Minn. L. Rev. 968, 984 (2004) ("Most states retain strict limits on the reach of the subpoena power, holding that subpoena service cannot reach nonparties found out-

side the state."). This territorial restriction on state courts' subpoena powers "reflects the traditional concept of states as sovereign powers, exercising plenary jurisdiction within their territories but largely powerless beyond state lines." Scott, *supra*, at 984.

In recognition of the limited reach of the subpoena power, Nevada and many other states, including California, have "adopted the Uniform Interstate Depositions and Discovery Act ('UIDDA'), which provides a mechanism for parties litigating in one state, the trial state, to issue a subpoena to a nonparty in another state, the discovery state." *Colo. Mills*, 269 P.3d at 734 (internal quotation marks omitted).[4] The UIDDA provides that when a party seeks out-of-state discovery, the party must first obtain a subpoena from the trial state (here, Nevada) and then submit that subpoena to the clerk of court in the discovery state (California), who then reissues the subpoena within the discovery state. Any motion practice associated with the discovery subpoena, such as a motion to enforce or quash a subpoena, must take place in the discovery state and is governed by the law of the discovery state. The commentary to the UIDDA explains the rationale behind this: "[T]he discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests." UIDDA § 6 cmt. (Unif. Law Comm'n 2017).

In seeking to compel the depositions of the Quinn Emanuel attorneys, Sinatra initially complied with the procedures set forth in California's version of the UIDDA. Sinatra sought to depose the Quinn Emanuel attorneys in the California county in which they worked and resided. She obtained subpoenas first from the Nevada district court directing the Quinn Emanuel attorneys to appear for deposition in California, and then caused those deposition subpoenas to be reissued in California. Cal. Civ. Proc. Code §§ 2029.300, 2029.350 (West 2018). After the Quinn Emanuel attorneys filed a motion to quash the subpoenas in the California court, Sinatra moved to enforce the subpoenas by filing a motion to compel in the California court. Cal. Civ. Proc. Code § 2029.600(a) (West 2018) (providing that any request to enforce or quash a subpoena may be filed in the superior court in the county where the discovery is to be conducted). Because the discovery was to take place in California and the deposition subpoenas were issued in California, the California court had jurisdiction over the discovery dispute that ensued between the Quinn Emanuel attorneys and Sinatra. *Id*. This jurisdiction did not end merely because the California court refused to resolve the discovery dispute by the discovery cutoff date in the Nevada action as requested by Sinatra.

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[4]*See* NRS 53.100-.200 (Nevada's version of the UIDDA); Cal. Civ. Proc. Code §§ 2029.100-.900 (West 2018) (California's version of the UIDDA).

Sinatra's attempt to enforce the California subpoenas in Nevada district court while a challenge to those subpoenas was pending in the California court was improper, and we conclude the Nevada district court had no authority to grant her motion to compel.[5] California's UIDDA governed the discovery dispute, and thus the authority to resolve the attorneys' petition to quash the subpoenas and Sinatra's motion to compel rested with the California superior court. This conclusion is consistent with Nevada's own UIDDA, codified at NRS 53.100-.200, which contemplates that enforcement of a subpoena issued to an out-of-state nonparty rests with "the court in the county in which discovery is to be conducted."[6] NRS 53.190; *see also* NRS 53.200 (providing that, in applying and interpreting the UIDDA, "consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it"). In addition, NRCP 37(a)(1) requires that a motion to compel a nonparty deponent "be made to the court in the district where the deposition is being, or is to be, taken," rather than in the district court where the action is filed. Thus, it is clear that any application for an order to compel should have been made to and adjudicated by the California court.

Sinatra argues that, regardless of the California court's jurisdiction over the discovery dispute, the Nevada district court properly exercised its jurisdiction in granting the motion to compel. Sinatra contends that the district court was not enforcing the California subpoenas but rather was acting pursuant to its inherent authority when it ordered the Quinn Emanuel attorneys to appear in Nevada for depositions. Sinatra's argument, however, mischaracterizes the record. The district court's own statements in granting the motion to compel indicate that the district court's order was dependent on the California subpoenas, as no deposition notice or subpoena had been issued to the Quinn Emanuel attorneys for their appearance in Nevada. As we explained above, the district court had no authority to enforce the deposition subpoenas issued in California.

Even if we assume that Sinatra's motion to compel was not an attempt to enforce the California subpoenas and that the district court's order was independent of those subpoenas, Sinatra's argu-

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[5]The parties do not suggest, and the record does not reflect, that any Nevada subpoena requiring the Quinn Emanuel attorneys to appear for deposition in Nevada was issued to or served on the Quinn Emanuel attorneys in Nevada.

