TEVA PARENTERAL MEDICINES, INC., FKA SICOR, INC.; BAXTER HEALTHCARE CORPORATION; AND MCKESSON MEDICAL-SURGICAL, INC., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TREVOR L. ATKIN, DISTRICT JUDGE; THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE; AND THE HONORABLE JAMES CROCKETT, DISTRICT JUDGE, RESPONDENTS, AND YVETTE ADAMS; MARGARET ADYMY; THELMA ANDERSON; JOHN ANDREWS; MARIA ARTIGA; LUPITA AVILA-MEDEL; HENRY AYOUB; JOYCE BAKKEDAHL; DONALD BECKER; JAMES BEDINO; EDWARD BENAVENTE; MARGARITA BENAVENTE; SUSAN BIEGLER; KENNETH BURT; MARGARET CALAVAN; MARCELINA CASTANEDA; VICKIE COLE-CAMPBELL; SHERRILL COLEMAN; NANCY COOK; JAMES DUARTE; SOSSY ABADJIAN; GLORIA ACKERMAN; VIRGINIA ADARVE; FRANCIS ADLER; CARMEN AGUILAR; RENE NARCISO; RHEA ALDER; GEORGE ALLSHOUSE; SOCORRO ALLSHOUSE; LINDA ALPY; JOYCE ALVAREZ; REBECCA L. ANDERSON; EMANUEL ANDREI; TERRIE ANTLES; KELLIE APPLETON-HULTZ; ANTHONY ARCHULETA; ESTEBAN ARELLANOS; RICKIE ARIAS; MARK ARKENBURG; ROGER ARRIOLA; MARIA ARTIGA; ROBIN ASBERRY; WINIFRED BABCOCK; ROBERT BACH; SUSAN F. BACHAND; ELAINE BAGLEY-TENNER; MELISSA BAL; BRYAN BALDRIDGE; RONALD BARKER; RONALD BARNCORD; PEGGY JO BARNHART; DONALD BARTLETT; SHERYLE BARTLETT; JOSEPH BAUDOIN; BARBARA BAXTER; VENUS BEAMON; BARBARA ROBIN BEATTY; RODNEY BEHLINGS; CRISTINA BEJARAN; TOMAS BENEDETTI; VERNA BENFORD; RICHARD BENKERT; MARSHALL BERGERON; DONNA BERGERON; SYLVIA BIVONA; ROBERT BLAIR; HARRY BLAKELEY; DAWN BLANCHARD; BONNIE BLOSS; DARRELL BOLAR; ROY BOLDEN; VICTOR BONILLA; GRACIELA BORRAYES; BILLY BOWEN; SHIRLEY BOWERS; SHIRLEY BRADLEY; CARLA BRAUER; CAROLYN BROWN; JACK BROWN; LESLIE BROWN; MICHAEL BROWN; ROBERTA BROWN; AMELIA B. BRUNS; CARL L. BURCHARD; TRACI BURKS; ELIZABETH BURTON; ANGELITE BUSTAMANTE-RAMIREZ; ANASTASIO BUSTAMANTE; DOROTHY ANN BUTLER; LEE CALCATERRA; EVELYN CAMPBELL; MARIA CAMPOS; BOONYUEN CANACARIS; MELISSA CAPANDA; MARTIN CAPERELL; PEDRO CARDONA; SUSIE CARNEY; TERESA CARR; BER-

NARDINO CARRASCO; TRUMAN CARTER; XANDRA CASTO; SPENCE CAUDLE; MARGARET CAUSEY; XAVIER CEBALLOS; ROBERT CEDENO; DINORA CENTENO; ROY CHASE; CARIDAD CHEA; ELSA CHEVEZ; LUCILLE CHILDS; ALICIA CLARK; CAROL CLARK; PATRICIA CLARK; RICHARD COIRO; PERCELL COLLINS, JR.; ERNEST CONNER; SUSAN COREY; PATRICIA CORREA; PAUL A. COULOMBE; AMBER CRAWFORD; RONALD CROCKER; HOWARD CROSS; ROSSLYN CROSSLEY; WILLIAM R. DANIELS; EVELYN DAVIS; MARY JEAN DAVIS; VIRGINIA A. DAVIS; JESSIE L. DAWSON; EMELYN DELACRUZ; SILVIA DERAS; SHERIDA DEVINE; CLAIRE DIAMOND; JOSE DIAZ-PEREZ; OTIS L. DIXON; EMILIO DOLPIES; PAMELA DOMINGUEZ; EUQENA DOMKOSKI; JOSEPH DONATO; HUGO DONIS; PATRICIA L. DONLEY; LJUBICA DRAGANIC; DELORIS K. DUCK; KATHLEEN J. DUHS; LILLIAN DUNCAN; HAROLD DUSYK; ALLYSON R. DYER, JR.; LOIS EASLEY; DEISY ECHEVERRIA; ROLAND E. ELAURIA; DARIO E. ESCALA; ENGARCIA B. ESCALA; KATHY A. ESCALERA; MARIA ESCOBEDO; TERESA I. ESPINOSA; LEON EVANS; MARY FAULKNER; ABRAHAM FEINGOLD; MURIEL FEINGOLD; OSCAR FENNELL; MARIETTA FERGUSON; WILLIE FERGUSON; DANIEL FERRANTE; CAROLYN FICKLIN; JOE FILBECK; ETHEL FINEBERG; MADELINE C. FINN; ALBERT L. FITCH; ADRIAN FLORES; MARIA FLORES; RAUNA FOREMASTER; JOSEPH E. FOSTER; PHYLLIS G. FOSTER; CYNTHIA D. FRAZIER; VICTORIA FREEMAN; LAWRENCE FRIEL; BONITA M. FRIESEN; NESS FRILLARTE; NANCY C. FRISBY; JODI GAINES; ESPERANZA GALLEGOS; NEOHMI GALLEGOS; BRENDA GARCIA; MARTHA GARCIA; SANDRA GARDNER; MICHAEL GARVEY; THERESA GEORGE; TINA GIANNOPOULOS; ARIS GIANNOPOULOS; WANDA GILBERT; JEAN GOLDEN; GOLOB LUCIANO; PASTOR GONZALES; JESUS GONZALEZ-TORRES; JEFF GOTLIEB; ALLEN GOUDY; BILL GRATTAN; ARNOLD GRAY; BONNIE GRAY; TANIA GREEN; ROY GREGORICH; WILLIE GRIFFIN; VERNA GRIMES; CANDELARIO GUEVARA; NICHOLAS GULLI; JULIA GUTIERREZ; DENISE F. HACHEZ; SUE HADJES; FRANK J. HALL; TINA HALL; CHARDAI C. HAMBLIN; ROBERT HAMILTON, JR.; JOANN HARPER; DORIS HARRIS; GLORICE HARRISON; SHARA HARRISON; RONALD K. HARTLEY; ESTHER A. HAYASHI; SAMUEL HAYES; CANDIDO HERNANDEZ; MARIA HERNANDEZ; THOMAS HERROLD; LUZ HERRON; SUSAN M. HILL;

