IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE PENSION FUND, APPELLANT, *v.* GEORGE R. BROKAW; CHARLES M. LILLIS; TOM A. ORTOLF; CHARLES W. ERGEN; CANTEY M. ERGEN; JAMES DEFRANCO; DAVID K. MOSKOWITZ; CARL E. VOGEL; THOMAS A. CULLEN; KYLE J. KISER; AND R. STANTON DODGE, RESPONDENTS.

No. 69012

IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE PENSION FUND, APPELLANT, *v.* GEORGE R. BROKAW; CHARLES M. LILLIS; TOM A. ORTOLF; CHARLES W. ERGEN; CANTEY M. ERGEN; JAMES DEFRANCO; DAVID K. MOSKOWITZ; CARL E. VOGEL; THOMAS A. CULLEN; KYLE J. KISER; AND R. STANTON DODGE, RESPONDENTS.

No. 69729

September 14, 2017 401 P.3d 1081

Consolidated appeals from a district court order of dismissal after the district court deferred to a special litigation committee's determination that the derivative claims should be dismissed and an order awarding costs. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Affirmed in part and vacated in part.

[Rehearing denied December 8, 2017]

PICKERING, J., dissented in part.

McDonald Carano, LLP, and *Jeffrey A. Silvestri* and *Amanda C. Yen*, Las Vegas, and *Debbie A. Leonard*, Reno; *Bernstein Litowitz Berger & Grossman, LLP*, and *Mark Lebovitch, Jeroen Van Kwawegen*, and *Adam D. Hollander*, New York, New York, for Appellant.

Holland & Hart, LLP, and *J. Stephen Peek, Robert J. Cassity*, and *David J. Freeman*, Las Vegas, and *Holly Stein Sollod*, Denver, Colorado; *Young, Conway, Stargatt & Taylor, LLP*, and *David C. McBride, Robert S. Brady, C. Barr Flinn*, and *Emily V. Burton*, Wilmington, Delaware, for Respondents, George R. Brokaw, Charles M. Lillis, and Tom A. Ortolf.

Reisman Sorokac and *Joshua H. Reisman* and *Robert R. Warns III*, Las Vegas; *Willkie, Farr & Gallagher, LLP*, and *James C.*

Dugan, Tariq Mundiya, and *Mary K. Warren*, New York, New York, for Respondents, Charles W. Ergen and Cantey M. Ergen.

Pisanelli Bice, PLLC, and *James J. Pisanelli* and *Debra L. Spinelli*, Las Vegas; *Sidley Austin, LLP*, and *Bruce R. Braun*, Chicago, Illinois, for Respondents Thomas A. Cullen, Kyle J. Kiser, and R. Stanton Dodge.

Brownstein Hyatt Farber Schreck, LLP, and *Maximilien D. Fetaz, Kirk B. Lenhard*, and *Jeffrey S. Rugg*, Las Vegas; *Sullivan & Cromwell, LLP*, and *Brian T. Frawley*, New York, New York, for Respondents James DeFranco, David K. Moskowitz, Carl E. Vogel, and (in their capacity as Director Defendants) George R. Brokaw, Charles M. Lillis, and Tom A. Ortolf.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

Appellant Jacksonville Police and Fire Pension Fund (Jacksonville) brought suit, derivatively on behalf of DISH Network Corporation, challenging certain conduct of, among others, Charles W. Ergen, the chairman and chief executive officer of DISH. To investigate Jacksonville's claims, DISH's board of directors (the Board) created a Special Litigation Committee (the SLC), respondent in this matter. After the SLC concluded it was not in DISH's best interest to pursue Jacksonville's derivative claims, the district court deferred to the SLC's decision, dismissed the complaint, and awarded costs to the SLC.

In these consolidated appeals, we address the appropriate legal standard for a district court's consideration of an SLC's motion to defer to the SLC's recommendation that derivative claims should be dismissed because pursuing those claims would not be in the company's best interest. In doing so, we adopt the standard set forth in *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), and conclude that the district court did not abuse its discretion in determining that the SLC was independent based upon its voting structure, which required an independent member's affirmative vote in order for any resolution of the SLC to have effect, and that the SLC conducted a good-faith and thorough investigation. We therefore affirm the district court's order granting the SLC's motion to defer and dismissing the complaint. With respect to costs, we affirm the district court's awards for electronic discovery costs and photocopying and scan-

ning costs, but vacate the award for teleconference costs because we conclude that the district court lacked justifying documentation.

FACTS AND PROCEDURAL HISTORY

While we recognize that the underlying litigation and related proceedings involve extensive, complex, and contested facts, *see, e.g.*, *In re LightSquared Inc.*, 511 B.R. 253, 265-314 (Bankr. S.D.N.Y. 2014), none of the issues before us concern the substantive merits of Jacksonville's claims or the SLC's determinations.[1] Accordingly, we briefly summarize the events leading up to our review and focus on the facts most pertinent to the disposition of the instant consolidated appeals—i.e., the SLC's formation and investigation.

Background summary

This case arises out of Ergen's purchases of secured debt of LightSquared L.P. and DISH's efforts to acquire LightSquared's assets after Ergen's purchases. Challenging this conduct, DISH stockholder Jacksonville brought claims for breach of loyalty and unjust enrichment against Ergen, and claims for breach of loyalty against DISH's Board and officers. LightSquared filed for Chapter 11 bankruptcy with approximately $1.7 billion face amount of secured debt outstanding. The secured debt is governed by a credit agreement, which lists DISH and Echostar Corporation, an entity controlled by Ergen, as disqualified companies such that neither can be an eligible assignee of the debt.

From April 2012 to April 2013, Ergen, through SP Special Opportunities, LLC (SPSO), another entity that he owns and controls, and using funds provided from his personal assets, purchased approximately $850 million of LightSquared's secured debt for a total purchase price of approximately $690 million. Ergen later informed DISH and Echostar of the opportunity to acquire LightSquared's assets through its bankruptcy. Ergen also disclosed to DISH's Board that he purchased LightSquared debt.

At a meeting held several days later and without the Ergens, the Board created the Special Transaction Committee (the STC) to determine whether DISH would pursue the LightSquared opportunity. On July 21, 2013, the STC recommended that DISH submit a bid, and the STC was dissolved that same day. Based on the STC's recommendation, on July 23, 2013, DISH submitted a $2.22 billion bid to acquire LightSquared's assets as part of a bankruptcy plan. How-

[1]We note that no party to the instant matter has raised issue preclusion with respect to the related bankruptcy proceedings. Further, we note that only the respondents who are members of the SLC filed an answering brief and participated in these consolidated appeals.

ever, on December 23, 2013, the Board authorized the termination of the bid.

Derivative litigation

Before DISH terminated its bid, on August 9, 2013, Jacksonville instituted the instant derivative litigation. Originally, Jacksonville brought certain claims for breach of loyalty and unjust enrichment against Ergen and other directors and officers arising from, among other things, (1) Ergen's purchases, through SPSO, of LightSquared's secured debt; (2) the STC established by the Board to consider a bid for wireless spectrum and related assets of LightSquared; and (3) DISH's subsequent bid for the LightSquared assets. Jacksonville argued that Ergen's purchases of LightSquared's secured debt usurped corporate opportunities belonging to DISH, Ergen pressured DISH to make the bid in order to ensure that LightSquared could use the proceeds of DISH's bid to pay off Ergen's secured debt at substantial profit to Ergen, and Ergen interfered with the STC before it recommended the bid to the Board.

After DISH terminated its bid, Jacksonville filed its second amended complaint, adding as defendants the SLC members, among others, and further alleging the bid would have been beneficial to DISH and should not have been terminated. Thus, in addition to the events listed above, Jacksonville's claims stemmed from the withdrawal of DISH's bid and the establishment of the SLC.

The SLC's formation and investigation

On September 18, 2013, the Board created the SLC to investigate Jacksonville's claims and determine whether it was in the company's best interest to pursue the claims. The SLC initially consisted of long-standing board member Tom A. Ortolf and George R. Brokaw, who became a board member on October 7, 2013. In its status report to the court the following month, Jacksonville noted the flawed composition of the SLC, arguing Ortolf and Brokaw had close personal and professional ties to Ergen. On December 9, 2013, Charles M. Lillis, who became a board member on November 5, 2013, was added to the SLC. The resolutions appointing Lillis to the SLC made it so that the SLC could not act without Lillis's approval.

Ultimately, the SLC determined that it was not in DISH's best interest to pursue the litigation. As detailed in its report of over 300 pages, the SLC determined that the claims lacked merit, DISH could not prevail on the claims, and pursuit of the claims would be costly to DISH and undermine DISH's defenses asserted in other litigation. The SLC decided that the claims should be dismissed.

The SLC submitted its report to the district court on October 24, 2014. In the time leading up to the SLC's report, the district court

considered multiple motions, status reports, and status conferences surrounding DISH's efforts to acquire LightSquared's assets, the events in LightSquared's bankruptcy and the adversary proceeding, and the derivative claims.

The SLC's motion to defer

After investigating for almost a year, the SLC moved the court to defer to the SLC's determination that the claims should be dismissed. After an initial hearing and reviewing the SLC's report and initial briefing on the motion to defer, the district court granted Jacksonville discovery pursuant to NRCP 56(f) regarding the SLC's independence and the thoroughness of the SLC's investigation. After discovery, the district court ordered supplemental briefing and oral argument. Ultimately, the district court granted the SLC's motion to defer, dismissing the case with prejudice, and Jacksonville timely appealed.

Costs

After the SLC filed its memorandum of costs, Jacksonville filed a motion to retax, challenging, in relevant part, costs sought by the SLC for electronic discovery, photocopying and scanning, and teleconferences. The district court awarded the SLC $151,178.32 for "costs of the electronic discovery vendors utilized by the SLC" because pursuant to NRS 18.005(17), the costs "were a reasonable and necessary expense incurred in connection with the action as a method by which to acquire and process the information that was required to be produced in response to [Jacksonville]'s NRCP 56(f) discovery requests." Additionally, the district court awarded the SLC costs for photocopying and scanning under NRS 18.005(12), and for teleconference calls under NRS 18.005(13). Ultimately, the SLC was awarded $186,100.60 in costs, plus interest. Again, Jacksonville timely appealed, and this court consolidated the two appeals.

DISCUSSION

These consolidated appeals primarily concern the district court's granting the SLC's motion to defer to its decision to dismiss Jacksonville's derivative complaint. An SLC has the power to terminate a derivative complaint to the extent allowed by the state of incorporation. *See Burks v. Lasker*, 441 U.S. 471, 486 (1979). Although this court has yet to address this issue, two principal legal standards exist for considering an SLC's request to dismiss derivative claims. *See generally Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979). Under both tests, the district court determines whether the SLC is independent and conducted a good-faith, thorough investigation. *Zapata*, 430 A.2d

at 788; *Auerbach*, 393 N.E.2d at 1001, 1002-03; *see also Curtis v. Nevens*, 31 P.3d 146, 152 (Colo. 2001) (indicating that both tests recognize "trial courts are well equipped to evaluate the methodology and procedures best suited to conduct such an investigation"). The *Auerbach* test stops there—so long as the SLC is independent and employed reasonable procedures in its analysis, courts following this approach "may not second-guess [the SLC's] business judgment in deciding not to pursue the derivative litigation." *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 638 (Colo. 1999) (following *Auerbach*). The *Zapata* approach, on the other hand, adds a second step—if the court finds the SLC "was independent and showed reasonable bases for good faith findings and recommendations, the [c]ourt may proceed, in its discretion, to . . . determine, applying its own independent business judgment, whether the motion should be granted." *Zapata*, 430 A.2d at 789. Because Nevada's business judgment rule "prevents courts from 'substitut[ing] [their] own notions of what is or is not sound business judgment,'" *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 378, 399 P.3d 334, 344 (2017) (alterations in original) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)), we conclude that *Auerbach* is the better approach. *See Lewis v. Anderson*, 615 F.2d 778, 783 (9th Cir. 1979) ("[T]he good faith exercise of business judgment by a special litigation committee of disinterested directors is immune to attack by shareholders or the courts."); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1342-43 (Ohio Ct. App. 1990) (finding *Zapata*'s "degree of scrutiny to be irreconcilable with the spirit of the business judgment rule").

Accordingly, and as a matter of first impression, we hold that courts should defer to the business judgment of an SLC that is empowered to determine whether pursuing a derivative suit is in the best interest of a company where the SLC is independent and conducts a good-faith, thorough investigation. *See Auerbach*, 393 N.E.2d at 996 ("While the substantive aspects of a decision to terminate a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors are beyond judicial inquiry under the business judgment doctrine, the court may inquire as to the disinterested independence of the members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee."); *see also Curtis*, 31 P.3d at 152 (heeding "the cautionary words expressed by the New York Court of Appeals in *Auerbach*, that a court 'may not under the guise of consideration of such factors trespass in the domain of business judgment.'" (quoting *Auerbach*, 393 N.E.2d at 1002)). Additionally, we conclude that the application of this standard is a matter left to the sound discretion of the district court, and absent an abuse of that discretion, the district court's rulings will not be

disturbed on appeal. *See, e.g.*, *Kokocinski ex rel. Medtronic, Inc. v. Collins*, 850 F.3d 354, 361-62 (8th Cir. 2017); *Miller*, 591 N.E.2d at 1343; *see also Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) ("The district court's factual findings . . . are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence." (quoting *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009))).[2]

The district court did not abuse its discretion in deferring to the SLC's decision and dismissing the complaint

Jacksonville argues that the district court made numerous reversible errors in evaluating the independence and good faith of the SLC. We disagree.

Pursuant to *Auerbach*, 393 N.E.2d at 996, and consistent with *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 645, 137 P.3d 1171, 1187 (2006), and *In re AMERCO Derivative Litig.*, 127 Nev. 196, 222, 252 P.3d 681, 700 (2011), a shareholder must not be permitted to proceed with derivative litigation after an SLC requests dismissal, unless and until the district court determines at an evidentiary hearing that the SLC lacked independence or failed to conduct a thorough investigation in good faith. Here, the district court's hearing on the SLC's motion, which followed Jacksonville's discovery into the SLC's independence and good faith, was sufficient to constitute an evidentiary hearing because the district court and parties relied,

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[2]Jacksonville and our dissenting colleague argue that de novo review is required, analogizing to the standards of review applicable to summary judgment motions under NRCP 56 and motions to dismiss under NRCP 12(b)(6). Unlike a motion for summary judgment or to dismiss, however, the district court's review of an SLC's motion under *Auerbach* does not concern the adequacy of the pleadings or the merits of the derivative suit. Rather, the standard we adopt from *Auerbach* involves assessing the weight and credibility of the evidence, and reaching conclusions that depend greatly on factual determinations. Such fact-intensive legal standards are appropriately reviewed deferentially,

> particularly where: (1) the district court is better positioned than the reviewing court to decide the issue because of its familiarity with the evidence—in such instances the normal "law-clarifying benefits" of the circuit courts will not be advanced with more searching review; and (2) the facts of each case are of a "multifarious, fleeting, special, [and] narrow" nature resulting in close calls, so as not to be susceptible of "useful generalization."

Kokocinski, 850 F.3d at 361 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990)); *see also Allied Ready Mix Co. ex rel. Mattingly v. Allen*, 994 S.W.2d 4, 9 (Ky. Ct. App. 1998) ("The record overall supports the trial court's findings of good faith, reasonableness and independence on the part of the special litigation committees. We decline to disturb its findings."). Therefore, we disagree with the parties' and our dissenting colleague's arguments regarding standards applicable to summary judgment proceedings.

at least in part, on deposition testimony.[3] *See* NRCP 43(c). Based on the evidence before it, the district court ultimately found that the SLC was independent due to its voting structure, which required an affirmative vote by Lillis, an independent member, in order for any resolution of the SLC to have effect, and that the SLC conducted a good-faith and thorough investigation. While the SLC, as the party moving for dismissal, bears the burden of proof and is entitled to no presumption, the district court arrived at its conclusions without explicitly requiring Jacksonville to bear the burden of proof or presuming the SLC's independence and good faith. Accordingly, for the reasons discussed below, we conclude that the district court did not abuse its discretion in granting the SLC's motion and dismissing the complaint.

Independence

Jacksonville maintains that the district court erred by applying the test used in pre-suit demand futility cases, thereby presuming the SLC's independence and good faith, placing the burden of proof on Jacksonville to overcome that presumption, and limiting its consideration of the SLC's independence to financial independence. We disagree.

The independence standard that applies to directors in the demand-futility context is equally applicable to determine whether an SLC is independent. *See, e.g.*, *In re ITT Derivative Litig.*, 932 N.E.2d 664, 666 (Ind. 2010) ("[T]he same standard [applies] for showing 'lack of disinterestedness' both as to the composition of special board committees . . . and to the requirement that a shareholder must make a demand that the corporation's board act un-

[3]Our dissenting colleague asserts that "the district court did not conduct an evidentiary hearing, but decided the motion on written submissions." However, the record demonstrates that Jacksonville submitted with its supplemental briefing the evidence it obtained through discovery, including the deposition testimony of each SLC member. At the subsequent hearing, Jacksonville also quoted from the deposition transcripts, among other evidence, in illustrative slides it presented to the district court—Jacksonville did not request a more formal proceeding nor object to the lack thereof. Thus, the district court received evidence, heard arguments on the evidence, and considered the evidence in granting the SLC's motion.