[6]Other states have likewise interpreted their own uniform acts as evidencing a legislative intent "that enforcement of civil subpoenas against out-of-state nonparties is left to the state in which the discovery is to take place." *Colo. Mills*, 269 P.3d at 735; *see also Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, 770 S.E.2d 440, 445 (Va. 2015) (explaining that Virginia's "UIDDA affords protection to Virginia citizens subject to a subpoena from another state by providing for enforcement of the subpoena in Virginia," and "[i]n turn, the UIDDA contemplates that Virginia courts will respect the territorial limitations of their own subpoena power").

ments about the district court's inherent authority fail for several reasons. First, because no subpoena or notice for deposition in Nevada was issued to the attorneys, there was no discovery in Nevada with which they could be ordered to comply.[7] Second, in light of the territorial restrictions on the district court's subpoena powers, the district court had no authority to compel the Quinn Emanuel attorneys to appear in Nevada.

In determining that it had authority to compel the out-of-state nonparty attorneys to appear for depositions in Nevada, the district court relied on the Quinn Emanuel attorneys' pro hac vice applications to find that the attorneys had subjected themselves to the jurisdiction of Nevada courts. By using this jurisdiction as the basis for its subpoena authority, the district court appeared to conflate personal jurisdiction with subpoena power. As other jurisdictions have recognized, the concept of personal jurisdiction is different from that of subpoena power. *See In re Nat'l Contract Poultry Growers' Ass'n*, 771 So. 2d 466, 469 (Ala. 2000); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So. 2d 1186, 1187 (La. 1994); *Yelp*, 770 S.E.2d at 443. Personal jurisdiction is based on conduct that subjects an out-of-state *party* "to the power of the [Nevada] court to adjudicate its rights and obligations in a legal dispute, sometimes arising out of that very conduct." *Phillips*, 634 So. 2d at 1187-88; *see also* NRS 14.065(1), (2). Subpoena power, on the other hand, "is based on the power and authority of the court to compel the attendance at a deposition of [a *nonparty*] in a legal dispute between other parties." *Phillips*, 634 So. 2d at 1188. Here, the out-of-state witnesses are not parties to the civil action pending in Nevada. And the fact that the Quinn Emanuel attorneys were admitted pro hac vice in the Nevada action would not confer on the Nevada district courts the power to require them to appear for deposition as nonparty witnesses.[8] *See Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So. 2d 121, 129 (Miss. 2005) ("[A] Mississippi court cannot subpoena a nonresident nonparty to appear and/or produce in Mississippi documents which are located outside the State of Mississippi, even if that nonresident nonparty is subject in another context to the personal jurisdiction of the court."); *Yelp*, 770 S.E.2d at 443 ("[T]he power to compel a nonresident non-party to produce documents in Virginia or appear and give testimony in Virginia is not based on consideration of whether the nonresident non-party would be subject to the personal jurisdic-

[7]At oral argument, Sinatra suggested for the first time that the motion to compel was better characterized as a request to extend the discovery cutoff date. This assertion is belied by the record.

[8]We make no decision on whether an attorney's pro hac vice admission in Nevada could subject the attorney to the personal jurisdiction of the Nevada courts in a civil action in which the attorney is a party.

tion of a Virginia court if named as a defendant in a hypothetical lawsuit."). Accordingly, we conclude that the district court's basis for exercising subpoena power over the witnesses was erroneous.

Finally, Sinatra argues that the district court nevertheless properly relied on the attorneys' pro hac vice admission to justify its grant of the motion to compel because the district court's inherent authority over attorneys who appear and practice in court provides the court with authority to compel those attorneys to comply with discovery. In support of this broad assertion, Sinatra cites to caselaw providing that district courts have the power to sua sponte remove counsel from representing a defendant, sanction or refer counsel to the State Bar for misconduct, and order an evidentiary hearing to ascertain whether counsel's conflict screening measures were adequate to protect the client in a case before the court. Sinatra's argument in this regard is unavailing. The inherent power of the court over attorneys is not limitless, and there is no logical connection between the court's power to compel a nonparty witness to sit for deposition and the court's power to regulate the legal profession and stop or redress professional misconduct by out-of-state counsel. Sinatra sought to compel the Quinn Emanuel attorneys' appearance in their role as witnesses, not in their role as attorneys. Allowing the court to order an out-of-state nonparty witness to appear for a deposition merely because that witness happens to be an attorney is not consistent with the court's inherent authority over the legal profession. *See* SCR 39 ("Authority to admit to practice and to discipline [attorneys] is inherent and exclusive in the courts."); SCR 99(2) (recognizing the court's "power to maintain control over proceedings conducted before it, such as the power of contempt"). Thus, we decline to recognize an exception to the district court's subpoena power over an out-of-state nonparty witness when that witness is an attorney who has practiced in Nevada courts.

CONCLUSION

We conclude that the district court had no authority to enforce out-of-state subpoenas issued to out-of-state nonparty witnesses or to compel those witnesses to appear in Nevada for deposition in a civil action. Accordingly, we grant the petition for writ relief and direct the clerk of this court to issue a writ of prohibition directing the district court to vacate the order granting the motion to compel depositions.[9]

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

[9]In light of our decision, we deny as moot petitioners' motion to extend the district court's stay.