ISHEKA HINER; ARLENE HOARD; BETH HOBBS; MICHELLE HOLLIS; JAQUELINE A. HOLMES; JAMES HORVATH; ANA HOSTLER; AUGUSTAVE HOULE; CARL HOVIETZ II; RUTH HOWARD; MICHELLE HOWFORD; EDWARD L. HUEBNER; LOVETTE M. HUGHES; VIRGINIA M. HUNTER; PATRICIA HURTADO-MIGUEL; ANGELA HYYPPA; JOSEPH INFUSO; FRANK INTERDONATI; BRIAN IREY; CECIL JACKSON; ROLANDO JARAMILLO; RICHARD JILES; LETHA JILES; CLIFTON JOHNSON; DORIS JOHNSON; JOHNNY JOHNSON; JOYCE JOHNSON; ARNOLD JONES; ANN KABADAIAN; ANTHONY K. KALETA; ARUN KAPOOR; LINDA J. KEELER; MICHAEL F. KELLY; DARRELL KIDD; CONNIE KIM; SOO-OK KIM; TAESOOK KIM; SONDRA I. KIMBERS; ELIZABETH I. KINDLER; IRIS L. KING; JOANNA KOENIG; MICHAEL J. KRACHENFELS; CORINNE M. KRAMER; DAVID KROITOR; OLGA KUNIK; KAREN A. KUNZIG; ANEITA LAFOUNTAIN; BARBARA LAKE; BERTHA LAUREL; AGNES G. LAURON; MARIE LAWSON; PHYLLIS LEBLANC; ARLENE LETANG; JAMES A. LEWIS; JOAN LIEBSCHUTZ; MINERVA L. LIM; EDWARD LINDSEY; WILLIAM LITTLE; DOROTHY LIVINGSTON-STEEL; FELISA LOPEZ; IRAIDA LOPEZ; NOE LOPEZ; FLORENCE LUCAS; DARLENE LUTHER; FRANK L. LYLES; DEBORAH MADRID; MARWA MAIWAND; DOROTHY J. MAJOR; MARIO MALDONADO; IDA MALWITZ; AUDREY MANUEL; GABRIEL MARES; CAROL A. MARQUEZ; HUGO MARTINEZ; JORGE B. MARTINEZ; JOSE MARTINEZ; MARY LOUISE MASCARI; LUCY MASTRIAN; LEROY MAYS; LISA MAYS; VIRGINIA A. MCCALL; STELLA MCCRAY; LAURENCE MCDANIEL; JOHN MCDAVID, JR.; DOLORES MCDONNELL; DENISE ANNE MCGEE; MAE MCKINNEY; JANET MCKNIGHT; FRED MCMILLEN, III; MYRON MEACHAM; AIDA A. MEKHJIAN; CHELSEY L. MELLOR; JIGGERSON MENDOZA; SUSAN MERRELL-CLAPP; JAMES MIDDAUGH; SYLVIA MILBURN; CORINNE MILLER; JANICE MITCHEL; MIKHAIL MIZHIRITSKY; KIRK MOLITOR; MARY MOORE; JOSE MORA; YOLANDA MORALES; ELIZABETH CASTRO MORALES; YOLANDA MORCIGLIO; BIVETTA MORENO; DAVID MORGAN; DENISE M. MORGAN; DOUGLAS MORGAN; SONIA MORGAN; ANDREW MORICI; BARRY MORRIS; JAMES MORRIS; JUANITA E. MORRIS; MICHELE MORSE; DAN R. MORTENSEN; MIGDALIA MOSQUEDA; ANDREA MOTOLA; ANNIE MUNA; LUCILA MUNGUIA; WILLIE MURRAY; JOSEPH NAGY; BONNIE NAKONECZNY; ER-

LINDA NATINGA; LEEANNE NELSON; LANITA NEWELL; ROSEMARIE NORLIN; MARSHALL NYDEN; WADE OBERSHAW; JOSEPH O'CONNELL; DIGNA OLIVA; JOHN O'MARA; L. NORMA J. O'NEA; LINDA ORCULLO; PAULA OROZCO-GALAN; ANGELA PACHECO; DENIS PANKHURST; MATT PARK; KATHY PARKINSON; JESUS PAZOS; TERESA PECCORINI; PHYLLIS PEDRO; JOSE O. PENA; PATRICIA PEOPLES; DELMY C. PERDOMO; DORA PEREZ; LOUISE PEREZ; LUIS PEREZ; MARIA PEREZ; MERCEDES PEREZ; AGUSTIN PEREZ-ROQUE; ANDRE PERRET; JANET P. PERRY; ALAN K. PETERSON; LOWELL PHILIP; MICHELLE PHILIP; DONALD PINSKER; JASON B. PITMAN; WAYNE PITTMAN; RON POLINSKI; MOHAMMED POURTEYMAUR; DONNA POWERS; EVA POWERS; JENNIFER POWERS; JOSE PRIETO; LUISA PRIETO; FRANCISCO QUINTERO; ANTHONY RAY QUIROZ; MARIBEL RABADAN; ADRIANA RAMIREZ; JOHN RAMIREZ; RAUL RAMIREZ; ROBERT RAPOSA; CELIA REYES DE MEDINA; GABRIEL REYES; MIGUEL REYES; BARBARA ROBERTS; CONSTANCE ROBINSON; LLOYD H. ROBINSON; CONNIE ROBY; ANTOINETTE ROCHESTER; VICKI RODGERS; TREVA RODGERS; MARIA RODRIGUEZ; NENITA RODRIGUEZ; RICARDO RODRIGUEZ; YOLANDA RODRIGUEZ; JOSE RODRIGUEZ-RAMIREZ; FREEMAN ROGERS; CAROLE ROGGENSEE; SONIA ROJAS; JOSEPH ROMANO; JEAN ROSE; ROSETTA RUSSELL; DEMETRY SADDLER; JANISANN SALAS; MARIA SALCEDO; KERRI SANDERS; LOVIE SANDERS; SHERRILYN SAUNDERS; ISA SCHILLING; RAY SEAY; SANDRA SENNESS; ANTHONY SERGIO, JR.; SYLVIA SHANKLIN; DOUGLAS SHEARER; SANDRA SIMKO; JAMES SLATER; JACKLYN SLAUGHTER; JOHN SLAUGHTER; CATHERINE SMITH; WILBUR SMITH; LILA SNYDER; DOLORES SOBIESKI; WAYNE SOMMER; MARIA SOTO; JULIE SPAINHOUR; JESSICA SPANGLER; PATRICIA SPARKS; WILLIAM STANKARD; GINGER STANLEY; RODNEY STEWART; LETICIA STROHECKER; HAROLD STROMGREN; MAFALDA SUDO; BARBARA SWAIN; NORMA TADEO; RYSZARD TARNOWISKI; MIRKA TARNOWISKI; ROXANNE E. TASH; JILL TAYLOR; JEANNE THIBEAULT; CATHERINE TITUS-PILATE; RAYMOND TOPPLE; DOMINGA TORIBIO; YADEL TORRES; RITA M. TOWNSLEY; ROSELYN TRAFTON; SALVATORE TROMELLO; PATRICIA A. TROPP; DOROTHY TUCKOSH; LUCY TURNER; TERRY TURNER; ROBERT TUZINSKI; WILLIAM UNRUH; JESUS VALLS; DIANNE VALONE; HILLEGONDA VANDER-