Additionally, we note that evidence need not be in a particular format to qualify as evidence—testimony is evidence whether it is given in court or a deposition. *See Evidence*, *Black's Law Dictionary* (10th ed. 2014). Indeed, deposition proceedings involve the same procedures followed in court, including the ability to cross-examine the witness or object to a question or answer. Accordingly, we disagree with our dissenting colleague's conclusion that there was no evidentiary hearing.

less the demand would be futile.").[4] In the demand-futility context, courts look "at 'whether the board that would be addressing the demand can impartially consider its merits without being influenced by improper considerations,' such that it could 'properly exercise[ ] its independent and disinterested business judgment in responding to a demand.'" *Shoen*, 122 Nev. at 639, 137 P.3d at 1183 (alteration in original) (quoting *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). Likewise, in considering whether an SLC properly exercised its independent business judgment in determining that litigation would not be in the company's best interest, courts should assess whether any improper influences prevented the SLC from impartially considering the merits of a derivative suit before recommending it be dismissed.

However, while a court may appropriately rely on cases in the pre-suit demand context for the independence inquiry, it should not presume an SLC to be independent nor require the derivative plaintiff to bear the burden of proof. *See Hasan v. CleveTrust Realty Inv'rs*, 729 F.2d 372, 376 (6th Cir. 1984) ("Neither the *Auerbach* approach nor the *Zapata* approach allows a reviewing court to extend to the members of a special litigation committee the presumption of good faith and disinterestedness. As the *Auerbach* court recognized, the policies of the business judgment rule do not protect from judicial scrutiny the complexion and procedures of a special litigation committee."); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004) ("Unlike the demand-excusal context, where the board is presumed to be independent, the SLC has the burden of establishing its own independence by a yardstick that must be 'like Caesar's wife'—'above

[4]Our dissenting colleague implies that our reliance on this case is misplaced. However, while *In re ITT Derivative Litigation* concerns corporation statutes that do not exist in Nevada, the Indiana Business Corporation Law was "largely modeled" after the Model Business Corporation Act. *Id.* at 667. Because the Model Business Corporation Act builds on the law relating to SLCs developed by numerous states, we are informed by the caselaw of other states. *See* 2 Model Bus. Corp. Act Ann. § 7.44 cmt. at 7-341 (Am. Bar Ass'n 2011). Accordingly, while Indiana's corporation statutes do not contemplate the burden-shifting scheme we discuss *infra*, the case is nonetheless relevant to the proposition for which it is cited because it treats director independence the same in both the demand-futility and SLC contexts. *See also Booth Family Tr. v. Jeffries*, 640 F.3d 134, 149 n.2 (6th Cir. 2011) (Griffin, J., dissenting) (noting that "Delaware courts consistently look to demand futility cases in addressing the issue of SLC independence"); *St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 Civ. 688(SWK), 2008 WL 2941174, at *8 & n.7 (S.D.N.Y. July 30, 2008) (citing to cases involving demand excusal); *London v. Tyrell*, No. 3321-CC, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010) (explaining that the inquiry into an SLC's independence is often "informed by case law addressing independence in the pre-suit demand context and vice-versa"); *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 938-39 (Del. Ch. 2003) (citing to cases involving demand excusal).

reproach.' Moreover, unlike the presuit demand context, the SLC analysis contemplates not only a shift in the burden of persuasion but also the availability of discovery into various issues, including independence." (internal footnotes omitted) (quoting *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985))). Thus, the formula for evaluating the independence of an SLC is still consistent with that which pertains in pre-suit demand cases, but the SLC is entitled to no presumption and bears the burden of proof.

Additionally, there is no exhaustive list of factors to be considered in evaluating independence. A lack of independence or disinterestedness may exist where the facts show "that the directors' execution of their duties is unduly influenced," or "that the majority is beholden to directors who would be liable or for other reasons is unable to consider a demand on its merits." *Shoen*, 122 Nev. at 639, 137 P.3d at 1183 (internal quotation marks and footnote omitted). "Additionally, director interestedness can be demonstrated through alleged facts indicating that 'a majority of the board members would be materially affected either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.'" *AMERCO*, 127 Nev. at 219, 252 P.3d at 698 (alteration in original) (internal quotation marks omitted) (quoting *Shoen*, 122 Nev. at 639, 137 P.3d at 1183). These same factors, among others, can and should be considered in assessing the independence of an SLC. Indeed, citing to cases evaluating the independence of directors in the demand-futility context and of SLC members, this court has "note[d] that, depending on the circumstances, allegations of close familial ties might suffice to show interestedness or partiality." *Shoen*, 122 Nev. at 639 n.56, 137 P.3d at 1183 n.56 (citing *In re Oracle Corp. Derivative Litig.*, 824 A.2d at 937-38). Thus, the district court's independence inquiry is not limited to financial independence, and the relevant factors may be determined on a case-by-case basis.

In the instant case, the district court did not abuse its discretion when it relied on caselaw in the demand-futility context to support its conclusion that the SLC was independent. Although the SLC, as the party moving for dismissal, bore the burden of proof, the district court did not explicitly assign to Jacksonville the burden of proof nor did it explicitly apply a presumption in favor of the SLC. Rather, it acknowledged that the parties disputed whether a presumption applied and ultimately reached its conclusions "irrespective of which party bears the burden." Furthermore, the record on appeal suggests the district court *focused* its inquiry on the SLC members' financial independence, but does not clearly indicate the district court *limited* its inquiry to the same. As such, we conclude that Jacksonville's arguments regarding demand-futility standards and financial independence lack merit.

Jacksonville also argues that the district court erred by concluding the SLC was independent because two of the three members were not independent. We disagree.

When the SLC was established, it consisted of only two members—Ortolf and Brokaw, both of whom maintain close, personal relationships with Ergen and Ergen's family. For instance, emails between Ortolf and Cantey Ergen, Ergen's wife, sent days before the SLC report was finalized refer to "love and friendship" and their being "good friends," Ortolf's children have worked for DISH, Ergen's daughter refers to Ortolf as "Uncle Tom," and the Ortolfs have vacationed with the Ergens. In addition, Cantey Ergen is Brokaw's son's godmother, the Brokaws and Ergens have vacationed together, attended family dinners, and celebrated birthdays together, and two days after the SLC was formed, Cantey Ergen asked if she could sleep at the Brokaw's with a child and grandchild while visiting New York. While "business, social, and more remote family relationships are not disqualifying, without more," *AMERCO*, 127 Nev. at 232, 252 P.3d at 706 (PICKERING, J., concurring in part and dissenting in part), Ortolf's and Brokaw's personal and professional ties with Ergen represent the type of improper influences that could inhibit the proper exercise of independent business judgment.

However, Jacksonville challenged the SLC's flawed composition based on Ortolf's and Brokaw's personal and professional ties to Ergen and Ergen's family just weeks after the SLC was established. To address Jacksonville's concerns about the SLC's ability to act independently, Lillis was added to the SLC. Nonetheless, Jacksonville again raised the issue of independence in response to the SLC's motion to defer, and before ruling on the motion, the district court granted Jacksonville discovery into the SLC's independence and good faith. Ultimately, the district court found Lillis to be independent, and based on Lillis's independence *and* the SLC's voting structure, the district court determined that the SLC was independent too.

Unlike Ortolf's and Brokaw's ties to the Ergens, the affiliations that Jacksonville challenges between Lillis and senior DISH executive Thomas A. Cullen are not substantial enough to undermine Lillis's independence. Jacksonville does not challenge the district court's finding that "[d]uring the relevant time period, Lillis had no financial or business connection to any defendant other than his service on the DISH Board." Rather, Jacksonville focuses on the facts that Lillis and Cullen have worked together in the past and see each other socially once or twice per year. Without more, these business and social affiliations are not disqualifying. *See AMERCO*, 127 Nev. at 232, 252 P.3d at 706 (PICKERING, J., concurring in part and dissenting in part). Therefore, we conclude that the district court did not abuse its discretion in concluding that Lillis was independent.

Once Lillis was added in response to Jacksonville's raising the issue of independence, the SLC could not act without Lillis's ap-

proval. The resolutions appointing Lillis to the SLC provided that "any and all actions or determinations of the [SLC] . . . must include the affirmative vote of Mr. Lillis and at least one (1) other committee member in order to constitute a valid and final action or determination of the SLC." Similar to cases involving two-person committees, Lillis's independence ensured the independence of the SLC as a whole because the SLC could not act without Lillis's affirmative vote. *See, e.g.*, *Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 450 n.3 (S.D.N.Y. 1998) (indicating that where only one director was needed to form an SLC, if one of the two SLC members lacked some degree of independence, "such a finding would not deprive the SLC as a whole of its independence"); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994) (holding that even if one SLC member had "some alleged interest," since he was not the only member of the SLC, there was "nothing to indicate that the SLC's judgment was tainted in any way"); *Johnson v. Hui*, 811 F. Supp. 479, 487 (N.D. Cal. 1991) ("[E]ven if the evidence suggests that [one SLC member] is tainted to some degree, this taint does not rise to the level where the Court should conclude that the SLC is tainted. [The SLC member in question] is not the only member of the SLC, and there is no indication that the objectivity of [the other SLC member] or committee counsel were overborne by [his] arguments or conduct . . . .").[5] Therefore, despite Ortolf's and Brokaw's relationships with the Ergens, we conclude that the district court did not abuse its discretion in concluding that the SLC was independent based on Lillis's independence and the SLC's voting structure.

Good-faith and thorough investigation

Jacksonville next argues that the district court erred in determining the SLC conducted a good-faith, thorough investigation. We disagree.

In accordance with the business judgment rule, courts can "inquir[e] into the procedural indicia of whether the directors resorted in good faith to an informed decisionmaking process." *Wynn Re-*

[5]Our dissenting colleague implies that our reliance on *Strougo*, *Oracle*, and *Johnson* is misplaced because those courts offered their alternative holdings only after determining that the challenged SLC member was sufficiently independent. However, while the caselaw does not account for the unique facts of the instant case, we do not read *Strougo*, *Oracle*, and *Johnson* to require a finding that Ortolf and Brokaw are independent before considering the SLC's voting structure. Based on Lillis's independence and voting power, our conclusion that Ortolf's and Brokaw's ties to the Ergens *could* inhibit their independent business judgment does "not deprive the SLC as a whole of its independence." *Strougo*, 27 F. Supp. 2d at 450 n.3. There is no evidence suggesting that Lillis's objectivity was "overborne by the arguments or conduct of" Ortolf and Brokaw, *Johnson*, 811 F. Supp. at 487, or in any way "affected by [their] participation," *Oracle*, 852 F. Supp. at 1442.

sorts, Ltd. v. Eighth Judicial Dist. Court, 133 Nev. 369, 378, 399 P.3d 334, 343 (2017) (quoting *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994)) (setting forth the factors for considering whether a director acted in good faith). The inquiry into whether the SLC made its determination in good faith and on an informed basis "focuses on the process used by the SLC, rather than the substantive outcome of the process. Courts look to indicia of the SLC's investigatory thoroughness, such as what documents were reviewed and which witnesses interviewed." *Sarnacki v. Golden*, 778 F.3d 217, 224 (1st Cir. 2015) (internal citations omitted).

> Proof, however, that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment doctrine, would raise questions of good faith or conceivably fraud which would never be shielded by that doctrine.

Auerbach v. Bennett, 393 N.E.2d 994, 1003 (N.Y. 1979).

Here, the SLC's investigation, which was comprehensive by any objective measure, included the following: monitoring proceedings and reviewing documents in the LightSquared bankruptcy; conducting 21 interviews of 16 different people, including present respondents and former defendants, DISH senior executives, and regulatory and other technical experts; reviewing hundreds of thousands of pages of relevant documents; and holding more than 17 formal meetings in addition to multiple informal and telephonic meetings. The SLC requested legal advice on the issues raised by the matters under investigation throughout its investigation, and each member invested over 100 hours in the investigation. Accordingly, we conclude that Jacksonville's arguments regarding good faith and the SLC's investigation lack merit and, therefore, the district court did not abuse its discretion in determining that the SLC conducted a good-faith, thorough investigation.

The district court was within its discretion to award costs for electronic discovery and photocopying and scanning, but abused its discretion in awarding costs for teleconferences

Jacksonville also challenges the district court's award of costs. Costs may be awarded to a prevailing party as provided in NRS 18.020. The costs allowed under that provision are set forth in NRS 18.005. This court reviews a district court's decision awarding costs for an abuse of discretion. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015).

Electronic discovery costs

Jacksonville first argues that the district court abused its discretion in taxing $151,178.32 in costs for electronic discovery to Jackson-

ville under NRS 18.005(17) because electronic discovery expenses are not "costs" under NRS 18.005. We disagree.

NRS 18.005(17) defines "costs" as including "[a]ny other reasonable and necessary expense incurred in connection with the action." *See* NRCP 34(d) ("The party requesting that documents be copied must pay the reasonable cost therefor . . . ."). The district court found that the electronic discovery expenses were a reasonable and necessary expense incurred as part of fulfilling the SLC's obligations in response to Jacksonville's NRCP 56(f) discovery requests. We conclude the district court was within its sound discretion to determine that the expenses for the electronic discovery were allowable as costs under NRS 18.005(17).

Jacksonville also maintains that allowing costs for electronic discovery essentially taxed part of the SLC's legal fees to Jacksonville. For support, Jacksonville cites to *Bergmann v. Boyce*, in which this court held that computer research expenses were not recoverable costs because they were "more closely related to [an] attorney's fee than to the kinds of recoverable costs defined in NRS 18.005." 109 Nev. 670, 680, 856 P.2d 560, 567 (1993).[6] However, Jacksonville cites no authority to explain how electronic discovery expenses incurred by the SLC in responding to Jacksonville's NRCP 56(f) requests are more akin to attorney fees or computer research expenses than to the reasonable and necessary costs recoverable under NRS 18.005. Unlike the computer research expenses at issue in *Bergmann* that were incurred by the attorneys "as a function of their research of the law," 109 Nev. at 680, 856 P.2d at 567, the district court determined that the costs awarded to the SLC were for electronic discovery conducted by electronic discovery vendors, not the SLC's counsel, "as a method by which to acquire and process the information that was required to be produced in response to [Jacksonville]'s NRCP 56(f) discovery requests." The costs awarded did not include any electronic discovery expenses incurred by the SLC as a function of their investigation of Jacksonville's derivative claims. Therefore, the electronic discovery expenses do not represent part of the SLC's legal fees and, thus, we conclude that Jacksonville is not entitled to relief on this claim.

Costs for photocopying, scanning, and teleconferences

Jacksonville also argues that the district court abused its discretion in awarding $18,820.08 in costs for photocopying and scanning under NRS 18.005(12), and $708.02 in costs for teleconferences under NRS 18.005(13). Jacksonville maintains that the SLC initially

[6]We note that NRS 18.005(17) was amended in 1995, after *Bergmann*, and now includes "reasonable and necessary expenses for computerized services for legal research" as costs, but the analytical framework used in *Bergmann* to decide whether an expense falls within the "catchall" definition in NRS 18.005(17) remains good law.

failed to submit sufficient support to determine that these costs were reasonable and necessary, and only provided a supporting declaration for the photocopying and scanning expenses after Jacksonville raised the deficiencies.

To support an award of costs, justifying documentation must be provided to the district court to "demonstrate how such [claimed costs] were necessary to and incurred in the present action." *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352-53, 971 P.2d 383, 386 (1998). Justifying documentation means "something more than a memorandum of costs." *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015).

We conclude that the SLC provided the district court with sufficient justifying documentation to support the award of costs for photocopying and scanning under NRS 18.005(12). In addition to the memorandum of costs, the SLC provided an itemized list of the photocopying and scanning charges, and a declaration of counsel. The declaration explains how the photocopying expenses were necessary and incurred rather than simply telling the district court that the costs were reasonable and necessary. *See Cadle*, 131 Nev. at 121, 345 P.3d at 1054. As such, the district court did not abuse its discretion in awarding costs for photocopying and scanning.

With respect to the costs awarded for teleconferences under NRS 18.005(13), we conclude that the district court abused its discretion. The SLC provided invoices for the teleconferences in its memorandum of costs, which list the date, time, moderator, number of participants, and cost. However, there was no justifying documentation provided to the court to "*demonstrate* how such fees were necessary to and incurred in the present action." *Cadle*, 131 Nev. at 121, 345 P.3d at 1054 (quoting *Bobby Berosini*, 114 Nev. at 1352-53, 971 P.2d at 386). Therefore, the district court had no evidence on which to judge the reasonableness or necessity of each teleconference and, thus, lacked justifying documentation to award costs for teleconferences.

CONCLUSION

Accordingly, for the reasons set forth above, we affirm the district court's order granting the SLC's motion to defer and we vacate the portion of the district court's order awarding costs for teleconferences because it lacked justifying documentation.[7]

CHERRY, C.J., and DOUGLAS, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

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[7]We have considered the parties' remaining arguments and conclude they lack merit.

PICKERING, J., concurring in part and dissenting in part:

While I agree with my colleagues that the New York approach taken in *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), to dismissal of a shareholder derivative action on motion of a special litigation committee better fits Nevada law than the Delaware approach laid out in *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), I disagree with the overly deferential version of *Auerbach* they devise. As I read *Auerbach*, the district court committed legal error when it dismissed this shareholder derivative action on motion of the DISH special litigation committee (SLC), given the genuine issues of material fact the majority acknowledges exist respecting the SLC's independence. This is a legal determination, not a factual one, so de novo review applies. Reviewed de novo, the district court's order of dismissal should be reversed, not affirmed, and the costs award vacated accordingly. For these reasons, though I concur in the decision to adopt *Auerbach* and the partial reversal of the costs award, I otherwise respectfully dissent.

I.

A.

A claim by a corporation against its current or former directors for breach of duty belongs to the corporation, not its shareholders. *Auerbach*, 393 N.E.2d at 1000. Ordinarily, the decision to sue—or not to sue—rests with the board of directors, in their business judgment. *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917); *see* 13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 5963, at 60-61 (2013). But when the claim is against one or more directors for breach of duty owed to the corporation, a conflict arises. If the corporation does not sue on the claim, a shareholder may attempt to do so derivatively, that is, bring the claim on behalf of the corporation. *See* Deborah A. DeMott & David F. Cavers, *Shareholder Derivative Actions Law & Practice* § 1:1 (2016). In response, the conflicted board may create a special litigation committee or SLC composed of independent, disinterested directors to investigate and determine whether it is in the corporation's best interest to pursue the derivative action and, if not, to move to dismiss. At that point, the legal "question to be decided becomes: When, if at all, should an authorized board committee be permitted to cause litigation, properly initiated by a derivative stockholder in his own right, to be dismissed?" *Zapata*, 430 A.2d at 785; *see Auerbach*, 393 N.E.2d at 999-1000 ("the disposition of this case on the merits turns on the proper application of the business judgment doctrine, in particular to the decision of a specially ap-

pointed committee of disinterested directors acting on behalf of the board to terminate a shareholders' derivative action").

Today, the corporate law in most states recognizes that a board may appoint a special litigation committee, which committee has the power, at least in certain circumstances, to terminate a shareholder derivative action on motion, not because the action lacks legal merit but because pursuing it is not in the best interests of the corporation. Kenneth B. Davis, Jr., *Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence*, 90 Iowa L. Rev. 1305, 1306 (2005). In states like Nevada without SLC-specific statutes, courts typically address such motions under variants of either New York's *Auerbach* or Delaware's *Zapata* approach. *Id.* New York and Delaware differ in that Delaware adds a second layer of judicial review, but they share the same first principle: A court will not dismiss a shareholder derivative action at the behest of an SLC unless the SLC shows that it was "composed of independent and disinterested directors, considered a variety of factors and reached, in good faith, a business judgment that [the] action was not in the best interest of [the corporation]." *Zapata*, 430 A.2d at 787 (internal quotations omitted); *Auerbach*, 393 N.E.2d at 1001, 1002, 1003 (an SLC may terminate a derivative action on motion "only if [its members] possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment," can "show that they have pursued their chosen investigative methods in good faith," and have adopted "methodologies and procedures best suited to the conduct of an investigation of facts and the determination of legal liability").[1]

B.

The most common challenge to an SLC's motion to terminate a derivative action, and the one made here, is that the SLC members

[1]In Delaware, if the court "is satisfied under Rule 56 standards that the committee was independent and showed reasonable bases for good faith findings and recommendations, the Court may proceed, in its discretion to the next step," in which, in a demand-excused case, the reviewing court may "determine, applying its own independent business judgment, whether the motion [to terminate the derivative action] should be granted." *Zapata*, 430 A.2d at 789. Delaware is uniquely situated, given its highly specialized chancery courts and rich body of corporate decisional law. As the Colorado Supreme Court noted in choosing *Auerbach* over *Zapata*, "most courts 'are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments,'" making it appropriate to limit "the role of a Colorado trial court in reviewing an SLC's decision regarding derivative litigation . . . to inquiring into the independence and good faith of the committee." *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 638 (Colo. 1999) (quoting *Auerbach*, 393 N.E.2d at 1000). *Zapata*'s second step is also inconsistent with the deference ordinarily extended to a decision by a board or subcommittee of disinterested directors on a matter entrusted to their business judgment. *In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 754 N.W.2d 544, 554-59 (Minn. 2008); *see* NRS 78.138(3).

lack the independence and disinterestedness required to neutrally determine whether it is in the corporation's best interests to pursue the claims. *See Einhorn v. Culea*, 612 N.W.2d 78, 85 (Wis. 2000). While the SLC procedure "provides the corporation with an important tool to rid itself of meritless or harmful litigation and strike suits," 13 William Meade Fletcher, *supra*, § 6019.50, at 282, it also vests SLC members with "enormous power to seek dismissal of a derivative suit brought against their director-colleagues," *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004), a power rife with the potential for abuse and the cynicism and mistrust such abuse engenders. *See Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985) ("The only instance in American Jurisprudence where a defendant can free itself from a suit by merely appointing a committee . . . is in the context of a stockholder derivative suit."). To hold the balance between these competing objectives, the sine qua non of both *Auerbach* and *Zapata* is that the SLC demonstrate that its members are independent and disinterested. Edward Brodsky & M. Patricia Adamski, *Law of Corporate Officers and Directors: Rights, Duties and Liabilities*, § 9:34 (2016) ("Whether a particular jurisdiction adopts the New York or Delaware approach to termination of derivative suits, there is general agreement that the decision as to the maintenance of the derivative litigation must be made by 'independent' or 'disinterested' directors.").

To be regarded as independent, an SLC member "does not have to be unacquainted or uninvolved with fellow directors." *London v. Tyrrell*, No. 3321-CC, 2010 WL 877528, at *12 (Del. Ch. March 11, 2010). But an SLC member is not independent if he or she is "*for any substantial reason*, incapable of making a decision with only the best interests of the corporation in mind." *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920 (Del. Ch. 2003) (internal quotations omitted; emphasis in original). "Denying a fellow director the ability to proceed on a matter important to him may not be easy, but it must, as a general matter, be less difficult than finding that there is reason to believe that the fellow director has committed serious wrongdoing and that a derivative suit should proceed against him." *Id.* at 940. For these reasons,

> the independence inquiry goes beyond determining whether SLC members are under the "domination and control" of an interested director. *Independence can be impaired by lesser affiliations, so long as those affiliations are substantial enough to present a material question of fact as to whether the SLC member can make a totally unbiased decision*. For example, independence could be impaired if the SLC member senses that he owes something to the interested director based on prior events. This sense of obligation need not be of a financial nature.

London, 2010 WL 877528, at *12 (emphasis added) (citations omitted).

II.

A.

This case came before the district court on the motion of the DISH SLC to terminate the minority shareholder's derivative claims. The basis for the motion was not that the action lacked merit but that the SLC had decided, in its business judgment, that pursuing the action was not in DISH's best interests. As the moving party, the SLC had "the normal burden of proving that there is no genuine issue as to any material fact and that it is entitled to dismiss the complaint as a matter of law." 13 William Meade Fletcher, *supra*, § 6019.50, at 289. And, given the "bye" the SLC sought to declare in favor of the conflicted DISH director-defendants, the SLC also had the substantive-law "burden of proving independence, good faith, and a reasonable investigation"; there is in this setting "no presumption of independence, good faith, or reasonableness." *Id.* at 289-90.

Normally, we give de novo review to an appeal from an order terminating an action on motion without a trial. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."); *see Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634, 137 P.3d 1171, 1180 (2006) ("Since dismissing a shareholder derivative suit for failure to sufficiently plead the demand requirement is akin to dismissing a complaint for failure to state a claim upon which relief can be granted, such dismissal orders are subject to . . . de novo . . . review."). Despite this law, which is settled, the majority opts to review the district court's dismissal order in this case deferentially, for an abuse of discretion. Majority opinion *ante* at 443-44. As support, it cites the Eighth Circuit's recent decision in *Kokocinski ex rel. Medtronic, Inc. v. Collins*, 850 F.3d 354, 361-62 (8th Cir. 2017). But *Kokocinski* is an outlier in that it rejects the de novo standard of review the First, Fifth, Sixth, and Ninth Circuits deem appropriate in the SLC setting, *Sarnacki v. Golden*, 778 F.3d 217, 222 (1st Cir. 2015); *Bach v. Nat'l W. Life Ins. Co.*, 810 F.2d 509, 513 (5th Cir. 1987); *Booth Family Tr. v. Jeffries*, 640 F.3d 134, 139-41 (6th Cir. 2011); *Gaines v. Haughton*, 645 F.2d 761, 769-71 (9th Cir. 1981), *overruled in part on other grounds by In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984), and in doing so relies on Fed. R. Civ. P. 23.1, even though most recent cases have replaced abuse of discretion with de novo review for dismissals ordered under that rule, e.g., *Espinoza v. Dimon*, 797 F.3d 229, 234-35 (2d Cir. 2015) (adopting de novo review and collecting cases that "have expressed doubt about the wisdom of reviewing Rule 23.1 dismissals for abuse of discretion rather than de novo").

The dispute over the standard of review signifies a deeper divide than just a difference of opinion over a point of appellate procedure. The question is one of substantive law. *Auerbach* and *Zapata* empower the corporation to terminate an arguably legitimate derivative action on motion, because a specially appointed committee has decided pursuing the claims asserted against the directors in that action is not in the corporation's best interest. To earn this judicial deference, the SLC must demonstrate, usually after allowing the plaintiff discovery into the matter, that no genuine issue of material fact exists respecting the independence and disinterestedness of its members. *Hasan v. CleveTrust Realty Inv'rs*, 729 F.2d 372, 379-80 (6th Cir. 1984) (applying *Auerbach* and determining that genuine issues of material fact respecting the SLC's independence required reversal of summary judgment and remand for litigation on the merits of the derivative action); *London*, 2010 WL 877528, *13 (applying *Zapata* and rejecting the SLC motion to dismiss and allowing the derivative action to proceed because, after applying *Zapata*'s first step, there remained "a material question of fact as to the independence of both SLC members based on their relationships to Tyrrell," the alleged principal wrongdoer). A corporation facing a derivative action "has every opportunity to form a perfectly independent special litigation committee." *Booth Family Tr.*, 640 F.3d at 143. Requiring that the SLC demonstrate that no genuine issue of material fact exists as to the independent disinterestedness of its members "ensure[s] that stockholders do not have to rely upon special litigation committee members who must put aside personal considerations that are ordinarily influential in daily behavior in making the already difficult decision to accuse fellow directors of serious wrongdoing." *Oracle*, 824 A.2d at 947; *Auerbach*, 393 N.E.2d at 1001 (affirming an order granting an SLC's motion to terminate a derivative action, because "there is nothing in this record to raise a triable issue of fact as to the independence and disinterested status of the[ ] three directors" comprising the SLC).

The majority equates director independence in the demand-futility context with director independence in the SLC motion-to-terminate setting. Majority opinion *ante* at 445-46 (citing *In re ITT Derivative Litig.*, 932 N.E.2d 664, 666 (Ind. 2010)). But the Indiana case on which the majority relies has limited relevance; it answered questions a federal court had certified to the Indiana Supreme Court concerning the meaning of an Indiana state corporation statute Nevada does not have. *ITT Derivative Litig*., 932 N.E.2d at 665-66. Qualitatively, determining director independence in the demand-futility context implicates many of the same concerns as it does in the SLC dismissal context. But the contexts differ, and with them, so does the burden of proof. In the demand-futility context, the plaintiff bears the burden of proving that interestedness makes demand futile, *Shoen*, 122 Nev. at 636-37, 137 P.3d at 1181; in the SLC con-

text, the SLC "has the burden of establishing its own independence by a yardstick that must be 'like Caesar's wife'—'above reproach.'" *Beam*, 845 A.2d at 1055 (quoting *Lewis*, 502 A.2d at 967). "As a practical matter, the procedural distinction relating to the diametrically opposed burdens and the availability of discovery into independence may be outcome-determinative on the issue of independence," *id.*, making it possible that "a court might find a director to be independent in the pre-suit demand context but not independent in the [SLC] context based on the same set of factual allegations made by the two parties," *London*, 2010 WL 877528, at *13.

Put differently, "[a] defendant who desires to avail itself of this unique power to self destruct a suit brought against it ought to make certain that the Special Litigation Committee is truly independent." *Lewis*, 502 A.2d at 967. A court cannot know the subjective independence and good faith of an SLC's members. It can only assess whether the connections identified by the evidence "would be on the mind of the SLC members in a way that generates an unacceptable risk of bias," such that it is unreasonable for a court to require shareholders to rely on their judgment. *Oracle*, 824 A.2d at 947. For these reasons, the rules are different in the SLC as opposed to the demand-futility context. In the SLC context, "[i]f a reasonable doubt exists as to the special litigation committee's independence, the special litigation committee's conclusions are rejected then and there; no further resolution is required on the independence question. The case then proceeds to the merits of the claims against the defendants." *Booth Family Tr.*, 640 F.3d at 142-43; *see Janssen v. Best & Flanagan*, 662 N.W.2d 876, 889-90 (Minn. 2003) (applying *Auerbach* and holding that "[g]enerally, when the committee authorized with making a business decision for the corporation is found to lack the independence needed to grant summary judgment, or where the independence is uncertain, the derivative suit proceeds on its merits").

B.

According to the majority, the district court reached and resolved contested issues of fact respecting the SLC's independence—determinations to which we, as a reviewing court, should defer unless "clearly erroneous." Majority *ante* at 443-44 (citing NRCP 43); *id.* at 444 n.2 (describing the district court's task under *Auerbach* as "assessing the weight and credibility of the evidence, and reaching conclusions that depend greatly on factual determinations"). As the district court did not conduct an evidentiary hearing, but decided the motion on written submissions raising genuine issues of material fact, I question how it could have resolved questions of fact with-

out thereby committing an abuse of discretion. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2416 (3d ed. 2008 and Supp. 2017) (discussing Fed. R. Civ. P. 43 and explaining that "when questions of fact or credibility predominate, a district court's decision not to hear oral testimony often is found to be an abuse of discretion"). But even setting aside the lack of an evidentiary hearing, under the authorities just discussed, the genuine issues of material fact respecting the SLC's independence made it improper, as a matter of law, for the district court to terminate this case on motion of the SLC.

DISH formed its SLC in response to the filing of this suit, which alleges that Charles Ergen, who chairs DISH's board of directors and is its majority shareholder, usurped corporate opportunities and breached fiduciary duties owed DISH in acquiring senior secured debt of LightSquared LP, which owned broadband assets of unique value to DISH. For additional background see *In re LightSquared Inc.*, 511 B.R. 253, 256-314 (Bankr. S.D.N.Y. 2014). As originally formed, the SLC had two members: Tom Ortolf and George Brokaw. Understating matters considerably, the majority admits that "Ortolf's and Brokaw's personal and professional ties with [the principal defendant] Ergen represent the type of improper influences that could inhibit the proper exercise of independent business judgment." Majority opinion *ante* at 448. Thus, both Ortolf and Brokaw "maintain close, personal relationships with" Ergen and Ergen's family, including Ergen's wife, Cantey, who serves alongside her husband as a member of the DISH board of directors. *Id.* Ortolf is one of Ergen's "favorite" friends, his travel companion and colleague of nearly 40 years, whose children worked at DISH. Brokaw chose Cantey Ergen to be his son's godmother. And, just two days after the SLC was formed, Cantey Ergen asked to stay with the Brokaws at their New York City apartment while she visited the city with her child and grandchild, rather than stay in a hotel. Given this and the other evidence of record, some of which the majority summarizes *ante* at 448, the SLC as originally formed did not qualify as an independent and disinterested evaluator of DISH's claims against Ergen.

Three months after forming the SLC, the DISH board added a third member, Charles Lillis, to the SLC. It did so after the plaintiff in this case questioned Ortolf's and Brokaw's objectivity given their ties to Ergen. The board resolution adding Lillis to the SLC operated prospectively only. It provided that "any and all actions or determinations of the [SLC] following the date of theses resolutions must include the affirmative vote of Mr. Lillis and at least one (1) other committee member in order to constitute a valid and final action or determination of the [SLC]." To the majority, the resolution meant that "[o]nce Lillis was added . . . the SLC could not act without Lil-

lis's approval." Majority opinion *ante* at 448-49. "Therefore, despite Ortolf and Brokaw's relationships with the Ergens, . . . the district court did not abuse its discretion in concluding that the SLC was independent based on Lillis' independence and the SLC's voting structure." *Id.* at 449.

I cannot agree. Before Lillis was added, the SLC, in its original flawed form, had issued its first report, in which, after investigation, it opposed the derivative-action plaintiff's motion for preliminary injunctive relief; portrayed Ergen's personal interests as aligned with DISH's best interests; and reported to the court on, among other matters, the DISH board's dissolution, with Ortolf's support, of the DISH special transaction committee formed to evaluate DISH's interest in acquiring the LightSquared assets. After Lillis was added, the SLC *continued* its work. By then, though, the mise en scène for the SLC's investigation was set. An investigation involves more than "acts and determinations." It includes countless decisions along the way of whom to interview, what to ask, what to review, what not to review, and how to interpret the information and advice assembled. SLC "investigations do not follow a scientific process like an old-fashioned assembly line. The investigators' mindset and talent influence, for good or ill, the course of an investigation." *Oracle*, 824 A.2d at 941.