GAAG; HENRY VELEY; STELLA VILLEGAS; LOUIS VIRGIL; CECILIA VITAL-CEDENO; COLLEEN VOLK; CHRIST VORGIAS; WILLIAM WADLOW; BETTY WAGNER; JOHN WALTERS; JASON WALTON; JANICE WAMPOLE; BARBARA WARD; GLORIA WARD; SANDRA WARIS; LESTER WEDDINGTON; ARLENE WEISNER; KATHRYN WHEELER; FRANK E. WHITE; SERENE WHITE; SHARON WHITE; BRIDGET WILKINS; ACE K. WILLIAMS; ANTHONY WILLIAMS; AUBREY WILLIAMS; CHARLES WILLIAMS; CHERYL WILLIAMS; MARY WILLIAMS; WILLIE WILLIAMS; GARY WILSON; ROBERT WILSON; STEVEN WILT; ANGELA WINSLOW; BEVERLY WINTEROWD; BETTY WINTERS; JAMES WOLF; DEREK WORTHY; MAUREEN BRIDGES; MARIA LISS; MARY CATTLEDGE; FRANKLIN CORPUZ; BARBARA EDDOWES; ARTHUR EINHORN; CAROL EINHORN; WOODROW FINNEY; JOAN FRENKEN; EMMA FUENTES; JUDITH GERENCES; ANNIE GILLESPIE; CYNTHIA GRIEM-RODRIGUEZ; DEBBIE HALL; LLOYD HALL; SHANERA HALL; VIRGINIA HALL; ANNE HAYES; HOMERO HERNANDEZ; SOPHIE HINCHLIFF; ANGEL BARAHONA; MARTA FERNANDEZ VENTURA; WILLIAM FRALEY; RICHARD FRANCIS; GEORGINA HETHERINGTON; JANICE HOFFMAN; GEORGE JOHNSON; LINDA JOHNSON; SHERON JOHNSON; STEVE JOHNSON; SEAN KEENAN; KAREN KEENEY; DIANE KIRCHER; ORVILLE KIRCHER; STEPHANIE KLINE; KIMBERLY KUNKLE; PATRICIA LEWIS-GLYNN; BETTE LONG; PETER LONGLY; DIANA LOUSIGNONT; MARIA KOLLENDER; DAVID MAGEE; FRANCISCO MANTUA; DANA MARTIN; MARIA MARTINEZ; JOHN MAUIZIO; ANGA McCLAIN; BARRY McGIFFIN; MARIAN MILLER; HIEP MORAGA; SONDRA MORENO; JIMMY NIX; NANCY NORMAN; GEORGIA OLSON; MARK OLSON; BEVERLY PERKINS; MARYJANE PERRY; RICKY PETERSON; BRANDILLA PROSS; DALLAS PYMM; LEEANN PINSON; SHIRLEY PYRTLE; EVONNE QUAST; RONALD QUAST; LEANNE ROBIE; ELEANOR ROWE; RONALD ROWE; DELORES RUSS; MASSIMINO RUSSELLO; GEOLENE SCHALLER; JAN MICHAEL SHULTZ; FRANCINE SIEGEL; MARLENE SIEMS; RATANAKORN SKELTON; WALLACE STEVENSON; ROBERT STEWART; RORY SUNDSTROM; CAROL SWAN; SONY SYAMALA; RICHARD TAFAYA; JACQUELINE BEATTIE; PRENTICE BESORE; IRENE BILSKI; VIOLA BROTTLUND-WAGNER; PATRICK CHRISTOPHER; PAUL DENORIO; DAVID DONNER; TIMOTHY DYER; DEMECIO GIRON; CAROL

HIEL; CAROLYN LAMYER; REBECCA LERMA; JULIE KALSNES; FANNY POOR; FRANCO PROVINCIALI; JOELLEN SHELTON; FRANK STEIN; JANET STEIN; LOIS THOMPSON; FRANK TORRES; FRANK BEALL; PETER BILLITTERI; IRENE CAL; CINDY COOK; EVELYN EALY; KRISTEN FOSTER; PHILLIP GARCIA; JUNE JOHNSON; LARRY JOHNSON; WILLIAM KEPNER; PEGGY LEGG; JOSE LOZANO; JOSEPHINE LOZANO; DEBORAH MADISON; MICHAEL MALONE; ANN MARIE MORALES; GINA RUSSO; COLLEEN TRANQUILL; LORAINE TURRELL; GRAHAM TYE; SCOTT VANDERMOLIN; LOUISE VERDEL; J. HOLLAND WALLIS; ANGELA HAMLER; SHARON WILKINS; MARK WILLIAMSON; STEVE WILLIS; BENYAM YOHANNES; MICHAL ZOOKIN; LIDIA ALDANAY; MARIDEE ALEXANDER; ELSIE AYERS; JACK AYERS; CATHERINE BARBER; LEVELYN BARBER; MATTHEW BEAUCHAMP; SEDRA BECKMAN; THOMAS BEEM; EMMA RUTH BELL; NATHANIA BELL; PAMELA BERTRAND; VICKI BEVERLY; FRED BLACKINGTON; BARBARA BLAIR; MICHELLE BOYCE; NORANNE BRUMAGEN; HOWARD BUGHER; ROBERT BUSTER; WINIFRED CARTER; CODELL CHAVIS; BONNIE CLARK; KIP COOPER; MICHEL COOPER; CHRISTA COYNE; NIKKI DAWSON; LOU DECKER; PETER DEMPSEY; MARIA DOMINGUEZ; CAROLYN DONAHUE; LAWRENCE DONAHUE; CONRAD DUPONT; DEBORAH ESTEEN; LUPE EVANGELIST; KAREN FANELLI; LAFONDA FLORES; MADELINE FOSTER; ELOISE FREEMAN; ELLAMAE GAINES; LEAH GIRMA; ANTONIO GONZALES; FRANCISCO GONZALES; RICHARD GREEN; ISABEL GRIJALVA; JAMES HAMILTON; BRENDA HARMAN; DONALD HARMAN; SUSAN HENNING; JOSE HERNANDEZ; MARIE HOEG; JAMES H. MCAVOY; MARGUARITE M. MCAVOY; WILLIAM DEHAVEN; VELOY E. BURTON; SHIRLEY CARR; MARY DOMINGUEZ; CAMILLE HOWEY; LAVADA SHIPERS; JANNIE SMITH; MILDRED J. TWEEDY; KATHERINE HOLZHAUER; ALICIA HOSKINSON; GREG HOUCK; DIONNE JENKINS; JOHN JULIAN; WILLIAM KADER; MARY ELLEN KAISER; VASILIKI KALKANTZAKOS; WILLIAM KEELER; ROBERT KELLAR; SHIRLEY KELLAR; MELANIE KEPPEL; ANITA KINCHEN; PETER KLAS; LINDA KOBIGE; LINDA KORSCHINOWSKI; DURANGO LANE; JUNE LANGER; NANCY LAPA; EDWARD LEVINE; MERSEY LINDSEY; ZOLMAN LITTLE; STEVE LYONS; MARSENE MAKSYMOWSKI; PAT MARINO; BILLIE MATHEWS; KRISTINE MAYEDA; CARMEN MCCALL; MICHAEL

McCOY; ANNETTE MEDLAND; JOSPEHINE MOLINA; LEN MONACO; RACHEL MONTOYA; THEODORE MORRISON; XUAN MAI NGO; JACQUELINE NOVAK; FAITH O'BRIEN; DENISE ORR; JAVIER PACHECO; ELI PINSONAULT; FLORENCE PINSONAULT; STEVE POKRES; TIMOTHY PRICE; STEVEN RAUSCH; CLIFTON ROLLINS; JOHN ROMERO; JEAN ROSE; RONALD RUTHER; JUAN SALAZAR; PRISCILLA SALDANA; BUDDIE SALSBURY; BERNICE SANDERS; DANNY SCALICE; CARL SMITH; VICKIE SMITH; WILLIAM SNEDEKER; EDWARD SOLIS; MARY SOLIZ; ROGER SOWINSKI; CYNTHIA SPENCER; STEPHEN STAGG; TROY STATEN; LINDA STEINER; GWEN STONE; PHAEDRA SUNDAY; CLARENCE TAYLOR; CATHERINE THOMPSON; MARGRETT THOMPSON; VERNON THOMPSON; DAVID TOMLIN; VON TRIMBLE; CHUONG VAN TRONG; JOHN VICCIA; STEVEN VIG; JANET VOPINEK; KATHY WALENT; LINDA WALKER; SHIRLEY WASHINGTON; MARY WENTWORTH; BETTY WERNER; SALLY WEST; DEE LOUISE WHITNEY; SHIRLEY WOODS; TONY YUTYATAT; CATALINA ZAFRA; METRO ZAMITO; CHRISTINA ZEPEDA; ANDREW ZIELINSKI; CAROLYN ARMSTRONG; BETTY BRADLEY; CHARLEEN DAVIS SHAW; REBECCA DAY; DION DRAUGH; AND VINCENZO ESPOSITO, Real Parties in Interest.