I agree with my colleagues that Lillis's ties to senior DISH executive Thomas Cullen do not, standing alone, materially impeach his independence. *See* majority opinion *ante* at 448. Still, those ties, combined with Lillis arriving after the investigation mapped out by Ortolf and Brokaw was already underway, raise genuine concerns respecting bias. Without more, the board's decision to retain Ortolf and Brokaw and add Lillis after plaintiff voiced concern with the SLC's composition raises more questions than it answers. *Cf. Janssen*, 662 N.W.2d at 888-89 (declining to afford a board a second opportunity to constitute a disinterested SLC to conduct a good faith investigation when it failed to establish the independence and good faith of its initial effort); *Boland v. Boland*, 31 A.3d 529, 565 (Md. 2011) (reversing and remanding order terminating action on motion of SLC where the record did not provide enough information for the court to "properly examine the specific circumstances surrounding the selection and delegation of responsibility to the SLC in determining whether it has shown its independence").

The voting structure DISH established for the SLC when it added Lillis does not dispel and, in fact, actually increases the bias concerns. Lillis did not have sole authority; he needed the affirmative vote of Ortolf or Brokaw, or both, for the SLC to act. As the majority recognizes, the affiliations between Ortolf and Brokaw, on the one hand, and the Ergens, on the other, were significant enough to conclude they lacked independence. The resolution structured the SLC

so that Lillis could not cause it to take "valid and final action" or make a binding determination unless he could overcome the natural inclination of either Ortolf or Brokaw, based on those affiliations, to favor the Ergens.

The three two-member SLC cases the majority cites to suggest that the voting structure somehow saves the SLC differ significantly. Majority opinion, *ante*, at 449. In each, the reviewing court concluded that the connections alleged as a basis for questioning the independence of one of the two directors were not sufficiently material to cast genuine doubt on the director's disinterestedness. *See Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 451 (S.D.N.Y. 1998) ("Both of the members of the SLC are 'disinterested' members of the SLC in the sense that they are in a position to base their decisions on the merits of the issues rather than on extraneous considerations or influences."); *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994) (the contacts of Costello, the assertedly interested SLC member, "alone, do not demonstrate an interest or bias that would compromise Costello's objectivity"); *Johnson v. Hui*, 811 F. Supp. 479, 487 (N.D. Cal. 1991) (the assertedly interested member's "nominal appearance as a defendant does not undermine his ability to operate as an independent and unbiased member of the SLC"). The cases then offered, as an alternative holding, that even crediting the suggestion of taint, the taint did not "rise to the level where the Court should conclude the SLC is tainted," given the unquestionable independence of the other member of the SLC and its overall investigation. *Johnson*, 811 F. Supp. at 487; *see Oracle Sec. Litig*, 852 F. Supp. at 1442 ("Even[ ] if Costello's background suggested some alleged interest . . . there is nothing to indicate that the SLC's judgment was tainted in any way."). In this case, by contrast, the connections between Ortolf and Brokow, and the Ergens, do not allow the court to posit, as the courts in *Strougo*, *Oracle Securities Litigation*, and *Johnson* did, that the allegedly interested SLC member was in fact disinterested and independent. We have instead an SLC comprised of two interested and one arguably disinterested member, with the arguably disinterested member, Lillis, coming late to the work of the SLC. More concerning, while the SLC cannot act unless Lillis is in the majority, Lillis cannot act and avoid a deadlock, unless he persuades a fellow director, whose independence and disinterestedness is fairly subject to question, to side with him. While this works well if the vote is to dismiss, it does not work if the vote is to pursue the derivative litigation. Just as Lillis can hold out by being required to be part of any majority, so too can Ortolf and Brokaw hold out, by refusing to vote with Lillis.

III.

The burden was on DISH to show that it appointed an SLC whose independence and disinterestedness cannot be seriously questioned.

The company had every opportunity to form a perfectly independent special litigation committee, yet did not. Lacking an explanation for the SLC's membership having been structured and maintained as it was, I am not convinced, as both *Auerbach* and *Zapata* require, that the SLC's recommendation to dismiss was driven solely by consideration of DISH's best interest. I would reverse and remand for the litigation to proceed on the merits and therefore respectfully dissent.

PROPERTY PLUS INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AN ILLINOIS CORPORATION; AND CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLP TRUST 3, IN C/O ALTISOURCE ASSET MANAGEMENT CORPORATION, RESPONDENTS.

No. 69072

September 14, 2017 401 P.3d 728

Appeal from a district court order granting summary judgment in a quiet title action involving HOA superpriority liens. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Reversed and remanded.

Kim Gilbert Ebron and *Jacqueline A. Gilbert* and *Diana Cline Ebron*, Las Vegas; *Kang & Associates, PLLC*, and *Patrick W. Kang* and *Erica D. Loyd*, Las Vegas, for Appellant.

Wright, Finlay & Zak, LLP, and *Dana Jonathon Nitz, Edgar C. Smith*, and *Christopher A.J. Swift*, Las Vegas, for Respondents.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal from a district court summary judgment in a quiet title action involving superpriority liens, we hold that an HOA is not limited to only one superpriority lien under NRS 116.3116 per parcel of property forever. Rather, when an HOA rescinds a superpriority lien on a property, the HOA may subsequently assert a separate superpriority lien on the same property based on monthly assessments, and any maintenance and nuisance abatement charges, accruing after the rescission of the previous superpriority lien. Additionally, we conclude that an HOA lien survives bankruptcy even

though the homeowner's personal obligation is extinguished upon a Chapter 7 discharge. Accordingly, we reverse the district court's order granting summary judgment and remand this matter for further proceedings because factual issues remain with respect to whether the HOA's second lien included monthly assessments that accrued after the rescission of its first lien.

FACTS AND PROCEDURAL HISTORY

This case arises from conflicting claimed interests in the real property located at 8787 Tom Noon Avenue, No. 101, Las Vegas, Nevada (Tom Noon property).[1] The Tom Noon property is subject to the covenants, conditions, and restrictions (CC&Rs) of, among others, High Noon at Arlington Ranch Homeowners Association (High Noon), which were recorded on March 25, 2004. Megan Sulliban purchased the property on April 27, 2007. To finance the purchase, Sulliban borrowed from Bank of America $215,000, repayment of which was secured by a deed of trust recorded on April 30, 2007. Although Bank of America remained the loan servicer, on April 7, 2014, the deed of trust was assigned to Christiana Trust, respondent in this matter along with Mortgage Electronic Registration Systems, Inc.

The 2010 lien

On April 8, 2010, High Noon recorded a notice of lien for unpaid assessments (the 2010 lien). On July 1, 2010, High Noon recorded a default for its lien.

Bank of America hired counsel, Miles, Bergstrom & Winters, LLP (MBW), to negotiate with High Noon's counsel, Alessi & Koenig, LLC (AK), to protect the deed of trust. Seeking to satisfy the superpriority amount of the 2010 lien, around August 16, 2010, MBW sent to AK a letter requesting the amount of the superpriority portion of the 2010 lien. Based on the statement of account it received from AK in response to its inquiry, on September 23, 2010, MBW sent to AK a $522 check intended to satisfy the maximum nine months of $58 common assessments. In an accompanying letter, MBW indicated that High Noon's accepting the check would constitute payment in full. The payment was ultimately rejected, and around October 30, 2010, Bank of America received the returned check. AK provided no correspondence with the returned check, although AK had sent a letter to MBW, dated September 8, 2010, indicating that AK could not accept partial payment as payment in full based on a district court case it interpreted to allow for an HOA's lien to include collection costs.

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[1]While the district court's order lists the address as unit number 21, the lien and associated documentation in the record indicate the correct address is unit number 101.

On August 25, 2010, Sulliban entered into a payment plan agreement with AK. On June 22, 2011, AK informed Sulliban that she defaulted under that agreement and at that time owed $412.78 for a past-due balance. AK later received a $459.76 check from Sulliban on July 21, 2011, although that payment is not accounted for on High Noon's statement for Sulliban's account. High Noon released the 2010 lien on August 11, 2011.

The 2012 lien

On July 20, 2012, High Noon recorded a second notice of lien for unpaid assessments (the 2012 lien). On October 31, 2012, High Noon recorded a default for its lien.

On December 19, 2012, Sulliban filed for Chapter 7 bankruptcy. Sulliban listed High Noon as a creditor holding a secured claim of $1,877.01. This amount reflected the amount listed as unpaid debt on the notice of lien for the 2012 lien, although the notice of default for the same identified the unpaid debt as $3,190.45. On March 20, 2013, Sulliban received a discharge.

On June 21, 2013, High Noon recorded a notice of trustee's sale foreclosing on its 2012 lien. The notice listed Sulliban's unpaid debt as $5,019.80, which included assessments, fees, and costs that accrued prior to her bankruptcy.

On July 17, 2013, appellant Property Plus Investments, LLC, purchased the property at a nonjudicial foreclosure sale for $7,500. The deed was subsequently recorded and listed $5,979.89 as the amount of unpaid debt and costs.

Property Plus brought a quiet title action. Respondents eventually filed a motion for summary judgment, arguing in part that High Noon's sale did not extinguish the deed of trust because High Noon had rejected Bank of America's 2010 tender and because the 2012 lien had been extinguished by virtue of Sulliban's bankruptcy discharge. The district court granted respondents' summary judgment motion "for two reasons: (1) the homeowners' association lien foreclosed on in this case lost its super-priority portion when the HOA and/or foreclosure agent refused the bank's tender of payment, and (2) the HOA lien was discharged by the United States Bankruptcy Court prior to foreclosure." After the district court denied its motion for reconsideration, Property Plus filed the instant appeal.

DISCUSSION

Property Plus challenges the district court's order granting summary judgment, which this court reviews de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

The district court erred insofar as it concluded that High Noon was limited to only one superpriority lien per parcel of property

Property Plus first argues the district court erred in concluding that a tender in satisfaction of the 2010 lien would strip the 2012 lien of its superpriority piece. We agree.

NRS 116.3116 is the HOA lien statute. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 744, 334 P.3d 408, 410 (2014); *see also* Thomas W. Stewart & Jenn Odell, *2015 Legislative Recap: Important Bills from Nevada's 78th Legislative Session*, 16 Nev. L.J. 419, 436-38 (2015) (explaining the 2015 amendments to NRS Chapter 116). "NRS 116.3116(2) . . . splits an HOA lien into two pieces, a superpriority piece and a subpriority piece." *SFR Invs. Pool 1*, 130 Nev. at 745, 334 P.3d at 411. The superpriority piece is limited to "the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges," whereas the subpriority piece "consist[s] of all other HOA fees or assessments." *Id.* The superpriority piece is prior to a first deed of trust, and the subpriority piece is subordinate to the same. *Id.* Thus, proper foreclosure of a superpriority lien under NRS Chapter 116 will extinguish a first deed of trust. *Id.* at 758, 334 P.3d at 419.

This court has not addressed whether an HOA is limited to only one superpriority lien under NRS 116.3116 per parcel of property forever, but Nevada's federal court has. In *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, for example, the United States District Court for the District of Nevada considered whether "an HOA is precluded from bringing multiple enforcement actions to enforce entirely separate liens (with superpriority portions) for unpaid assessments against the same parcel of property." 200 F. Supp. 3d 1141, 1167 (D. Nev. 2016). Analogous to the instant case, the plaintiff bank and holder of a first deed of trust in *JPMorgan* argued that its payment to the HOA on one lien "forever discharged the superpriority lien" such that the enforcement of an entirely separate lien constituted an impermissible "attempt to resuscitate [the first lien] by successive enforcement action." *Id.* For support, the plaintiff cited "to a report from the Joint Editorial Board for Uniform Real Property Acts (JEB), an arm of the Uniform Law Commission," *id.*, which clarifies that section 3-116(c) of the Uniform Common Interest Ownership Act of 1982 (UCIOA) "does not (and was not intended to) authorize an association to file successive lien enforcement actions every six months as a means to extend the association's limited lien priority,"[2] Joint Editorial Bd. for Unif. Real Prop. Acts, *The Six-Month "Limited Priority Lien" for Associa-*

[2]NRS 116.3116 "is a creature of the [UCIOA], § 3-116." *SFR Invs. Pool 1*, 130 Nev. at 744, 334 P.3d at 410. However, among other exceptions not relevant here, "UCIOA § 3-116 differs from NRS 116.3116(1) in that it limits the superpriority to six rather than nine months of unpaid dues." *Id.* at 745 n.1, 334 P.3d at 411 n.1.

tion Fees Under the Uniform Common Interest Ownership Act, 12 (June 1, 2013).

Like the respondents in the instant case, the plaintiff in *JPMorgan* specifically relied upon the report's fourth example, which indicates that "[s]ection 3-116(c) provides an association with first lien priority only to the extent of the six months of unpaid common expense assessments that accrued immediately preceding a lien foreclosure action by either the association or the first mortgagee." JEB Report, *supra*, at 14; *see also JPMorgan*, 200 F. Supp. 3d at 1167-68. However, the U.S. District Court determined that example four was factually distinct:

> [I]n the JEB Report example and the *Lake Ridge* case [cited therein], the association was attempting to enforce the superpriority portion of its lien multiple times during the pendency of the same bank foreclosure action. Here, [plaintiff] had no foreclosure action pending during either period of time when the HOA attempted to foreclose on its lien for assessments. Moreover, the policy rationale for preventing the association from repeatedly asserting the superpriority portion of its lien while the same bank foreclosure action is pending—namely, that allowing such successive liens would deter banks from ever paying off the original lien so as not to create another superpriority lien—does not apply with the same force in a case where, as here, the bank never attempted to foreclose.

Id. at 1168 (internal footnote and citations omitted). Rather, the U.S. District Court determined that example five was the most instructive:

> This case is more comparable to the JEB Report's fifth example, in which the bank paid the association an amount equal to the superpriority portion of its lien and the association subsequently commenced an action to enforce its lien for later-accrued unpaid assessments. In that example, the JEB concluded that the first payment would not preclude the association from asserting the superpriority portion of its lien for the subsequent unpaid assessments.

Id. at 1168 n.8. Thus, the U.S. District Court rejected the plaintiff's arguments and ultimately concluded that the superpriority piece of an HOA lien is not "a one-shot offer that, once discharged, can never be asserted again." *Id.* at 1168.

We agree with the analysis set forth in *JPMorgan* and conclude that NRS 116.3116 does not limit an HOA to one lien enforcement action or one superpriority lien per property forever. To hold otherwise "would be contrary to the purposes of Nevada's HOA lien statute, one of which is to encourage the collection of needed HOA funds and avoid adverse impacts on other residents." *Id.* (citing *SFR*

Invs. Pool 1, 130 Nev. at 755, 334 P.3d at 417). Therefore, when an HOA rescinds a superpriority lien on a property, the HOA may subsequently assert a separate superpriority lien on the same property based on monthly HOA dues, and any maintenance and nuisance abatement charges, accruing after the rescission of the previous superpriority lien.

In the instant case, the district court focused on Bank of America's tender with respect to the 2010 lien, ultimately concluding that "the homeowners' association lien foreclosed on in this case lost its super-priority portion when the HOA and/or foreclosure agent refused the bank's tender of payment." However, whether Bank of America tendered payment in satisfaction of the superpriority piece of the 2010 lien is immaterial because High Noon eventually released that lien in August 2011. Instead, the district court should have considered whether High Noon's 2012 lien contained a superpriority piece for the unpaid assessments that accrued in the months preceding the notice of lien recorded on July 20, 2012, but following the release of the 2010 lien.

Upon reviewing the record, we conclude that a genuine issue of material fact exists regarding whether the 2012 lien included unpaid assessments that became due during the months before institution of the action to enforce the lien, but accrued after the rescission of the 2010 lien. An HOA cannot simply reject payment and release the lien, only to turn around and record another lien based on the same unpaid assessments in order to safeguard the superpriority status. Accordingly, while High Noon must not be precluded from bringing more than one action to enforce entirely separate superpriority liens against the same parcel of property, remand is necessary to further develop the record.

The district court erred in holding that High Noon could not lawfully foreclose on a lien that contained costs and fees that were discharged by Sulliban's bankruptcy

Property Plus next argues that the district court erred in concluding the 2012 lien violated Sulliban's bankruptcy discharge. We agree.

A Chapter 7 discharge "extinguishes *only* 'the personal liability of the debtor.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (quoting 11 U.S.C. § 524(a)(1)). Accordingly, while Sulliban's personal liability on the 2012 lien was extinguished under 11 U.S.C. § 523(a)(16) (providing that HOA fees and assessments are dischargeable if the debt arose "before entry of the order for relief in a pending or subsequent bankruptcy case"), the 2012 lien survived. *See Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy."); *Johnson*, 501 U.S. at 84 ("[A] bankruptcy discharge extinguishes only one

mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*."). As such, we conclude that the district court erred, as a matter of law, in holding that High Noon could not lawfully foreclose on the 2012 lien due to Sulliban's bankruptcy discharge.

CONCLUSION

Accordingly, for the reasons set forth above, we reverse the district court's order granting summary judgment and remand this matter for further proceedings because factual issues remain with respect to whether the HOA's 2012 lien included monthly assessments that accrued after the rescission of the HOA's 2010 lien.

CHERRY, C.J., and DOUGLAS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

LACY L. THOMAS, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 69074

September 14, 2017 402 P.3d 619

Original petition for extraordinary relief challenging a district court order denying a motion to dismiss an indictment, or alternatively, to order the district court to rule upon petitioner's motion to dismiss the indictment as deficient.

Petition granted.

[Rehearing denied January 19, 2018]

PICKERING, J., dissented.

Law Office of Franny Forsman and *Franny A. Forsman*; *Daniel J. Albregts, Ltd.*, and *Daniel J. Albregts*, Las Vegas, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Michael V. Staudaher* and *Ofelia L. Monje*, Deputy District Attorneys, Clark County, for Real Party in Interest.

Before the Court EN BANC.[1]

[1]THE HONORABLE MICHAEL L. DOUGLAS, Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, STIGLICH, J.:

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), the United States Supreme Court held that when a mistrial is declared at a defendant's request, the Double Jeopardy Clause of the United States Constitution bars reprosecution only in those instances where a defendant demonstrates that the prosecutor intentionally acted to "goad" the defendant to move for a mistrial. Nevada adopted the *Kennedy* standard in *Melchor-Gloria v. State*, 99 Nev. 174, 660 P.2d 109 (1983).

In the years following *Kennedy*, a number of states have observed the difficulty of proving a prosecutor's specific intent to provoke a mistrial, and adopted broader standards. Having reviewed these decisions, this court agrees that the *Kennedy* standard is unduly narrow. Therefore, the court concludes that pursuant to the protections of Article 1, Section 8 of the Nevada Constitution, when a defendant requests a mistrial, jeopardy will also attach when a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant which cannot be cured by means short of a mistrial.

FACTS AND PROCEDURAL HISTORY

In 2008, the State of Nevada filed an indictment against Lacy L. Thomas, the former chief executive officer of University Medical Center (UMC), charging five counts of theft and five counts of official misconduct. The charges related to contracts entered into between Thomas and five separate entities, which the State asserts were controlled by friends or associates of Thomas. The State contended that the terms of the five contracts were so grossly unfavorable to UMC that each contract represented an act of theft. One of these theft charges related to a contract negotiated by Thomas with Superior Consulting (ACS).

Thomas initially proceeded to trial in 2010. On approximately the fifth day of trial, an attorney for ACS, in a conversation with Thomas's attorneys outside of court, referred to a binder of documents that he believed to be exculpatory with respect to ACS. ACS's attorney indicated he had previously provided these documents to the police detectives investigating ACS and Thomas. These documents had never been provided to Thomas.[2]

On the basis of this late disclosure, Thomas moved for a mistrial. The district court granted the motion on the tenth day of trial. After a cursory review, the district court found that, at a minimum,

[2]The defense did not receive the exculpatory documents until the conclusion of the seventh day of trial. On the ninth day of trial, the defense alerted the trial court to this late disclosure. To the extent the dissent suggests sandbagging by the defense, this is not borne out by the record.

the documents provided substantial material relevant to the cross-examination of several key witnesses. Given that 13 witnesses had already testified over nine days of trial, the district court determined that a mistrial was necessary.

Following the mistrial, Thomas filed a motion to dismiss pursuant to the Double Jeopardy Clause, and a motion to dismiss the indictment for vagueness and failure to state a claim with sufficient specificity. The district court granted the second motion with respect to all counts, finding that the State had failed to identify its allegations against Thomas with sufficient specificity. The district court did not rule on Thomas's claims that the underlying statutes were unconstitutionally vague. On appeal, this court upheld the dismissal of the theft charges related to ACS, but found that the indictment provided Thomas with sufficient notice of the remaining charges. *State v. Thomas*, Docket No. 58833 (Order Affirming in Part, Reversing in Part and Remanding, Sept. 26, 2013).

Upon remand to the district court, Thomas renewed his motion to dismiss for double jeopardy. He also filed a renewed motion regarding vagueness, arguing that the district court had not reached these claims in its prior order.

Following an evidentiary hearing, the district court made a conclusive finding that the documents at issue were exculpatory in nature, as they tended to demonstrate that ACS had performed work pursuant to its contract with UMC. The district court also found that the documents had been provided to the district attorney's office by police detectives. Nonetheless, the court denied Thomas's double jeopardy motion, finding that the State had not intentionally withheld the documents from Thomas. The district court further noted that the documents withheld related to conduct by ACS. Because the theft charge was dismissed with respect to ACS, the district court determined that there was no "carryover" of double jeopardy to any remaining counts. The district court concluded that it lacked authority to consider Thomas's vagueness motion, as the parties had argued the issue of constitutional vagueness in the first appeal to this court.

Thomas now petitions for extraordinary relief, asking this court to consider (1) whether double jeopardy bars reprosecution, (2) whether double jeopardy has attached to all charged counts, and (3) whether the district court had authority to rule on his renewed motion to dismiss for unconstitutional vagueness.

We exercise our discretion to consider Thomas's petition

The decision to consider a writ of mandamus lies within the sole 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 that the law requires . . . or to control an arbitrary or capricious exercise of dis-

cretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (internal quotation marks omitted) (citation omitted). "[W]here there is [no] plain, speedy and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; *Smith*, 107 Nev. at 677, 818 P.2d at 851. "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene 'under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (quoting *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)).

The double jeopardy issues presented by this case are important issues of law that require clarification. Further, given Thomas's argument that double jeopardy bars reprosecution, sound judicial economy supports consideration of these issues before a second jury trial. Therefore, we exercise our discretion to intervene in these circumstances by way of extraordinary writ.[3]

Double jeopardy applies in this case

Thomas first argues that his renewed prosecution by the State following the initial mistrial violates the Double Jeopardy Clause of the United States and Nevada Constitutions. This presents a question of law that this court reviews de novo. *Grupo Famsa v. Eighth Judicial Dist. Court*, 132 Nev. 334, 337, 371 P.3d 1048, 1050 (2016). However, this court "will not disturb [the] district court's findings of fact unless th[ose] [findings] are clearly erroneous and not based on substantial evidence." *All Star Bail Bonds, Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 419, 422, 326 P.3d 1107, 1109 (2014) (internal quotation marks omitted).

Generally, a state may not put a defendant in jeopardy twice for the same offense. U.S. Const. amend. V; Nev. Const. art. 1, § 8. As observed by the United States Supreme Court, a fundamental purpose of the bar against double jeopardy is to ensure that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense

[3]We note that this court generally reviews questions related to double jeopardy by way of a writ of prohibition. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009).

> and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). Given the purpose of protecting against potential abuses by the state, in analyzing whether double jeopardy bars reprosecution after mistrial, "both the United States Supreme Court and this court have made a distinction between those cases in which the *prosecution* moves for mistrial and those in which the *defense* moves for mistrial." *Taylor v. State*, 109 Nev. 849, 861, 858 P.2d 843, 851 (1993) (SHEARING, J., concurring in part and dissenting in part); *see also Rudin v. State*, 120 Nev. 121, 142-43, 86 P.3d 572, 586 (2004).

Double jeopardy following the State's request for mistrial

In cases where a mistrial is declared at the request of the prosecutor, the concern that the state may pursue a mistrial for its own advantage is strong. Therefore, in these instances, a court must examine (1) whether the declaration of a mistrial was dictated by "manifest necessity," and (2) "in the presence of manifest necessity, whether the prosecutor is responsible for the circumstances which necessitated declaration of a mistrial." *Hylton v. Second Judicial Dist. Court*, 103 Nev. 418, 422-23, 743 P.2d 622, 625 (1987); *see also Illinois v. Somerville*, 410 U.S. 458, 463 (1973) (discussing the "manifest necessity" standard). The state may retry a defendant only after establishing both manifest necessity, and that the prosecutor was not "in some way responsible" for the mistrial. *Hylton*, 103 Nev. at 424, 743 P.2d at 626 (internal quotation marks omitted).

Double jeopardy following a defendant's request for mistrial

Conversely, a defendant's motion for, or consent to, a mistrial generally removes any double jeopardy bar to reprosecution. *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). As noted by the United States Supreme Court in *Kennedy*, when "the defendant himself has elected to terminate the proceedings against him, the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause." *Id.* Nonetheless, the Court delineated a narrow exception, holding that in those circumstances where the prosecutor intentionally provokes or "goad[s]" the defendant into moving for a mistrial, a defendant may raise double jeopardy as a defense to subsequent reprosecution. *Id.* at 673-74.

This court adopted the *Kennedy* standard in *Melchor-Gloria v. State*, determining that to bar reprosecution under the Double Jeopardy Clause, a defendant must demonstrate intent by the state to provoke a mistrial. 99 Nev. 174, 178, 660 P.2d 109, 112 (1983). In that case, the court noted that "prosecutorial conduct that might be

viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* This court again applied the *Kennedy* standard in *Collier v. State*, concluding that even though the prosecutor's remarks leading to mistrial were "egregious," double jeopardy did not bar reprosecution because the defendant failed to prove that "the prosecution was disposed to seek a mistrial for its advantage." 103 Nev. 563, 566, 747 P.2d 225, 227 (1987).[4]

Criticism of the Kennedy standard

As observed by Justice Stevens in his concurring opinion in *Kennedy*, "[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the defendant." 456 U.S. at 688 (Stevens, J., concurring). Further, by limiting the protections of the Double Jeopardy Clause to the narrow circumstances delineated in *Kennedy*, the purposes of double jeopardy protection are not fully realized. The New Mexico Supreme Court noted that "[t]he object of constitutional double-jeopardy protections is not to punish disreputable prosecutors. The purpose, rather, is to protect the defendant's interests in having the prosecution completed by the original tribunal before whom the trial was commenced." *State v. Breit*, 930 P.2d 792, 800 (N.M. 1996). Notably, whether dismissal results from goading or other intentional misconduct, "the burden of a second trial is not attributable to the defendant's preference for a new trial over completing trial infected by an error. Rather, it results from the state's readiness, though perhaps not calculated intent, to force the defendant to such a choice." *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983).

Given similar concerns, a number of courts have noted the difficulty in proving a prosecutor's specific intent to provoke a mistrial, and adopted approaches pursuant to their respective state constitutions that encompass other intentional or willful prosecutorial misconduct. *See, e.g.*, *People v. Batts*, 68 P.3d 357, 360 (Cal. 2003) (observing that the *Kennedy* standard "has been widely viewed as unduly narrow and as not fully protective of the interest that the [D]ouble [J]eopardy [C]lause was intended to safeguard"); *Breit*, 930 P.2d at 803 (holding that double jeopardy attaches when an of-

[4]In this case, both in arguments before the district court and in the petition to this court, Thomas argued that his claim of double jeopardy should be analyzed under the "manifest necessity" standard set forth in *Hylton*. This is incorrect. Unlike *Hylton*, we note that Thomas, not the State, requested the mistrial.

Ultimately, the district court's written order did not apply *Hylton*, but stated simply that the prosecutor did not intentionally withhold the documents. Under the standard set forth in *Kennedy*, this finding indicates that double jeopardy would not bar reprosecution under the United States Constitution.

ficial intends to provoke a mistrial, or acts in "willful disregard" of the possibility of a mistrial); *Kennedy*, 666 P.2d at 1326 (extending double jeopardy protections to instances where the prosecutor "either intends or is indifferent to the resulting mistrial or reversal"); *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) (concluding that in addition to the goading discussed in *Kennedy*, double jeopardy also prohibits retrial "when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial"); *see also State v. Rogan*, 984 P.2d 1231, 1249 (Haw. 1999).[5] Indeed, the only state to have attempted adoption of a broader double jeopardy standard and then reversed its approach is Texas. *See Bauder v. Texas*, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996), *overruled by Ex parte Lewis*, 219 S.W.3d 335, 337 (Tex. Crim. App. 2007). We have reviewed the unique circumstances attendant to the *Bauder* and *Lewis* line of cases and find this authority unpersuasive.[6]

The difficulties inherent in the *Kennedy* standard are discussed at length in *Pool v. Superior Court*, where the Arizona Supreme Court noted that under *Kennedy*, proving specific intent to provoke mistrial "must necessarily involve a subjective inquiry and is too difficult to determine." 677 P.2d 261, 271 (Ariz. 1984). Therefore, in addition to those instances where a prosecutor intentionally attempts to "goad" a defendant into moving for a mistrial, the court further concluded that double jeopardy would attach in those instances where the guarantees of Arizona's Double Jeopardy Clause "would be impaired by a prosecutor's intentional, improper conduct." *Id*.

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[5]While not presented with the appropriate factual circumstances to expand the *Kennedy* standard, courts in both Minnesota and Washington have recognized arguments that the *Kennedy* standard may be unduly narrow. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985) (acknowledging that a state constitution may provide greater double jeopardy protections than the federal constitution); *State v. Hopson*, 778 P.2d 1014, 1019 (Wash. 1989) (extensively discussing Oregon's alternative approach to double jeopardy after *Kennedy*, but concluding that under the facts before the court, retrial was not barred under either approach). Similarly, the Michigan Court of Appeals adopted a wider double jeopardy standard, *People v. Dawson*, 397 N.W.2d 277, 282 (Mich. Ct. App. 1988), but the State subsequently conceded that the prosecutor had engaged in goading. *People v. Dawson*, 427 N.W.2d 886, 897 (Mich. 1988). Given this concession, the Michigan Supreme Court declined to consider the adoption of a broader standard. *Id.*

[6]The dissent points to the *Lewis* decision in Texas as an example of the alleged dangers of expanding the *Kennedy* standard. Interestingly, a compelling factor driving the *Lewis* court's decision to depart from Texas's earlier adoption of a wider double jeopardy standard appears to be a change in the makeup of the Texas Court of Criminal Appeals. As observed by the dissent in *Lewis*, "[*Bauder*] was not such a manifestly erroneous holding that we can justify overruling it just because there is a majority of the Court presently willing to do so." *Lewis*, 219 S.W.3d at 380 (Price, Meyers, and Holcomb, JJ., dissenting).

New standard for double jeopardy following a defendant's successful motion for mistrial

Having reviewed *Pool*, as well as other state court decisions discussing the rigidity of the *Kennedy* standard, this court agrees that the *Kennedy* approach is unduly narrow.[7] As stated in *Kennedy*, intentional conduct by the state to "goad" the defendant into requesting a mistrial certainly triggers the protections of the Double Jeopardy Clause. However, for the reasons discussed above, the protections of Nevada's Double Jeopardy Clause are no less implicated when a prosecutor intentionally engages in egregious misconduct for the purposes of securing a conviction. Therefore, this court finds that in addition to the conduct described in *Kennedy*, the protections of Article 1, Section 8 of the Nevada Constitution also attach to those instances when a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant which cannot be cured by means short of a mistrial.

In analyzing whether double jeopardy will attach under this approach, the court finds the test set forth in *Pool* to be instructive, and adopts it today. Accordingly, when evaluating a double jeopardy claim following a defendant's motion for a mistrial, courts should consider whether:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial . . . ; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.[8]

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[7]We recognize that "under the doctrine of stare decisis, this court will not overturn precedent absent compelling reasons for so doing." *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011) (internal quotation marks omitted). Nonetheless, "the doctrine of stare decisis must not be so narrowly pursued that the law is forever encased in a straight jacket." *Id*. (internal quotation marks omitted). Given the above discussion, the court concludes that compelling reasons exist to expand the protections of Nevada's Double Jeopardy Clause beyond *Kennedy*.

[8]We note that *Pool* also indicates that this test applies to prosecutorial misconduct that results in reversal on appeal. 677 P.2d at 271-72. Under the facts currently before the court, we need not reach the issue of whether double jeopardy may bar reprosecution in circumstances other than mistrial. Given that the purpose of the Double Jeopardy Clause is not to punish prosecutorial misconduct, but ensure that a defendant chooses when to go to trial, a defendant who chooses not to litigate any alleged prosecutorial misconduct at the trial level presents a less compelling argument that double jeopardy bars retrial.

Pool, 677 P.2d at 271-72; *see also People v. Dawson*, 397 N.W.2d 277, 282 (Mich. Ct. App. 1986) (adopting the Arizona test). With respect to the second prong of this test, we first note that the question of whether a prosecutor "knows" or "intends" his conduct to be improper and prejudicial should generally be measured by objective factors. As clarified by the court in *Pool*, these factors may include

> the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion. [A trial court] may also consider the prosecutor's own explanations of his "knowledge" and "intent" to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers.

Pool, 677 P.2d at 271 n.9.

In addition, we reiterate that the misconduct at issue must amount to more than "insignificant impropriety." The Arizona Supreme Court has noted that there is "an important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself." *State v. Minnitt*, 55 P.3d 774, 781 (Ariz. 2002) (citing *Pool*, 677 P.2d at 268-70).