No. 81024

March 4, 2021 481 P.3d 1232

Original petition for a writ of mandamus challenging district court orders denying petitioners' motions to dismiss the underlying consolidated tort cases on the basis of federal preemption.

Petition granted in part and denied in part.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Greenberg Traurig LLP* and *Tami D. Cowden, Eric Swanis*, and *Jason K. Hicks*, Las Vegas; *Greenberg Traurig LLP* and *Brian Rubenstein*, Philadelphia, Pennsylvania; *Hymanson & Hymanson* and *Philip M. Hymanson* and *Henry J. Hymanson*, Las Vegas, for Petitioners.

Wetherall Group, Ltd., and *Peter Wetherall*, Las Vegas; *Glen Lerner Injury Attorneys* and *Glen J. Lerner*, Las Vegas, for Real Parties in Interest.

Before the Supreme Court, En Banc.[1]

[1]The Honorable Abbi Silver, Justice, voluntarily recused herself from participation in the decision of this matter.

OPINION

By the Court, Hardesty, C.J.:

This original petition for a writ of mandamus arises from lawsuits brought against generic drug manufacturers for selling single-patient-use 50 mL vials of propofol to ambulatory surgical centers despite an allegedly foreseeable risk that the centers would use them on multiple patients. The question presented to us is whether the plaintiffs' state-law tort claims are preempted by federal drug regulations. Because we conclude that some, but not all, of the claims are preempted, we grant the petition in part and deny it in part.

FACTS AND PROCEDURAL HISTORY

Petitioners Teva Parenteral Medicines, Inc., Baxter Healthcare Corporation, and McKesson Medical-Surgical, Inc., manufacture and sell the generic drug propofol, also known by its brand name Diprivan. Propofol was approved for sale by the United States Food and Drug Administration (FDA) in 1989 for use as an anesthetic in outpatient and inpatient procedures. In this, the FDA has granted petitioners permission to manufacture and distribute generic propofol in three vial sizes: 20, 50, and 100 mL. The label on each vial clearly prescribes that it is for single-patient use.

Petitioners sold propofol to nonparty and now deceased Dr. Depak Desai for use at his endoscopy centers in Las Vegas. Despite warning labels to the contrary, Dr. Desai used petitioners' 50 mL single-patient vials on more than one patient. Dr. Desai was criminally charged for reusing single-use injection syringes at his clinics and for using single-patient anesthesia vials on multiple patients.[2] *See Desai v. State*, 133 Nev. 339, 340-41, 398 P.3d 889, 891 (2017). Due to Dr. Desai's criminal behavior, his patients received warning letters from the Centers for Disease Control and Prevention and the Southern Nevada Health District notifying them of a risk of possible infection with Hepatitis B, Hepatitis C, and HIV.

The real parties in interest (collectively, plaintiffs) are approximately 800 individuals who received the warning letters after being treated by Dr. Desai at his endoscopy clinics between 2004 and 2008. Plaintiffs obtained testing, and all tests came back negative. Plaintiffs sued petitioners to obtain compensation for the testing costs as well as pain and suffering associated with being tested and waiting for test results. Their complaints alleged the following claims: (1) strict product liability, (2) breach of implied warranty of fitness for a particular purpose, (3) negligence, (4) violation of the Nevada

[2]The parties do not dispute the criminal allegations surrounding Dr. Desai's misuse of 50 mL vials of propofol.

Deceptive Trade Practices Act, and (5) punitive damages.[3] Specifically, plaintiffs alleged that petitioners knew or should have known that selling 50 mL vials of propofol, as opposed to the smaller 20 mL vials, to Dr. Desai's ambulatory surgical centers with high patient turnover was unsafe because it would entice use of each vial on multiple patients, which increases the risk of contamination of the vial and infection of patients. Plaintiffs asserted that a 20 mL dose of propofol is commonly used to induce anesthesia in a patient, making the larger 50 mL vial more likely to be misused for multi-dosing at an ambulatory surgical center.

Petitioners filed a motion to dismiss in all three actions, alleging that under *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), and *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013), plaintiffs' claims must be dismissed because they conflict with federal law, specifically the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended at 21 U.S.C. § 355 (1984)), commonly known as the Hatch-Waxman Act. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 142 (2013). After hearing arguments, the district courts summarily denied petitioners' motions to dismiss, finding that plaintiffs' claims are not preempted by federal law. Petitioners filed this instant writ petition.

DISCUSSION

Entertaining the petition

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 discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Writ relief is not available, however, when an adequate and speedy legal remedy exists. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Although this court generally declines to consider writ petitions that challenge a district court's ruling on a motion to dismiss, this court will exercise its discretion to consider one when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *City of Mesquite v. Eighth Judicial Dist. Court*, 135 Nev. 240, 243, 445 P.3d 1244, 1248 (2019) (internal quotation marks omitted).

[3]Initially, three different lawsuits were filed in the Eighth Judicial District Court; those lawsuits have since been consolidated into one action in Department 8.

We conclude that whether the Hatch-Waxman Act preempts plaintiffs' state-law claims against a generic drug manufacturer is an important issue of law that needs clarification. Further, considerations of sound judicial economy and administration militate in favor of entertaining this petition because of the early stage of litigation and the vast number of plaintiffs involved in the consolidated action. Thus, we exercise our discretion to entertain the petition.

Preemption

Whether state-law claims are preempted by federal law is a question of law that this court reviews de novo, without deference to the findings of the district court. *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). The Supremacy Clause of the United States Constitution provides that federal law supersedes, or preempts, conflicting state law. U.S. Const. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law.").

There are two types of preemption—express and implied. *Rolf Jensen & Assocs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 441, 445, 282 P.3d 743, 746 (2012). Express preemption occurs when Congress explicitly declares in the statute's language its intent to preempt state law. *Id.* If the statutory language does not expressly preempt state law, preemption may be implied if the federal law dominates a particular legislative field (field preemption) or actually conflicts with state law (conflict preemption). *Id.* (citing *Nanopierce Techs.*, 123 Nev. at 371, 168 P.3d at 79-80).

Petitioners contend that conflict preemption applies here because the Hatch-Waxman Act imposes duties on them that conflict with the duties imposed under state tort law. Conflict preemption occurs where "it is impossible for a private party to comply with both state and federal requirements." *Mensing*, 564 U.S. at 618 (internal quotation marks omitted). Petitioners argue that as generic drug manufacturers, they are unable to both comply with their duties under the federal drug regulations and avoid state-law tort liability. They rely on two decisions by the United States Supreme Court—*Mensing* and *Bartlett*—which they argue preclude plaintiffs' claims.

Mensing *and* Bartlett

In *Mensing*, the plaintiffs sued generic drug manufacturers for failing to provide adequate warning labels on a generic drug that carried a risk of a severe neurological disorder with long-term use. *Id.* at 610. The plaintiffs claimed that the manufacturers knew or should have known about the risk and that they had a duty under state law to adequately warn of it. *Id.* The Supreme Court found that the state-law claims were preempted because the manufacturers'

duty under state law conflicted with their duty under federal drug regulations. *Id.* at 618. The Court explained that the Hatch-Waxman Act, which established an abbreviated process for FDA approval of generic versions of brand-name drugs, imposed a duty of "sameness" on the generic drug manufacturers. *Id.* at 612-13. This duty requires manufacturers to demonstrate that their generic drugs are identical to the brand-name drug in active ingredients, safety, efficacy, and warning label. *Id.* at 612-13 & n.2. By ensuring that their generic drug is equivalent to an FDA-approved brand-name drug, generic drug manufacturers can obtain FDA approval without undergoing the costly and lengthy clinical testing required for brand-name drugs, thereby expediting the introduction of low-cost generic drugs to the market. *See id.* at 612.