Finally, with respect to the third prong of this test, we note that the district court has multiple measures at its disposal to remedy prosecutorial misconduct. These may include the grant of a continuance to review newly produced evidence, various sanctions against the prosecutor, or the issuance of curative jury instructions. Double jeopardy will attach only when egregious and intentional prosecutorial misconduct has truly necessitated the grant of a mistrial.[9]

Under the facts of this case, double jeopardy bars reprosecution

At the evidentiary hearing on the double jeopardy motion, counsel for ACS testified that he had provided the Las Vegas Metropolitan Police Department (LVMPD) with a disc of documents that he believed demonstrated that ACS had worked diligently to perform its contractual obligations. Detective Robert Whitely generally remembered receiving the disc, and testified that the documents had

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Nonetheless, even courts applying the more restrictive *Kennedy* standard may find prosecutorial misconduct to be so severe that due process mandates dismissal. *See, e.g.*, *United States v. Lewis*, 368 F.3d 1102, 1107 (2004) (noting that a court always retains the inherent power to dismiss a case for due process violations).

[9]It is curious that the dissent characterizes this approach as "overruling" *Melchor-Gloria*. While our opinion expands the protections of Nevada's Double Jeopardy Clause, we affirm *Melchor-Gloria* to the extent it stands for the proposition that double jeopardy bars retrial when a prosecutor has intentionally goaded a defendant into requesting a mistrial.

been printed into a notebook by another LVMPD employee. While he did not specifically recall tendering the notebook to the district attorney's office, Detective Whitely stated that, based on the documents received from ACS, he and Sergeant Michael Ford had recommended to the district attorney's office that no charges be made with respect to ACS.[10]

Sergeant Ford more specifically testified that the documents tendered on the disc from ACS would have been submitted to the district attorney's office with his initial report recommending that the conduct involving ACS not be charged. Prior to the grand jury proceedings, Sergeant Ford recalled having at least one conversation with Deputy District Attorney Scott Mitchell where it was indicated that there was evidence that ACS had performed work at UMC. After the grand jury returned an indictment containing charges related to ACS, Sergeant Ford further testified he was "surprised." As a result, Sergeant Ford had *another* conversation with Mitchell about the decision to pursue charges against ACS, especially in light of the investigation and exculpatory documents. Sergeant Ford also provided Mitchell with a second copy of the documents in question. Mitchell did not testify at the evidentiary hearing. Indeed, no member of the prosecution team testified under oath.

As mentioned above, the parties appeared to believe that the standard governing this case was the "manifest necessity" standard discussed in *Hylton v. Eighth Judicial District Court*, which relates to those instances in which the State requests a mistrial. 103 Nev. 418, 422-23, 743 P.2d 622, 625 (1987). The district court did not specifically make a finding pursuant to *Melchor-Gloria* or *Kennedy*. However, in denying Thomas's motion to dismiss pursuant to the Double Jeopardy Clause, the court found that there was not an intentional act by the district attorney to withhold the evidence. Based on the evidence presented at the hearing, we conclude that this finding was clearly erroneous. Further, given the State's failure to present any evidentiary testimony in defense against Thomas's motion, we conclude that the record is sufficient to determine that under the standard announced today, double jeopardy bars reprosecution.[11]

In this, we note that testimony presented at the evidentiary hearing indicated that the prosecution had been provided with the docu-

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[10]It is unclear how the dissent finds this testimony of Detective Whitely to "squarely" support a finding of non-intentionality.

[11]The dissent suggests that this matter should be remanded to the district court because, under the test announced today, this presents an inquiry that is "highly fact-specific." Of note, the district court held a full evidentiary hearing, indicating that this court has all facts necessary to apply the *Pool* analysis. Notably, in the appropriate circumstances, this court has found remand to be unnecessary, even when announcing a new rule of law. *See, e.g.*, *McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 620 (2004). This case has been pending since 2008. No reason exists to further continue this matter.

ments at issue. Both Detective Whitely and Sergeant Ford testified that they had conversations with Mitchell in which they recommended against charging any misconduct with respect to ACS, based on the documentation they provided. Based on this testimony, the district court found that the documents at issue were both exculpatory and had been provided to Mitchell. Going further, we note that this testimony also clearly demonstrates that the prosecution was aware of the potential importance of the documents.

While, at the time of the initial mistrial motion, Mitchell made several statements that he did not intentionally withhold the documents, neither Mitchell nor any other employee of the district attorney's office testified at the evidentiary hearing. The sworn testimony by Detective Whitely and Sergeant Ford directly contradicts Mitchell's prior unsworn assertions. Therefore, under these unique circumstances, a negative inference arises from Mitchell's failure to testify. Given the uncontroverted testimony by Detective Whitely and Sergeant Ford indicating that Mitchell was aware of the exculpatory documents, the district court's conclusion that Mitchell's actions were unintentional was not supported by substantial evidence.

Under the three-part test adopted by the court today, the record clearly reflects that the mistrial was granted due to Mitchell's improper conduct.[12] When the issue of the withheld documents first arose, it appears that the district court initially considered allowing trial to proceed, and allowing the defense to recall any witnesses it felt necessary. Ultimately, given that the mistrial motion was not fully litigated until the tenth day of trial, coupled with the exculpatory nature and volume of documents disclosed, and the number of witnesses that had already testified, the district court concluded that no remedy short of a mistrial would cure the prejudice to Thomas. This court agrees. *See, e.g.*, *United States v. Miller*, 529 F.2d 1125, 1128 (1976) (noting that late disclosure may cause prejudice to the extent that a defendant is "prevented from receiving a constitutionally guaranteed fair trial"). Accordingly, the record clearly demonstrates that the first and third components of *Pool* are satisfied.

As discussed above, the second prong of *Pool*, regarding the intent of the prosecutor and the nature of the misconduct at issue, requires the court to consider "the situation in which the prosecutor

[12]During the proceedings below, both the parties and the district court discussed the late disclosure as a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As noted by the United States Supreme Court, "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Nonetheless, a "true" *Brady* violation occurs only when a court determines that "the suppressed evidence would have produced a different verdict." *Id*. Accordingly, it is not practicable to analyze a *Brady* violation prior to entry of a verdict. *See, e.g.*, *United States v. McPartlin*, 595 F.2d 1321, 1346 (7th Cir. 1979). Therefore, we have framed our discussion of the issues in this case in terms of late disclosure, rather than *Brady*.

found himself, the evidence of actual knowledge and intent, and any other factors which may give rise to an appropriate inference or conclusion." 677 P.2d at 271 n.9. A court may also consider the prosecutor's own explanation. *Id.* However, in this case, the State offered no explanation at the evidentiary hearing for its failure to disclose the documents. Perhaps more disturbingly, when the issue of the withheld binder of documents arose during trial, Mitchell repeatedly informed the district court that he had never seen the documents before. Mitchell later agreed with suggestions by the district court that LVMPD had the documents, and had likely failed to turn them over to the district attorney's office. These statements were directly contradicted by the testimony presented at the evidentiary hearing, which established that Mitchell had been provided with the documents on multiple occasions, and informed of their contents. This strongly indicates that the failure by the prosecution to disclose the documents was intentional.

Given the facts of this situation, we cannot say that the intentional withholding of these documents was minor error. Rather, when the State has withheld evidence "essential to the question of reasonable doubt," that conduct "raise[s] grave questions concerning the integrity of the criminal justice system." *Milke v. Mroz*, 339 P.3d 659, 667 (Ariz. Ct. App. 2014). Given the State's complete failure to introduce any evidence to dispute that Mitchell intentionally withheld the documents to improve his chances of securing a conviction, including the failure to call Mitchell as a witness, we conclude that Thomas presented sufficient evidence to satisfy the second prong of *Pool*.

Because Thomas presented sufficient evidence to satisfy all three prongs of the inquiry set forth in *Pool*, double jeopardy bars his reprosecution.

Double jeopardy bars reprosecution on all charged counts

As discussed above, the district court concluded that even in the event double jeopardy barred reprosecution of Thomas, it had only "attached" to the count of theft related to the contract with ACS. We disagree.

It is well settled that double jeopardy attaches when the jury is sworn. *Hanley v. State*, 83 Nev. 461, 465, 434 P.2d 440, 442 (1967). As established by the United States Supreme Court, the protections of the Double Jeopardy Clause arise from the fact that multiple prosecutions seriously disrupt a defendant's personal life during trial, create a potential for governmental harassment of the defendant, and enhance the likelihood that an innocent defendant may be convicted. *See Arizona v. Washington*, 434 U.S. 497, 503-04 (1978) (noting that a second prosecution "increases the financial and emotional burden on the accused, [and] prolongs the period in which he [or she] is

stigmatized by an unresolved accusation of wrongdoing"); *see also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (noting that reprosecution allows the government to "gain[ ] . . . advantage from what it learns at the first trial about the strengths of the defense" and its own weaknesses). Similarly, the interest in the finality of judgments contemplates "the importance to the defendant of being able, once and for all, to conclude his confrontation with society." *United States v. Jorn*, 400 U.S. 470, 486 (1971).

This court is aware of no controlling or persuasive authority in which a court has concluded that double jeopardy may bar reprosecution on a single charged count. Rather, a review of the interests protected by the Double Jeopardy Clause strongly suggests that when a case ends in mistrial, double jeopardy will bar reprosecution on either all counts or on none. To rule otherwise would deprive a defendant, through no fault of his own, of the important right to confront the charges against him in his initial trial.

In this case, a jury was initially sworn at the first trial in 2010, in which Thomas was charged with the same offenses as in the current case. Therefore, we conclude that double jeopardy attached to all counts when the jury was sworn, and bars reprosecution of Thomas on all counts.[13]

CONCLUSION

All evidence before the district court in this case suggests that the prosecutor intentionally and improperly withheld exculpatory documents. This conduct was egregious, and caused prejudice to Thomas which could not be cured by means short of a mistrial. Therefore, double jeopardy bars reprosecution of Thomas on all counts.

Accordingly, we grant Thomas's petition, and direct the clerk of this court to issue a writ of mandamus, instructing the district court to vacate its September 29, 2015, order denying the motion to dismiss and enter an order granting dismissal of the indictment.

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

GIBBONS, J., concurring:

I concur with the majority in result only.

PICKERING, J., dissenting:

The district court granted the defense motion for a mistrial but ordered a retrial, not dismissal. It found that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not providing the defense with a compact disc of documents having exculpatory value as to two of

[13]Because we conclude that the Double Jeopardy Clause bars reprosecution of Thomas on all counts, we do not reach the question of whether the district court had authority to rule on Thomas's renewed motion to dismiss for vagueness.

the ten criminal charges against Thomas; that the State had overlooked the disc, not hidden it; and that, with no intentional misconduct by the State, retrial did not offend double jeopardy.

The majority grants Thomas's petition for a writ prohibiting the district court from retrying him and directs dismissal of all charges against him. To reach this result, the majority overturns 35 years of settled law and embraces a state-constitution-based double-jeopardy test all federal and most state courts have rejected as unworkable and unsound. Questions of intent are quintessentially for the district judge, who sees firsthand what an appellate court only reads about. Despite this, and despite the district judge's familiarity with the facts, having presided over the aborted trial and the evidentiary hearing that followed, the majority deems "clearly erroneous" the district court's finding that the State did not intentionally suppress the compact disc or the documents it contained. The court then applies its new double-jeopardy test post hoc to an evidentiary hearing the district court and the parties conducted under prior law and, faulting the State for its lack of prescience, dismisses the case for a failure of essential proof under the court's new test.

The new double-jeopardy test the majority adopts was tried in Texas and failed, creating havoc and uncertainty. I fear it will fail Nevada too. I also do not subscribe to replacing existing law with new law, then applying the new law at the appellate level where, as here, the new law involves fact-finding not undertaken in district court. As I support neither the new rule of law announced by the majority, nor the procedure followed in adopting and implementing it, I respectfully dissent.

I.

A.

The double jeopardy clauses of the United States and Nevada Constitutions forbid the government from trying a person twice for the same crime. *See* U.S. Const. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); Nev. Const. art. I § 8(1) ("[n]o person shall be subject to be twice put in jeopardy for the same offense"). These clauses protect both a defendant's right to be secure in a judgment of acquittal—from which the State may not appeal—and his "valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. 82, 93 (1978). The latter right is not absolute; it does not guarantee a defendant that the State will always "vindicate its societal interest in the enforcement of criminal laws in one proceeding." *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). A defendant who successfully appeals his conviction, for example, receives a new trial, not an acquittal. *United States v. Tateo*, 377 U.S. 463, 465 (1964) ("The principle that [the Double Jeopardy Clause]

does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence."); *Collier v. State*, 103 Nev. 563, 565, 747 P.2d 225, 226 (1987) ("It has long been held that the double jeopardy clause does not bar retrial when a conviction is reversed on appeal."). Similarly, when a defendant's first jury deadlocks, double jeopardy yields to the "manifest necessity" of a mistrial and subsequent retrial. *United States v. Perez*, 9 Wheat. 579, 580 (1824); *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 702, 220 P.3d 684, 692 (2009) ("A deadlocked jury is the classic example of the 'manifest necessity' for mistrial before final verdict that will permit retrial without offense to a defendant's double jeopardy rights.") (citing *Logan v. State*, 144 U.S. 263 (1982), *abrogated on other grounds by Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

"If the law were otherwise, 'the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.'" *Kennedy*, 456 U.S. at 667 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Tateo*, 377 U.S. at 466.

B.

Much as an appellate reversal permits retrial, a defendant who successfully moves for a mistrial may be retried consistent with double jeopardy, the motion for mistrial being deemed a consent to retrial. *Kennedy*, 456 U.S. at 676 ("A defendant's motion for a mistrial constitutes a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.") (quotations omitted). But what if the State, seeing that it is losing, deliberately blunders, trying to provoke the defendant into moving for a mistrial so it can start over? An exception to the defense-initiated-mistrial rule exists where, seeing that the case is going badly for it, the government decides to throw the case by committing error designed to "goad" the defendant into requesting a mistrial. *United States v. Dinitz*, 424 U.S. 600, 611 (1976). Double jeopardy protects the defendant thus goaded, and his motion for mistrial does not constitute consent to retrial.

In *Oregon v. Kennedy*, the Supreme Court considered the limits of the goaded-mistrial exception to the defense-initiated mistrial rule, specifically, whether it should "broaden the test from one of *intent* to provoke a motion for a mistrial to a more generalized standard of 'bad faith conduct' or 'harassment' on the part of the judge or prosecutor." 456 U.S. at 674. After examining prior case law, the

Supreme Court rejected the broader exception as "offer[ing] virtually no standards" and unrealistic:

> Every act on the part of a rational prosecutor during a trial is designed to "prejudice" the defendant by placing before the judge or jury evidence leading to a finding of his guilt. Given the complexity of the rules of evidence, it will be a rare trial of any complexity in which some proffered evidence by the prosecutor or by the defendant's attorney will not be found objectionable by the trial court.

Id. at 674-75.

Motions for mistrial, like appeals, safeguard the fairness of the trial process. To adopt a rule that prosecutorial error serious enough to result in a mistrial automatically bars retrial is not only inconsistent with the rule that appellate reversal yields a new trial, not an acquittal, it would leave trial judges reluctant to grant otherwise appropriate motions for mistrial. *Id.* at 676 ("Knowing that the granting of the defendant's motion for mistrial would all but inevitably bring with it an attempt to bar a second trial on grounds of double jeopardy, the judge presiding over the first trial might well be more loath to grant a defendant's motion for mistrial."). For these reasons, *Kennedy* reaffirmed the goaded-mistrial exception to the defense-initiated mistrial rule: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.*

C.

In *Melchor-Gloria v. State*, 99 Nev. 174, 178, 660 P.2d 109, 111 (1983), this court considered whether "the Double Jeopardy Clause of the United States or Nevada Constitutions bars [a defendant's] retrial" where, as here, the first trial ended in a mistrial at the defendant's request. We did not differentiate between the similarly worded double jeopardy clauses in the United States and Nevada Constitutions, resolving both *Melchor-Gloria*'s federal and state constitutional challenges under *Oregon v. Kennedy*'s "goaded mistrial" test:

> As a general rule, a defendant's motion for, or consent to, a mistrial removes any double jeopardy bar to reprosecution. . . . [P]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . *The dispositive question is . . . whether the prosecutor's conduct* . . . constitutes "overreach-

> ing" or "harassment" *intended to goad [a defendant] into moving for a mistrial.*

Melchor-Gloria, 99 Nev. at 178, 660 P.2d at 111-12 (emphasis added) (citations omitted); *Benson v. State*, 111 Nev. 692, 695, 895 P.2d 1323, 1326 (1995) (recognizing that *Melchor-Gloria* adopts *Oregon v. Kennedy*'s "goaded mistrial" rule for "cases where prosecutorial misconduct led a defendant to seek a mistrial"); *see Collier*, 103 Nev. at 566, 747 P.2d at 227 (affirming order denying double-jeopardy-based motion to dismiss where the prosecutor engaged in "egregious" misconduct but did so to win, not "to goad the defense into moving for a mistrial").[1]

D.