The *Mensing* Court compared this federal-law duty of sameness to the state-law duty, concluding that "it was impossible for the [m]anufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same." *Id.* at 618. The Court reasoned that, because federal law requires generic drug labels to be the same as brand-name labels, any state-law duty that requires generic manufacturers to use safer labels conflicts with the federal "duty of sameness" and is preempted by federal law. Id. Further, the Court rejected the argument that the generic drug "[m]anufacturers [could have] asked the FDA for help" in strengthening the warnings and thereby defeating impossibility preemption. *Id.* at 620-21. The Court stated that the "question for 'impossibility' is whether the private party could independently do under federal law what state law requires of it." *Id.* at 620. "[W]hen a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes." *Id.* at 623-24.

Similarly, in *Bartlett*, the Court considered whether a state-law design-defect claim against a generic drug manufacturer was preempted by the Hatch-Waxman Act. 570 U.S. at 475. The plaintiff succeeded on the claim at trial, and the First Circuit Court of Appeals affirmed the jury verdict, holding that the claim was not preempted because a generic manufacturer could simply stop selling the drug to avoid liability and thus comply with both federal and state law. *Id.* at 479. The Supreme Court reversed and specifically rejected this "stop-selling rationale" as a way to avoid impossibility preemption. *Id.* at 475-76. The Court determined that the state-law claim imposed a duty on the manufacturer to redesign the drug or strengthen the warning on its label, which was not possible under federal regulations. *Id.* at 486-87. The Court concluded that "it [wa]s impossible for [the generic drug manufacturer] to comply with both state and federal law." *Id.* Thus, the state-law claim was preempted, and as explained by the Court, this preemption could

not be avoided by the "stop-selling" theory: "Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability." *Id.* at 488.

Read together, *Mensing* and *Bartlett* hold that the Hatch-Waxman Act imposes a duty of sameness on generic drug manufacturers that requires the labels and design of generic drugs to be the same as the corresponding brand-name drugs and precludes manufacturers from unilaterally altering the label or design of the drug. A state-law claim that imposes a duty on a generic drug manufacturer to alter either the label or the design of a generic drug, thus making it impossible for the generic drug manufacturer to avoid liability under state law without also violating its federal duty of sameness, is preempted. And preemption cannot be avoided simply because the manufacturer could have stopped selling the drug to avoid liability under state law.

Analysis of state- and federal-law duty

Petitioners contend that plaintiffs' causes of actions are preempted under *Mensing* and *Bartlett* because each cause of action would impose a duty on petitioners to alter either the design or the formulation of the 50 mL vial, change its warning labels, or stop selling it altogether to avoid liability. In determining whether conflict preemption exists, we must first identify petitioners' duties under state law and then determine whether those duties conflict with petitioners' federal-law duties. *See Bartlett*, 570 U.S. at 480. Plaintiffs asserted four causes of action in their complaints: strict product liability, breach of implied warranty, deceptive trade practice, and negligence.[4] Plaintiffs conceded at oral argument that their claims for strict product liability and breach of implied warranty are essentially failure-to-warn claims and are thus preempted under *Mensing* and *Bartlett*. However, they argue that their causes of action for negligence and deceptive trade practice survive because they are not premised on the labeling or design of the drug.

As to the deceptive trade practice claim, plaintiffs alleged that petitioners made representations about the 50 mL vials that were false and omitted material facts. Plaintiffs did not identify in their complaints any representations made by petitioners other than those contained in the FDA-approved labeling. *See* NRS 598.0915(5), (7), (15) (providing, generally, that a person engages in a deceptive trade practice when he knowingly makes false representations); NRS 598.0923(2) (providing that a seller who "[f]ails to disclose a material fact" engages in a deceptive trade practice). As *Mensing*

[4]Plaintiffs also alleged a claim for punitive damages in their complaints, but punitive damages is a remedy and not a separate cause of action. *See Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 313, 468 P.3d 862, 881 (Ct. App. 2020) ("[P]unitive damages is a remedy, not a cause of action.").

and *Bartlett* make clear, petitioners could not have rectified any alleged misrepresentation without violating federal law because they were required to adhere to the brand-name drug's labeling. Thus, this cause of action is preempted under *Mensing* and *Bartlett*.

Turning to plaintiffs' negligence claim, plaintiffs alleged that petitioners owed them a duty "to distribute, market, and package the propofol in safe single use vials that are not conducive to multi-dosing." Plaintiffs further alleged that petitioners "knew, or in the exercise of reasonable care should have known, that packaging, marketing, and distributing propofol to high turnover ambulatory clinics . . . in 50 [mL] vials, was . . . likely to encourage or facilitate multi-dosing." Under plaintiffs' negligence theory, petitioners had a duty under state law not to package, market, or sell 50 mL vials of propofol to Dr. Desai's ambulatory surgical clinics.

To the extent that plaintiffs' negligence claim alleges that petitioners provided improper warnings or descriptions in the labeling and packaging of the 50 mL vials, such a claim is preempted, as it is clear under *Mensing* and *Bartlett* that petitioners could not have unilaterally altered the labeling and packaging of the 50 mL vials under federal law. However, with respect to plaintiffs' claim that petitioners had a duty not to sell the 50 mL vials, we conclude that this cause of action is not preempted, as petitioners have not demonstrated that it would be impossible to comply with state law without violating federal law. The theory of this cause of action is that petitioners knew or should have known that Dr. Desai's ambulatory surgical centers were misusing the 50 mL vials of propofol labeled for single-patient use by anesthetizing multiple patients, and thus petitioners should have stopped selling 50 mL vials and sold only 20 mL single-dose vials to those centers. Petitioners contend that, to avoid liability under this theory, they would have had to either stop selling the 50 mL vials to Dr. Desai's ambulatory surgical centers or alter the size of the 50 mL vials. And, petitioners argue, the first option is precluded by *Mensing* and *Bartlett*, and the second option is preempted by conflict.

As to the first option, petitioners' duty to stop selling 50 mL vials of propofol to Dr. Desai's ambulatory surgical centers because petitioners allegedly knew that their vials were being misused, despite labels to the contrary, is not precluded by *Mensing* and *Bartlett*. Petitioners have not demonstrated that they have an absolute duty under federal law to continue selling 50 mL vials of propofol to clinics they allegedly know are misusing their product. Therefore, because petitioners' alleged state-law duty to stop selling the 50 mL vials to clinics it knows are misusing its product does not conflict with any federal-law duty, we conclude that plaintiffs' negligence cause of action is not preempted.

This conclusion is not affected by the Court's holding in *Bartlett* that "an actor seeking to satisfy both his federal- and state-law ob-

ligations is not required to cease acting *altogether* in order to avoid liability." 570 U.S. at 488 (emphasis added). Though petitioners rely heavily on *Bartlett* in arguing that plaintiffs' liability theory, which would require them to stop selling the 50 mL vials, cannot be used to avoid preemption, their reliance is misplaced. In *Bartlett*, the Court held that where there is a conflict between state and federal law, preemption cannot be avoided by requiring the generic drug manufacturer to stop selling the drug. *Id.* This analysis is not applicable here where there is no conflict between state and federal law in the first instance.

In the alternative, we agree that a conflict might arise if petitioners were required to unilaterally alter the size of their FDA-approved vials to avoid liability under state law.[5] However, plaintiffs are not asking petitioners to alter their vial size, and even if they were, plaintiffs' negligence cause of action would still not conflict with federal law. This is so because petitioners already obtained approval from the FDA to market a smaller, 20 mL vial size of propofol. Thus, unlike the generic drug manufacturers in *Mensing*, petitioners would not be required to make any unilateral changes to the drug's design to comply with state law. Rather, petitioners could satisfy a state-law duty to sell only the smaller, 20 mL vials of propofol to Dr. Desai's ambulatory surgical centers without violating their federal duty of sameness. Therefore, we hold that plaintiffs' negligence claim is not preempted even if it required petitioners to change their vial size to 20 mL, because petitioners already have approval for that smaller vial size.