Under *Melchor-Gloria* (and *Oregon v. Kennedy*), Thomas's double-jeopardy challenge fails. Thomas moved for a mistrial when he learned from a third party, a week into trial, that the State had not provided him discovery of a disc containing documents having exculpatory value with respect to two of the ten criminal charges against him. The State's obligation to provide Thomas with the compact disc arose, and was breached, before trial began. It makes no sense—and neither Thomas nor the majority suggest—that the State withheld the disc before trial so that, when Thomas learned about the disc's existence from a third party during trial, he would move for a mistrial. *Cf. United States v. Washington*, 198 F.3d 721, 725 (8th Cir. 1999) (affirming denial of a defendant's double-jeopardy-based motion to dismiss where the errors underlying the mistrial motion were discovery errors that occurred prior to trial: It is "highly unlikely the government manufactured pre-trial discovery errors to halt a trial that was not going well."). Even assuming, as the majority holds, that the State deliberately withheld the disc, logic and evidence say it did so to enhance the likelihood of conviction on the ACS counts, not to goad Thomas into moving for a mistrial. *See United States v. Coleman*, 862 F.2d 455, 458 (3d Cir. 1988) ("[A]ssuming arguendo a number of *Brady* violations prior to the first trial, the double jeopardy clause [still] is not implicated. The prosecutor's withholding of exculpatory evidence from the defendant may only be characterized as an overzealous effort to gain a conviction from the first jury and

[1]I agree with my colleagues that Thomas's reliance on *Hylton v. Eighth Judicial District Court*, 103 Nev. 418, 743 P.2d 622 (1987), is misplaced. A defendant may be retried after a mistrial in two instances: (1) if he consented to the mistrial; or (2) if manifest necessity required the mistrial as, for example, where the jury deadlocks. *Glover*, 125 Nev. at 709, 220 P.3d at 696 (citing *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). While the defendant in *Hylton* did not oppose the prosecutor's mistrial motion, he did not affirmatively move for a mistrial, as Thomas did here. *Hylton* is a "manifest necessity" case, not a defense-initiated mistrial case.

not as an attempt to subvert [the defendant's] valued right" to have the first jury decide his case.) (internal quotations omitted). The fact that the government blundered and "the blunder precipitates a successful motion for mistrial does not bar a retrial" unless, in committing the blunder, the prosecutor "is trying to abort the trial," of which there is no evidence here. *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993).

The State's failure to turn over material, exculpatory evidence, while it may constitute a due process violation under *Brady v. Maryland*, does not constitute a double-jeopardy violation under *Melchor-Gloria* and *Kennedy*. Due process does not seek "punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady*, 373 U.S. at 87. Thus, while dismissal has been ordered in extreme cases as a sanction against the government for egregious misconduct, including failing to afford discovery, *see* 6 Wayne R. LaFave et al. *Criminal Procedure* § 24.3(a), at 413 n.14 (4th ed. 2015), the remedy for a *Brady* violation is a new trial, as the district court correctly held. *Id.* In holding otherwise, and dismissing the charges against Thomas, the majority conflates due process, and *Brady*, with double jeopardy. *See Coleman*, 862 F.2d at 458-59 (rejecting argument that a *Brady* violation required dismissal of charges and noting, "Unlike the double jeopardy analysis, which places a premium upon the defendant's right to one prosecution, due process simply requires that the defendant be treated fairly."); *United States v. Lewis*, 368 F.3d 1102, 1107 (9th Cir. 2004) (government's alleged *Brady* violations at first trial did not establish a double jeopardy bar to retrial); *Green v. State*, 380 S.W.3d 368, 374-75 (Ark. 2011) ("[o]ur law is well settled that the remedy for a *Brady* violation is a new trial"; "prosecutorial conduct motivated by a desire to obtain a conviction and not by a desire to provoke the defendant into moving for a mistrial may be grounds for a mistrial but it does not preclude retrial of the case" as a matter of double jeopardy); *see also Lay v. State*, 116 Nev. 1185, 1199-1200, 14 P.3d 1256, 1266 (2000) (reversing judgment of conviction and remanding for a new trial based on the prosecution's *Brady* violation).

II.

Today's majority overrules *Melchor-Gloria*. It replaces the goaded-mistrial test we adopted from *Oregon v. Kennedy* with the expansive criteria the Arizona Supreme Court developed in *Pool v. Superior Court*, 677 P.2d 261, 271 (Ariz. 1984), as appropriate for interpreting the Arizona Constitution's double jeopardy clause. Majority, *ante*, at 475 ("when evaluating a double jeopardy claim following a defendant's motion for a mistrial, [Nevada] courts should consider whether: (1) mistrial is granted because of improper con-

duct or actions by the prosecutor; and (2) such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial . . . [or reversal];[2] and (3) the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial") (quoting *Pool*, 677 P.2d at 271-72). But courts do not grant mistrials or reverse judgments of conviction for harmless errors. Though formulated as a three-factor test, the law Arizona's *Pool* and now Nevada's *Thomas* state comes down to this: Prosecutorial error serious enough to require mistrial or reversal violates Nevada's double jeopardy clause and will require dismissal of charges if engaged in intentionally or with reckless disregard of the mistrial or reversal that might result.

The majority suggests its decision does not overrule *Melchor-Gloria* but this is incorrect. *Melchor-Gloria* affirmed denial of a double jeopardy challenge to a retrial, applying *Oregon v. Kennedy*. If the court had adopted *Pool*, a different analysis would have been required and Melchor-Gloria might have gone free. *Melchor-Gloria* may survive *Pool/Thomas* to the extent that, depicting the latter's expansive test as a Venn diagram, a small corner of the map covers a goaded mistrial. But *Pool/Thomas* disavows, and hence overrules, the goaded-mistrial test *Melchor-Gloria* adopted from *Oregon v. Kennedy*, which limits a defendant's double jeopardy right to a dismissal following a defense-initiated mistrial to motions for mistrial the State goads the defendant into making.

Stare decisis requires us to follow existing case law unless "compelling" reasons exist for overruling it. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008). "Mere disagreement" will not do. *Id.* A prior holding must have proven "badly reasoned" or "unworkable" before we will destabilize our case law by overruling it. *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (overruling *State v. Harnisch*, 114 Nev. 225, 954 P.2d 1180 (1998), because the confusion that decision spawned proved it "unworkable").

The majority largely repudiates these self-regulatory rules. Instead of examining Nevada's experience with *Oregon v. Kennedy*,

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[2]The majority omits the bracketed "or reversal" phrase from *Pool*. From its later discussion, the omission appears stylistic, not substantive, and that, under *Pool/Thomas*, a defendant who does not move for a mistrial but successfully appeals a judgment of conviction based on prosecutorial misconduct may thereafter secure, as such a defendant may in Arizona, dismissal of the charges under the state constitution's double jeopardy clause. *See State v. Jorgenson*, 10 P.3d 1177, 1180 (Ariz. 2000) (affirming dismissal of first-degree murder charges following reversal and remand of judgment of conviction based on intentional and egregious prosecutorial misconduct).

as adopted in *Melchor-Gloria*, the majority looks outside Nevada to support revising our law, representing that "a number" of states have "adopted approaches pursuant to their respective state constitutions" that reject *Kennedy*'s "goaded mistrial" test in favor of other less "narrow," more "fully protective" tests. Majority opinion, *ante*, at 469, 473. But this overstates matters considerably. In the 35 years since the Supreme Court decided *Oregon v. Kennedy*, only seven states have rejected its "goaded mistrial" test in favor of a more expansive reading of the double jeopardy clauses in their state constitutions. *See Pool*, 677 P.2d at 271; *People v. Batts*, 68 P.3d 357, 360 (Cal. 2003); *State v. Rogan*, 984 P.2d 1231, 1242-44 (Haw. 1999); *State v. Breit*, 930 P.2d 792, 803 (N.M. 1996); *State v. Kennedy*, 666 P.2d 1316, 1326 (Ore. 1983); *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992); *Bauder v. Texas*, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996), *overruled by Ex parte Lewis*, 219 S.W.3d 335, 337 (Tex. Crim. App. 2007). And that number is now down to six, since Texas has concluded that its state-specific test "should be overruled and that the proper rule under the Texas Constitution is the [goaded-mistrial] rule articulated by the United States Supreme Court in *Oregon v. Kennedy*." *Ex parte Lewis*, 219 S.W.3d at 337.[3]

Texas's experience holds a cautionary lesson for our court. In *Lewis*, the Texas court of criminal appeals overruled the decision it had rendered ten years earlier in *Bauder*. *Id.* Similar to *Pool/Thomas*, *Bauder* rejected *Oregon v. Kennedy*'s goaded-mistrial test as too narrow for purposes of the Texas Constitution's double jeopardy clause:

> . . . when a prosecuting attorney, believing that he cannot obtain a conviction under the circumstances with which he is confronted, and given the admissible evidence then at his

[3]According to LaFave, *supra*, § 25.2(b), at 795, "Several states' courts, relying on their state constitutions, have adopted standards for overreaching that barred retrial even in the absence of proof that the prosecution intended to provoke a motion for mistrial. Most . . . have followed the federal [*Oregon v. Kennedy*] standard." *See Tomlin v. State*, 695 So. 2d 157, 165 (Ala. 1996); *Green*, 380 S.W.3d at 374-75; *State v. Michael J.*, 875 A.2d 510, 534-35 (Conn. 2005); *Dinning v. State*, 485 S.E.2d 464, 465-66 (Ga. 1997); *State v. Morton*, 153 P.3d 532, 537-38 (Kan. 2007); *State v. Chase*, 754 A.2d 961, 963-64 (Me. 2000); *State v. DeMarco*, 511 A.2d 1251, 1253-54 (N.J. Sup. 1986). As support for adopting *Pool*, the majority cites three cases from Minnesota, Michigan, and Washington in which their supreme courts acknowledged but did not adopt a more expansive state-constitutional standard than *Oregon v. Kennedy*. Majority opinion, *ante*, at 474 n.5 (citing *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985), *People v. Dawson*, 427 N.W.2d 886, 897 (Mich. 1988), and *State v. Hopson*, 778 P.2d 1014, 1019 (Wash. 1989)). Given that these cases were decided 30 years ago, yet these states remain in the *Oregon v. Kennedy* majority, I read them as acknowledging the parties' arguments, not as indicating any of these states is about to adopt *Pool*.

> disposal, deliberately offers objectionable evidence which he believes will materially improve his chances of obtaining a conviction, and the law considers the prejudicial effect of such objectionable evidence to be incurable even by a firm judicial admonishment to the jury, it seems to us that the prosecutor's specific intent, whether to cause a mistrial or to produce a necessarily unfair trial or simply to improve his own position in the case, is irrelevant. In our view, putting a defendant to this choice, even recklessly, is constitutionally indistinguishable from deliberately forcing him to choose a mistrial.

Bauder, 921 S.W.2d at 699. *Bauder* held that, under the Texas Constitution, "a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only when the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request." *Id.*

Like Nevada, Texas endorses stare decisis and holds a "strong preference for adhering to past decisions." *Lewis*, 219 S.W.3d at 338. Despite this staunch preference, *Lewis* held that "[t]he *Bauder* opinion was flawed in [so many] respects" it needed to be overruled. *Id.* at 371. The *Lewis* court did so, first, because history does not support *Bauder*'s view of double jeopardy. *Lewis*, 219 S.W.3d at 354 (noting that early "cases applying double jeopardy protection to the mistrial setting uniformly held that a defendant could be tried anew if he had consented to the mistrial" by moving for it). Second, Lewis recognizes that *Bauder* is logically and doctrinally infirm because it conflates due process with double jeopardy. *See id*. at 353 ("the *Bauder* standard goes awry by operating as a penal sanction against the prosecution rather than as a shield against a prosecutor's attempt to abort a trial to prevent an impending acquittal").

> The question, for double jeopardy purposes, is not whether the defendant's trial was "fair" [a due process standard] but whether requesting a mistrial was ultimately his decision [a double jeopardy standard]. . . . Only when the prosecutor intends to provoke the defendant's mistrial motion can it be said that the prosecutor, rather than the defendant, has exercised primary control over the decision to seek the trial' termination.

Id. at 358-59.

Finally, *Lewis* recounts the havoc *Bauder* wrought as Texas courts struggled to define when prosecutorial misconduct was egregious enough to require dismissal, as opposed to a new trial, following the grant of a defendant's motion for mistrial. *Id.* at 370. The problem, the *Lewis* court observes, is "that [our] Court has never really been able to describe adequately what it believes double jeopardy should protect that is not already protected under *Oregon v. Kennedy*." *Id.*

Similar to the majority's assurance that its new *Pool*/*Thomas* test will not turn every defense-initiated, prosecutorial-error-based mistrial motion into a double-jeopardy challenge, *Bauder* purported to limit its holding to those cases where the prosecutor's misconduct deprived the defendant of his right to proceed to verdict before the first jury sworn, while recognizing errors occur in trials that can and do result in mistrials and reversals on appeals followed by retrials. This goal proved unachievable.

> The problem is that the refinement never seems to end. If we continue down the *Bauder* path, we must either accept at some point that some defendants who are not entitled to a double jeopardy acquittal will nevertheless obtain one under the *Bauder* standard, or we must continually refine the standard to reach for that elusive unarticulated ideal—overturning every grant of relief under *Bauder* along the way except on the rare occasion when relief would also be supported by *Oregon v. Kennedy.* The simple explanation for the never-ending path toward this "separate" state constitutional ideal is that it does not exist, because the real ideal is the *Oregon v. Kennedy* standard.

Lewis, 219 S.W.3d at 370-71; *see Michael J.*, 875 A.2d at 534 (endorsing *Oregon v. Kennedy* pre-*Lewis* after examining *Bauder*, *Pool*, and the other cases cited by the majority and concluding that the tests they adopt "lack the clarity to achieve an optimal balance between the defendant's double jeopardy rights and society's interest in enforcing its criminal laws").

III.

Pool mirrors *Bauder* and trying to apply *Pool*'s three-factor standard to this case presages the same problems with indeterminacy and inconsistent results that led *Lewis* to overturn *Bauder*. The complete, 180-degree dichotomy between how the district court and my colleagues in the majority interpret the record facts illustrates the point perfectly.

A.

Thomas was indicted on ten counts involving his dealings on behalf of his public-hospital employer with five different businesses. The lawyer representing one of the businesses, ACS, gave detectives a compact disc assembling materials showing that ACS in fact did work on the hospital contracts Thomas let to them and should not be criminally charged. ACS was not charged, but Thomas was.

A week into trial Thomas's lawyer spoke to ACS's lawyer and obtained the materials the latter had given the detectives—materials

the defense represented to the court they had never seen before. Several days later, when the defense attempted to use the ACS materials to cross-examine a prosecution witness, the State objected based on hearsay and its objection was sustained. There followed a motion for a mistrial by Thomas based on the prosecution's failure to have provided the ACS materials to the defense earlier, which the State opposed but the district court granted. Some months later, Thomas filed a motion to dismiss asserting, among other challenges, that Nevada's double jeopardy clause required dismissal of all charges against him.

The district court convened an evidentiary hearing on Thomas's motion to dismiss. It heard testimony from the two detectives and the lawyer for ACS. The prosecutors and defense counsel also made representations on the record as officers of the court, first in connection with Thomas's motion for mistrial and later in presenting and opposing Thomas's motion to dismiss. The State acknowledged that it had had constructive possession of the ACS disc from the time ACS's lawyer gave it to the detectives but denied having deliberately withheld it and argued that, as the disc only related to the ACS charges, one of which had by then been dismissed for legal insufficiency, retrial should proceed on the charges that remained. The defense argued that, whether the prosecutors had the disc or didn't, the State's failure to turn over the disc was "inexcusable" because of the prejudice it caused Thomas. Of note, the defense did *not* ask the district court to find the government withheld the disc intentionally. Thus, during the evidentiary hearing on Thomas's motion to dismiss, the defense objected based on relevance when the State asked one of the detectives if "there [was] anything you would not have provided or allowed [the defense] access of had he requested," maintaining that, "this isn't the issue. I'm not—I'm not alleging he hid something or didn't give me access. That's not the issue." Any suggestion this position was limited to the detectives as opposed to the prosecution denying the defense access to the ACS disc is repelled by the defense's acknowledgment in arguing the motion that, while "perhaps" the government's failure to provide discovery of the ACS disc "was intentional . . . I don't know that the record supports that and I—more importantly don't think you need to find that."

The district court denied Thomas's double-jeopardy-based motion to dismiss. It found that the ACS documents were exculpatory as to the two charges relating to Thomas's dealings with ACS but not as to the other eight charges against him. It further found that the prosecution did not intentionally withhold the documents from the defense. From the district court's finding that the State did not intentionally withhold the ACS disc, the implicit finding follows that the State did not engage in egregious misconduct or overreaching, much

less any prescient plan to withhold documents pretrial to "goad" Thomas during trial into moving for a mistrial.