For the reasons stated above, we conclude that plaintiffs' negligence cause of action is not preempted by federal law and that plaintiffs' request for punitive damages also survives to the extent it derives from the negligence cause of action. However, we conclude that the remainder of plaintiffs' causes of action are preempted, and we thus grant the petition in part and deny the petition in part. The clerk of this court shall issue a writ of mandamus directing the district court to dismiss all of plaintiffs' claims except their cause of action for negligence and their request for punitive damages.

Parraguirre, Stiglich, Cadish, Pickering, and Herndon, JJ., concur.

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[5]The Hatch-Waxman Act does not permit generic drug manufacturers to independently change a drug's strength, which includes a drug's vial size. *See* 21 U.S.C. § 355(j)(2)(A)(iii) (2018) (requiring the generic drug's "strength" to be equivalent to the brand-name drug); 21 C.F.R. § 314.3(b) (2020) (stating that a drug's "[s]trength" refers to "the amount of drug substance contained in, delivered, or deliverable from a drug product which includes . . . [t]he total quantity of drug substance in mass or units of activity in a dosage unit or container closure").

JASON T. SMITH, an Individual, Appellant, *v.* KATY ZILVERBERG, an Individual; and VICTORIA EAGAN, an Individual, Respondents.

No. 80154

JASON T. SMITH, an Individual, Appellant, *v.* KATY ZILVERBERG, an Individual; and VICTORIA EAGAN, an Individual, Respondents.

No. 80348

March 4, 2021 481 P.3d 1222

Consolidated appeals from district court orders granting an anti-SLAPP special motion to dismiss and awarding attorney fees, costs, and statutory damages. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Affirmed.

Flangas Dalacas Law Group, Inc., and *Gus W. Flangas* and *Kimberly P. Stein*, Las Vegas, for Appellant.

McLetchie Law and *Margaret A. McLetchie, Alina M. Shell*, and *Leo S. Wolpert*, Las Vegas, for Respondents.

Before the Supreme Court, Hardesty, C.J., Parraguirre and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

These appeals present issues concerning the scope of Nevada's anti-SLAPP statutory protections. As to the merits, appellant Jason Smith challenges the district court's finding that these provisions shield respondents Katy Zilverberg and Victoria Eagan against liability for allegedly defamatory statements they made about him on social media platforms. In addition, Smith contests the district court's conclusion that Zilverberg and Eagan are entitled to the attorney fees and costs they incurred from the beginning of the proceedings, not just those incurred in bringing their anti-SLAPP special motion to dismiss. Smith further challenges the district court's determination that Zilverberg and Eagan are entitled to an additional discretionary award of $10,000 each under Nevada's anti-SLAPP provisions.

We hold that the district court properly applied NRS 41.637(4) and the factors outlined in *Shapiro v. Welt*, 133 Nev. 35, 389 P.3d 262 (2017), in determining that Zilverberg and Eagan's statements were made in good faith and addressed an issue of public concern, and

thus warranted protection under the first prong of the anti-SLAPP statutes. The district court also correctly determined that Smith failed to make a prima facie showing of actual malice as required to satisfy the second prong of the analysis and thus appropriately granted the anti-SLAPP motion to dismiss. We further hold that the district court did not err in awarding attorney fees and costs because, under NRS 41.670(1)(a), if the court grants an anti-SLAPP special motion to dismiss, a prevailing defendant may recover attorney fees and costs incurred from the inception of the proceedings. Finally, we hold that the district court did not err in awarding Zilverberg and Eagan each an additional $10,000 because NRS 41.670(1)(b) authorizes an award of up to an additional $10,000 to each individual defendant who prevails on an anti-SLAPP special motion to dismiss. Thus, we affirm the district court's orders.

FACTS AND PROCEDURAL HISTORY

Smith is a professional thrifter who tours the United States teaching others how to thrift, i.e., buy items from thrift and antique stores and then resell those items through online marketplaces. He currently hosts two YouTube shows related to thrifting and previously starred in a Spike TV show. He has guest starred on *Pawn Stars* and has a business relationship with eBay and WorthPoint, two of the largest resources for finding, valuing, and pricing antiques and collectibles. He operates a Facebook group—The Thrifting Board—where he assists individuals in learning how to thrift.

Zilverberg and Eagan are thrifters who had both friendship and professional relationships with Smith through the thrifting community, before having a falling out. Zilverberg and Eagan operate a YouTube channel and have their own personal Facebook pages. Zilverberg, a former administrator of Smith's Facebook group, posted a YouTube video where she (1) criticized Smith for bullying behavior, (2) alleged that Smith retaliated against members of the thrifting community by releasing their personal information online or attempting to bar those individuals from thrifting events, and (3) implied that his behavior caused members of the thrifting community to contemplate self-harm. Eagan posted a statement on her personal Facebook page (1) criticizing Smith for what she considered misogynistic and bullying behavior and (2) stating that other individuals have sought restraining orders to stop Smith's behavior.

Smith filed a complaint alleging that Zilverberg's and Eagan's statements were false and defamatory. He brought claims for defamation per se, conspiracy, and injunctive relief. Zilverberg and Eagan filed an anti-SLAPP special motion to dismiss, which the district court granted, concluding that they met their burden under the first prong of the anti-SLAPP framework. The court further concluded that Smith did not satisfy his burden under the second prong of the

anti-SLAPP framework to demonstrate a probability of prevailing on his claims with prima facie evidence that Zilverberg and Eagan knowingly made any false statements.

Zilverberg and Eagan timely moved for attorney fees and costs under NRS 41.670(1)(a) for prevailing on their anti-SLAPP motion to dismiss, as well as an additional discretionary statutory award of $10,000 each under NRS 41.670(1)(b). The district court granted the motion, awarding Zilverberg and Eagan the attorney fees and costs they incurred from the inception of the proceedings and additional discretionary awards of $10,000 each. On appeal, Smith challenges the dismissal order and the order awarding fees, costs, and statutory damages.

DISCUSSION

The district court correctly granted the anti-SLAPP special motion to dismiss

We review a decision to grant or deny an anti-SLAPP special motion to dismiss de novo. *Rosen v. Tarkanian*, 135 Nev. 436, 438, 453 P.3d 1220, 1222 (2019).

Zilverberg's and Eagan's statements were made in good faith and in direct connection with a matter of public interest

Smith argues that Zilverberg's and Eagan's statements were not made in good faith and in direct connection with a matter of public interest as defined under NRS 41.637(4) and that the district court improperly applied the *Shapiro* factors in concluding otherwise. Smith asserts the statements are not entitled to protection under Nevada's anti-SLAPP statutes because they do not relate to the thrifting community, are the result of a private vendetta, and were an attempt to gather ammunition for another round of private controversy. We disagree.[1]

A court must grant an anti-SLAPP special motion to dismiss where (1) the defendant shows, by a preponderance of the evidence, that the claim is based on a "good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern" and (2) the plaintiff fails to show, with prima facie evidence, a probability of prevailing on the claim. NRS 41.660(3)(a)-(b). To satisfy the first prong, the defendant must show that (1) "the comments at issue fall into one of the four categories of protected communications enumerated in NRS 41.637" and (2) "the communication 'is truthful or is made without knowledge of its falsehood.'" *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020) (quoting NRS 41.637).

[1]The parties do not dispute that the statements at issue were made in a public forum—Facebook and YouTube. Accordingly, we only address whether the statements relate to a public interest and whether they were made in good faith.

We define an issue of public concern broadly, *see Coker v. Sassone*, 135 Nev. 8, 14, 432 P.3d 746, 751 (2019), and previously adopted the following guiding principles for district courts to use in distinguishing issues of private and public interest:

> "(1) 'public interest' does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people."

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)).

Relying on California caselaw, Zilverberg and Eagan argue that statements about a public figure are per se statements related to an issue of public concern. However, while the public might have a heightened interest in Smith given his status as a public figure, statements about a public figure may still concern matters that are private under the *Shapiro* factors. Accordingly, we reject the notion that statements regarding public figures necessarily relate to a public interest. Instead, we reiterate that district courts must apply the *Shapiro* factors to determine whether statements relate to a public interest even if the statements concern a public figure.

Applying the *Shapiro* analysis, we conclude that Zilverberg's and Eagan's statements relate to a public interest. In particular, we hold that consumers' interest in Smith's alleged behavior surpasses mere curiosity and is a matter of concern to a substantial number of people. This is especially apparent given Smith's status in the community, which includes a business where he teaches individuals how to thrift successfully. *See Abrams v. Sanson*, 136 Nev. 83, 87-88, 458 P.3d 1062, 1066-67 (2020) (holding that the public has an interest beyond a mere curiosity in an attorney's courtroom behavior because it serves as a warning to any potential, or current, client looking to hire that lawyer). As Smith conceded, he is a public figure of widespread fame in the thrifting community, and his reputation is important to those who choose to seek his guidance and do business with him. Accordingly, disclosure of Smith's behavior,

which occurred in connection with his thrifting business and related activities, informs the public's decision on whether to do business with him. Moreover, the record shows that the thrifting community is extensive and includes parties around the world, such that statements about Smith's behavior are of concern to a substantial number of people.[2]

While Smith provided a declaration stating that Zilverberg's and Eagan's actions arose from "animosity and personal spite," it contained conclusory statements that were not based on first-hand factual information. *See* NRS 50.025(1)(a) ("A witness may not testify to a matter unless . . . [e]vidence is introduced sufficient to support a finding that he has personal knowledge of the matter."). Moreover, Zilverberg's and Eagan's statements concern Smith's actions regarding others in the thrifting community, not simply their personal conflicts with him. In sum, Zilverberg's and Eagan's statements concern Smith's character as a leading figure in the thrifting community and are of interest to a broad swath of the public. Thus, the district court correctly determined that their statements directly relate to a public interest under the *Shapiro* factors.[3]

Zilverberg's and Eagan's statements were truthful or made without knowledge of falsehood, or were opinions incapable of being false

Smith next argues that the district court erred by concluding that Zilverberg's and Eagan's statements were made in good faith or were opinions because they knew their statements were false and failed to provide any substantive evidence to show the statements were true.

A statement is made in good faith if it is either "truthful or is made without knowledge of its falsehood." NRS 41.637(4). We do not parse the individual words to determine the truthfulness of a statement; rather, we ask "whether a preponderance of the evidence demonstrates that the gist of the story, or the portion of the story that carries the sting of the [statement], is true." *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (alteration in original) (internal quotation marks omitted). Additionally, statements of opinion cannot be false. *See Abrams*, 136 Nev. at 89-90, 458 P.3d at 1068-69.

The record shows that Zilverberg's statements criticizing Smith for bullying or retaliatory behavior, and outlining what she perceived to be the consequences of such behavior, were either truthful or made

[2]As a case in point, Smith's closed Facebook group, The Thrifting Board, has over 55,000 members.

[3]Smith argues that the speech at issue relates to an interest of a private community and that such speech must encourage participation in matters of public significance to be protected. However, he raises this argument for the first time in his reply brief. Thus, it is waived. *Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (stating that arguments raised for the first time in a reply brief are waived).

without knowledge of falsity. Zilverberg supported those statements with a declaration and other admissible evidence demonstrating her good-faith basis for making the statements. Such evidence included screenshots of a Facebook post where Smith published the personal information of an anonymous critic, a YouTube video where Smith exposed the anonymous critic's identity and hometown, screenshots of a Facebook conversation where Smith bragged about convincing the organizers of a major thrifting event to remove a target of Smith's displeasure as a speaker, and screenshots of a Facebook chat where Smith claimed he was arrested twice and committed felonies. Zilverberg's declaration, coupled with this evidence, shows that the gist of her statements was either true or made without knowledge of falsity. Moreover, Zilverberg's characterization of Smith's behavior as "bullying" is an opinion incapable of being false. *See Lubin v. Kunin*, 117 Nev. 107, 112, 17 P.3d 422, 426 (2001) (holding that statements that convey "the publisher's judgment as to the quality of another's behavior" are evaluative opinions).

Similarly, Eagan's statement characterizing Smith's behavior as misogynistic bullying is an opinion incapable of being false. *See id.* Moreover, the record shows that her statements about Smith's harassing behavior were based on her personal knowledge and were truthful or at least made without knowledge of falsity. The record likewise shows that Eagan's statements about Smith being the subject of restraining orders were based on her personal knowledge and were either truthful or at least made without knowledge of falsity.[4] Accordingly, we conclude that the district court correctly determined that Zilverberg and Eagan met their burden under the first prong of the anti-SLAPP analysis.

Smith failed to show with prima facie evidence a probability of prevailing on his claims

Next, Smith argues that the district court erred in concluding that he failed to provide prima facie evidence of actual malice because he provided evidence that Zilverberg and Eagan made their statements with reckless disregard for the truth.

To satisfy the second prong of the anti-SLAPP analysis, the plaintiff must show, by prima facie evidence, that his claims have minimal merit. *See* NRS 41.660(3)(b); *Abrams*, 136 Nev. at 91, 458 P.3d at 1069. In addressing the second prong, we review each claim and

[4]On appeal, Smith argues that Eagan defamed him by alleging he had a criminal history. Although the parties dispute whether Eagan said that Smith was the subject of restraining orders or that he had a criminal history, the record shows that Eagan merely alleged that Smith was the subject of restraining orders. Her declaration explained the basis of her belief that these statements were true—conversations with trusted individuals who informed her of Smith's alleged past restraining orders. Smith failed to provide any admissible evidence contradicting Eagan's declaration.

assess the plaintiff's probability of prevailing.[5] *Abrams*, 136 Nev. at 91, 458 P.3d at 1069. The probability of prevailing is determined by comparing the evidence presented with the elements of the claim. *See id.* at 91-92. 458 P.3d at 1069-70.

To prevail on a defamation claim, the plaintiff must show (1) a false and defamatory statement; (2) unprivileged publication to a third person; (3) fault; (4) damages, presumed or actual; and, when the plaintiff is a public figure, (5) actual malice.[6] *Rosen*, 135 Nev. at 442, 453 P.3d at 1225. Actual malice in this context means "knowledge that it [the statement] was false or [made] with reckless disregard of whether it was false or not." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002) (first alteration in original) (internal quotation marks omitted).

Here, we conclude that the statements at issue were not actionable because Smith failed to provide evidence of actual malice and the statements were opinions or Zilverberg and Eagan had an adequate factual basis for making them. The evidence Smith provided—his declaration—is insufficient to satisfy the actual malice standard because, in it, he merely asserted his subjective belief that Zilverberg's and Eagan's personal animosity toward him was the reason for the publication of the allegedly defamatory statements. However, such personal animosity, even if demonstrated, does not address the showing required for actual malice, as Smith did not attest to any facts tending to show that Zilverberg and Eagan knowingly or recklessly made false statements. Further, as discussed above, Zilverberg and Eagan provided declarations and other evidence that support their claim that they believed the statements to be true at the time they made them or the statements were in the nature of opinions. Thus, because Smith failed to provide evidence making a prima facie showing that Zilverberg's and Eagan's statements were actionable, he failed to meet his burden under the second prong of the anti-SLAPP analysis. Accordingly, we conclude that the district court properly granted Zilverberg and Eagan's special motion to dismiss.[7]

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[5]Smith does not challenge the district court's dismissal of his conspiracy claim or his request for injunctive relief. Accordingly, we limit our consideration to his defamation claim.