Unless "clearly erroneous," a district court's finding that the prosecutor did not act intentionally so as to provoke the defendant into waiving his double-jeopardy rights is a finding of fact that is binding on a reviewing court. *Collier*, 103 Nev. at 566, 747 P.2d at 227; *see Melchor-Gloria*, 99 Nev. at 178, 660 P.2d at 112 (an "express finding" by the district court that "there was no . . . . conduct on the part of the prosecutor which could be classified as bad faith" or "gross negligence" represented "findings of fact which must be sustained on appeal unless clearly erroneous"). Findings of fact are clearly erroneous and subject to reversal when "there is no evidence in support of [them]." *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984). And, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369 (1991) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

The majority deems "clearly erroneous" the district court's finding that the State did not intentionally withhold the ACS disc from Thomas. The record is not so one-sided the majority can fairly so hold. When the subject of the ACS disc emerged on the ninth day of trial, the defense and the prosecution expressed surprise. Without swearing either side's lawyer, the district court accepted both defense counsel's representation that he first learned about the disc on the seventh day of trial and the prosecutors' representation that they did not have or remember having the disc either. And, when the two detectives testified, one unequivocally stated that he did not give the disc to the prosecutor; the other could not recall but believed he did so as part of his recommendation against the State "charging ACS"—an ambiguous reference either to bringing charges against ACS or bringing ACS-related charges against Thomas. Both detectives testified, though, that had Thomas asked to inspect the evidence vault before trial, he would have been given free access and discovered the disc. If the prosecutors schemed to deliberately hide the disc from Thomas, this testimony makes no sense. While the record *could* support a finding that the prosecutors knew about and intentionally withheld the disc, lying to the court when they said they were as surprised by it as the defense, it *also* supports the district court's opposite finding that, with all the documents and discovery in the case, the State simply overlooked the disc and, while the State committed a *Brady* violation by failing to provide it before trial, the violation was unintentional. Where, as here, the record supports alternative findings, the tie should go to the district judge, who presided over the trial and the evidentiary hearing, listened to the lawyers in real time, and observed their demeanor and that of the detectives and lawyer who testified.

B.

Of greater concern, though, is how the double-jeopardy dismissal follows seemingly as a matter of course from the majority's finding that the prosecutors intentionally withheld the ACS disc. While *Pool/Thomas* is stated as a three-factor test, the first and third factors—"mistrial is granted because of improper conduct or actions by the prosecutor" and "the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial"—offer no guidelines beyond those generally applicable to motions for mistrial predicated on prosecutorial error. So the job of distinguishing between mistrials (or reversals, *see* note 2, *supra*) that permit retrial from those that do not falls to the second factor—was there "intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal"? Is winning an "improper purpose"? Assuming it is, once a prosecutor is found to have acted intentionally, it will be the rare case where "indifference to a significant resulting danger of mistrial or reversal" cannot be claimed, litigated, and found.

C.

If *Pool/Thomas* requires more for dismissal than intentional error by the prosecution and prejudice to the defense, the majority should remand to the district court so the parties can litigate—and the district court decide—whether retrial violates double jeopardy. Instead, the majority applies *Pool/Thomas* itself, faulting the State for not having called the prosecutors as witnesses and adversely inferring from its failure to have done so, a double jeopardy violation by the State under the newly announced *Pool/Thomas* test. But given *Melchor-Gloria* and *Kennedy*, neither the district court nor the parties had reason to anticipate, and did not apply, *Pool/Thomas*'s three-factor test. The majority justifies applying its new test itself instead of remanding by the number of years this prosecution has been pending. But delay comes with the territory of overthrowing decades of settled law; it does not justify an appellate court engaging in fact-finding. While I would avoid further delay by denying the writ based on *Melchor-Gloria*—except to the extent of directing the district court to resolve the remaining question raised by Thomas's motion to dismiss of whether the conduct charged constitutes a crime—applying the factors articulated in *Pool/Thomas* surely is a job in the first instance for the district court.

IV.

I do not condone the prosecution's failure to have turned over the ACS materials to the defense. But I do not believe the remedy

for the discovery, or *Brady*, violation in this case is dismissal of all charges under Nevada's double jeopardy clause, as opposed to a new trial.

I therefore dissent.

DITECH FINANCIAL LLC, FKA GREEN TREE SERVICING, LLC, APPELLANT, *v.* SANFORD BUCKLES, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, RESPONDENT.

No. 70475

September 14, 2017 401 P.3d 215

Certified question pursuant to NRAP 5 concerning the application of NRS 200.620. United States District Court for the District of Nevada; Gloria M. Navarro, Chief Judge.

Question answered.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Brooks Hubley LLP* and *Michael R. Brooks* and *Gregg A. Hubley*, Las Vegas; *Bradley Arant Boult Cummings, LLP*, and *Elizabeth A. Hamrick, Michael R. Pennington*, and *Scott Burnett Smith*, Huntsville, Alabama, for Appellant.

Haines & Krieger, LLC, and *David H. Krieger*, Las Vegas; *Kazerouni Law Group, APC*, and *Abbas Kazerounian* and *Michael Kind*, Las Vegas, for Respondent.

Peterson Baker, PLLC, and *Tamara Beatty Peterson*, Las Vegas, for Amicus Curiae.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

NRS 200.620 prohibits a person from recording a telephone call unless both parties participating in the call consent to the recording. In response to a certified question submitted by the United States District Court for the District of Nevada, we consider whether NRS 200.620 applies to telephone recordings made by a party outside Nevada who uses equipment outside Nevada to record telephone conversations with a person in Nevada without that person's consent. We answer the certified question in the negative, thereby hold-

ing that NRS 200.620 does not apply to the recording of interstate calls when the act of recording takes place outside Nevada.

FACTS AND PROCEDURAL HISTORY

This original proceeding arises out of a class action suit brought by respondent Sanford Buckles against appellant Ditech Financial LLC in the United States District Court for the District of Nevada. Ditech, a Delaware limited liability company, is a home-mortgage servicer that was headquartered in Minnesota at the time Buckles initiated the underlying litigation. Although Ditech is now headquartered in Florida, it has customer call centers equipped to record telephone calls in Arizona and Minnesota. Buckles is a Nevada resident whose home mortgage is serviced by Ditech. In his complaint, Buckles alleges Ditech violated NRS 200.620 by unlawfully recording certain telephone conversations without Buckles's consent.[1]

Ditech moved to dismiss the complaint, arguing NRS 200.620 does not apply to telephone calls recorded by persons and on equipment located outside of Nevada, and if NRS 200.620 does apply, the extraterritorial application of NRS 200.620 would violate the United States Constitution's Due Process Clause and Dormant Commerce Clause. The federal court concluded:

> If [NRS] 200.620 does not apply to recordings made outside of Nevada by Ditech, Ditech's motion to dismiss is due to be granted. If the statute applies to telephone recordings made outside of Nevada by Ditech, however, this Court must decide Ditech's constitutional challenge to the statute under the Due Process Clause and the Dormant Commerce Clause of the United States Constitution. The necessity of reaching these serious constitutional questions depends upon resolution of prior, potentially dispositive, questions of Nevada statutory law.

The federal court therefore decided to certify a question under NRAP 5 concerning the applicability of NRS 200.620. Because the parties ultimately were unable to agree upon the appropriate language of the question to be certified, the federal court certified two questions to this court:

> **Plaintiff's position**: Does [NRS] 200.620 apply to telephone recordings made by a party outside Nevada, who regularly records telephone conversations with Nevada residents, of telephone conversations with a person in Nevada without that person's consent?

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[1]NRS 200.690(1)(b) provides a private right of action against "[a] person who willfully and knowingly violates NRS 200.620."

> **Defendant's position**: Does [NRS] 200.620 apply to telephone recordings by a party outside Nevada who uses equipment outside Nevada to record telephone conversations with a person in Nevada without that person's consent? If so, does that decision apply retroactively or prospectively only?

DISCUSSION

The two certified questions ask essentially the same thing: whether NRS 200.620 applies to recordings of telephone conversations with a person in Nevada without that person's consent when the recordings are made by a party who is located and uses recording equipment outside of Nevada. Based on the following, we answer the question in the negative and, therefore, we need not address the parties' arguments concerning retroactivity.

NRS 200.620 does not apply to telephone conversations intercepted out of state

In relevant part, NRS 200.620(1)(a) provides that "it is unlawful for any person to intercept or attempt to intercept any wire communication unless . . . [t]he interception or attempted interception is made with the prior consent of one of the parties to the communication." *See also* NRS 179.430 (defining "[i]ntercept" as "the aural acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device or of any sending or receiving equipment"). This court has concluded that "the tape-recording of telephone conversations constitutes an intercept," and interpreted NRS 200.620 "to prohibit the taping of telephone conversations with the consent of only one party." *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179, 969 P.2d 938, 940 (1998); *see also* Ira David, Note, *Privacy Concerns Regarding the Monitoring of Instant Messaging in the Workplace: Is It Big Brother or Just Business?*, 5 Nev. L.J. 319, 330 (2004) (recognizing NRS 200.620 "parallels the Wiretap Act, and is likewise restricted to interception of actual transmission" (footnote omitted)).

The crux of Ditech's argument is that NRS 200.620 does not apply because the allegedly prohibited conduct—i.e., the interception—took place outside Nevada. Whereas Buckles argues that NRS 200.620 applies because the statute contains no location-based limitations and Ditech's conduct caused harm in Nevada. We agree with Ditech, and conclude that *Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), is instructive.

Mclellan did not address whether someone could be found guilty of violating NRS 200.620 for recording a phone call outside of Nevada; rather, it addressed whether an out-of-state recording of a

conversation with a person in Nevada made without that person's consent could be admitted as evidence at their criminal trial. *See id.* at 267-68, 182 P.3d at 109-10. This court ultimately held "that Nevada law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence." *Id.* at 265, 182 P.3d at 108. To reach that holding, this court concluded that the interception in *Mclellan* "was lawful at its inception in California" because California requires only one party to consent to police monitoring the communication. *Id.* at 267 & n.7, 182 P.3d at 109 & n.7. While the central issue concerned admissibility, this court concluded that because the recording was permissible in California, it was admissible in a Nevada criminal trial even though "the manner of interception would violate Nevada law had the interception taken place in Nevada." *Id.* at 267, 182 P.3d at 109.

Consistent with our analysis in *Mclellan*, we hold that NRS 200.620 does not apply when the act of interception takes place outside Nevada. *See id.* Instead, "[i]nterceptions and recordings occur where made." *Kadoranian v. Bellingham Police Dep't*, 829 P.2d 1061, 1065 (Wash. 1992); *see also State v. Fowler*, 139 P.3d 342, 347 (Wash. 2006) ("[T]he test for whether a recording of a conversation or communication is lawful is determined under the laws of the place of the recording."). Accordingly, whether the interception of telephone conversations with Buckles and other putative class members was lawful is determined according to the laws of Arizona and Minnesota, the places where the conversations were intercepted and recorded, not according to the laws of Nevada where the calls were received. Therefore, we answer the certified question in the negative, concluding that NRS 200.620 does not apply to recordings of telephone conversations with a person in Nevada without that person's consent when the recordings are made by a party who is located and uses recording equipment outside of Nevada.

CHERRY, C.J., and DOUGLAS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

AMY FACKLAM, Appellant, *v.* HSBC BANK USA, a National Association, as Trustee for Deutsche ALT-A Securities Mortgage Loan Trust, Mortgage Pass-Through Certificates Series 2007-AR2, Respondent.

No. 70786

September 14, 2017 401 P.3d 1068

Appeal from a district court order dismissing a quiet title action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Affirmed.

[Rehearing denied January 19, 2018]

Hafter Law and *Jacob L. Hafter*, Las Vegas, for Appellant.

Houser & Allison, APC, and *Mark H. Hutchings*, Las Vegas, and *Jeffrey S. Allison*, Irvine, California, for Respondent.

Before the Court En Banc.

OPINION

By the Court, Cherry, C.J.:

NRS 11.190(1)(b) provides that an aggrieved party under a contract may not commence a civil action if more than six years have elapsed since the cause of action accrued or the moment that the aggrieved party discovers or reasonably should have discovered facts supporting a cause of action. However, a lender may also pursue a nonjudicial foreclosure available when a borrower fails to meet his or her obligation under a promissory note that is secured by a deed of trust.

Because the nonjudicial foreclosure stems from the deed of trust, which exists only because of the underlying promissory note, we are asked to apply NRS 11.190(1)(b)'s statute of limitations for contract actions to nonjudicial foreclosures. We decline to do so because statutes of limitations only apply to judicial actions, and a nonjudicial foreclosure by its very nature is not a judicial action.

FACTS AND PROCEDURAL HISTORY

In 2006, appellant Amy Facklam entered into a home loan agreement, wherein she signed a promissory note that was secured by a deed of trust on the subject property. In 2009, Facklam defaulted on said loan and the prior mortgage servicer recorded a notice of default. The prior servicer eventually filed a rescission of its election to declare default.

In 2013, respondent HSBC became the beneficiary of the promissory note and deed of trust on Facklam's home. In 2016, after Facklam defaulted again, HSBC recorded a notice of default and election to sell the property. The notice provided, in bolded capital letters, that if Facklam failed to pay the entire debt that was due, HSBC would sell the property "without any court action."

Facklam commenced the present action to quiet title and extinguish HSBC's interest in the property. She claimed that HSBC was barred from foreclosing on the mortgaged property because the six-year limitation period began running with the initial notice of default in 2009 and, therefore, expired in 2015.

Facklam moved for summary judgment, and HSBC filed an opposition and countermotion to dismiss. The district court denied Facklam's motion for summary judgment and dismissed Facklam's complaint, finding that any potential acceleration created in 2009 was canceled when the prior servicer filed its rescission in 2011.[1]

DISCUSSION

Standard of review

We rigorously review orders granting NRCP 12(b)(5) motions to dismiss, presuming all alleged facts in the complaint to be true and drawing all inferences in favor of the plaintiff. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. We review all legal conclusions de novo. *Id.*

We review a district court's order regarding summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper only if the "pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted). When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

Statutes of limitations apply only to judicial actions and a nonjudicial foreclosure is not a judicial action

Facklam argues that the statute of limitations, set forth in NRS 11.190(1)(b), extinguishes HSBC's right to pursue a nonjudicial foreclosure. We disagree.

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[1]Because we conclude that NRS 11.190(1)(b) does not apply to nonjudicial foreclosures, we decline to address whether a limitation period would have commenced upon filing the notice of default in 2009 or would have tolled upon rescission in 2011.

"*[A]ctions other than those for the recovery of real property* . . . may only be commenced . . . [w]ithin 6 years . . . [for] [a]n action upon a contract, obligation or liability founded upon an instrument in writing." NRS 11.190(1)(b) (emphasis added). An action is a "civil or criminal judicial proceeding." *Action*, *Black's Law Dictionary* (10th ed. 2014). Civil actions are commenced when a party files a complaint with a court. NRCP 3.

Home loans contain two separate parts: the promissory note and the deed of trust. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 512, 286 P.3d 249, 254 (2012). The deed of trust is a lien on the property to secure the debt under the promissory note. *Id.* "When the grantor defaults on the note, the deed-of-trust beneficiary can select the judicial process for foreclosure pursuant to NRS 40.430 or the 'nonjudicial' foreclosure-by-trustee's sale procedure under NRS Chapter 107." *Id.* at 513, 286 P.3d at 254.

For over 150 years, this court's jurisprudence has provided that lenders are not barred from foreclosing on mortgaged property merely because the statute of limitations for contractual remedies on the note has passed.[2] *Henry v. Confidence Gold & Silver Mining Co.*, 1 Nev. 619, 621 (1865); *see also El Ranco, Inc. v. New York Meat & Provision Co.*, 88 Nev. 111, 115-16, 493 P.2d 1318, 1321 (1972) ("This court has long recognized that separate sections of the statute of limitations can be applicable to a given business transaction."), *disagreed with on other grounds by State v. Am. Bankers Ins. Co.*, 105 Nev. 692, 696, 782 P.2d 1316, 1318 (1989). "[I]f land is mortgaged to secure the payment of a promissory note . . . after an action at law on the note is barred by the statute of limitation[s], the [beneficiary] may maintain his action of ejectment for the land mortgaged." *Henry*, 1 Nev. at 622.

In this case, HSBC chose to exercise its right to foreclose outside of the judicial arena. NRS 11.190(1)(b) does not override our long-standing precedent that a lender may recover on a deed of trust even after the statute of limitations for contractual remedies on the note has passed.

Nonjudicial foreclosure is neither a civil nor a criminal judicial proceeding. It is not commenced by filing a complaint with the court. NRS 11.190 serves only to bar judicial actions; thus, they are inapplicable to nonjudicial foreclosures. Therefore, we affirm the district court's order denying Facklam's motion for summary judgment and granting HSBC's motion to dismiss even though the district court did so for a different reason. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court

[2]We have reaffirmed this rule, albeit in an unpublished order, as recently as 2016. *See, e.g.*, *Penrose v. Quality Loan Serv. Corp.*, Docket No. 68946 (Order Affirming in Part and Vacating in Part, Apr. 15, 2016).

will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

CONCLUSION

We conclude that NRS 11.190(1)(b) does not apply to nonjudicial foreclosures because nonjudicial foreclosures are not judicial actions and NRS 11.190 applies only to judicial actions. Accordingly, we affirm the district court's order denying summary judgment and granting the countermotion to dismiss.

DOUGLAS, GIBBONS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.