[6]In his complaint, Smith acknowledged his status as a public figure in the thrifting community and general public. Under the doctrine of judicial admissions, he is bound to that statement. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) ("Judicial admissions are defined as deliberate, clear, and unequivocal statements by a party about a concrete fact within that party's knowledge.").

[7]Smith argues that the district court failed to consider his affidavit when it analyzed the second prong. Thus, Smith argues, this court should remand for the district court to reconsider the second prong if we conclude that Zilverberg and Eagan met their burden under the first prong. However, the record shows that the district court *did* consider Smith's affidavit and determined that it was insufficient. We agree with this determination, and therefore, remand is not necessary.

The district court acted within its sound discretion by awarding respondents attorney fees and costs

We generally review a district court's decision to grant attorney fees and costs for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014). However, if the decision implicates a question of law, including matters of statutory interpretation, we review the ruling de novo. *See id.*

Smith contends that the district court erred in concluding that Zilverberg and Eagan are entitled, under NRS 41.670(1)(a), to all reasonable attorney fees and costs they incurred from the inception of the litigation rather than only those attorney fees and costs related to their anti-SLAPP motion. In addition, Smith argues that the amount of the attorney fees and costs the district court awarded was unreasonable under the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

When interpreting a statute, we look to its plain language. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction. *Local Gov't Emp.-Mgmt. Relations Bd. v. Educ. Support Emps. Ass'n*, 134 Nev. 716, 718, 429 P.3d 658, 661 (2018). If a statute's language is ambiguous, we will examine the provision's legislative history and the scheme as a whole to ascertain the Legislature's intent. *See We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). "Statutory language is ambiguous if it is capable of more than one reasonable interpretation." *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010).

The statute at issue here, NRS 41.670(1)(a), states that "[i]f the court grants a special motion to dismiss filed pursuant to NRS 41.660 . . . [t]he court shall award reasonable costs and attorney's fees to the person against whom the action was brought." The statute does not specify if the costs and fees to be awarded are those incurred litigating the entire action or only the costs and fees incurred litigating the anti-SLAPP motion. Because NRS 41.670(1)(a) is ambiguous on this point, we turn to the rules of statutory construction to determine the Legislature's intent.

"One basic tenet of statutory construction dictates that, if the legislature includes a qualification in one statute but omits the qualification in another similar statute, it should be inferred that the omission was intentional." *In re Christensen*, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006). Comparing NRS 41.670(1)(a) to NRS 41.670(2) is instructive here. NRS 41.670(2) provides that, when a special motion to dismiss is denied, the prevailing plaintiff can recover "reasonable costs and attorney's fees incurred in responding to the motion." In contrast, NRS 41.670(1)(a) contains no similar qualification limiting the period for which prevailing defendants can

recover attorney fees and costs. Because these are not simply similar attorney fees provisions, but are part of the same statutory scheme, the omission of any such qualification in NRS 41.670(1)(a) is particularly illuminating. Consequently, we conclude that the Legislature intended for prevailing defendants to recover reasonable attorney fees and costs incurred from the inception of the litigation, rather than just those incurred in litigating the anti-SLAPP motion.

The purpose of Nevada's anti-SLAPP statutes supports such an interpretation. As we have observed, the Legislature enacted these provisions in 1993 to filter out "unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits arising from their right to free speech under both the Nevada and Federal Constitutions." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 755, 219 P.3d 1276, 1282 (2009), *superseded by statute on other grounds as stated in Shapiro*, 133 Nev. at 37, 389 P.3d at 266. When the Legislature amended the statute in 1997, it reiterated that the intent of Nevada's anti-SLAPP statutes is to protect citizens' First Amendment right to free speech by limiting the chilling effect of civil actions filed against valid exercises of that right. 1997 Nev. Stat., ch. 387, preamble, at 1363-64.

To further these important purposes, the anti-SLAPP statutes provide immunity from civil liability for claims against protected speech. NRS 41.650 (providing that "[a] person who engages in a good faith communication in furtherance of the right . . . to free speech in direct connection with an issue of public concern is immune from any civil action for claims based upon the communication"). Thus, consistent with the Legislature's goals of preventing the chilling effect of SLAPP suits and protecting free speech, we conclude that it intended to permit a prevailing defendant to recover all reasonable fees and costs incurred from the inception of the litigation under NRS 41.670(1)(a). Accordingly, the district court did not abuse its discretion by awarding Zilverberg and Eagan attorney fees and costs incurred for the entire action.[8]

Further, the district court acted within its sound discretion in awarding $2,387.53 in costs and $66,615.00 in attorney fees. In determining the amount of fees to award, the district court can follow any rational method so long as it applies the *Brunzell* factors. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). Under *Brunzell*, a district court must consider the following factors when awarding attorney fees: (1) the qualities of the attorney, (2) the char-

[8]Smith relies on *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 46 Cal. Rptr. 2d 542 (Ct. App. 1995), to argue that respondents can recover attorney fees related only to the anti-SLAPP motion, not the entire action. However, while the California statutory language is similar to ours, *Lafayette Morehouse* largely based its holding on California's legislative history. *Id.* at 544. Nevada has no similar express legislative statement limiting the fees a prevailing defendant can recover. Accordingly, we decline to follow *Lafayette Morehouse*.

acter of the work done, (3) the actual work performed by the attorney, and (4) the result achieved. 85 Nev. at 349, 455 P.2d at 33. So long as the district court considers the *Brunzell* factors, "its award of attorney fees will be upheld if it is supported by substantial evidence." *Logan*, 131 Nev. at 266-67, 350 P.3d at 1143.

Here, the district court considered each of the *Brunzell* factors and the documentation provided in support of the attorney fees in finding them reasonable.[9] While Smith challenges the time spent on the anti-SLAPP motion to dismiss as excessive in light of Zilverberg and Eagan's counsel's expertise in First Amendment litigation, the billing logs in the record show that their lead counsel delegated much of the work to other qualified attorneys who billed at a lower rate and support the district court's finding that the time spent and fees incurred were reasonable. Further, Zilverberg and Eagan's counsel achieved a complete dismissal, which favors awarding attorney fees. Accordingly, the district court acted within its sound discretion in awarding Zilverberg and Eagan their attorney fees and costs.[10]

The district court acted within its sound discretion by awarding Zilverberg and Eagan each statutory damages

Finally, Smith argues that the district court erred by awarding Zilverberg and Eagan an additional $10,000 each under NRS 41.670(1)(b). He argues that, because he brought the action against Zilverberg and Eagan collectively and they lodged a joint defense through the same law firm, they can only be awarded a total of $10,000 under NRS 41.670(1)(b).[11] We disagree.

The plain language of NRS 41.670 does not limit the statutory award to $10,000 per lawsuit. Instead, NRS 41.670(1)(b) states that "[t]he court may award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an amount of up to $10,000 to the *person* against whom the action was brought." (Emphasis added.) "Person" is defined as "[a] human being" or "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." *Person*,

[9]The district court considered billing logs for the work performed, as well as declarations supporting the reasonableness of the rates and the work performed.

[10]Smith does not challenge the reasonableness of the portion of the fees the district court awarded for the work of Zilverberg and Eagan's prior counsel that was unrelated to the anti-SLAPP special motion to dismiss. Instead, he merely argues that they could not recover those fees because they were not related to the anti-SLAPP motion. Thus, we affirm the district court's order awarding fees and costs in its entirety.

[11]Smith also argues that the statutory language implies that a district court may grant a $10,000 award only when frivolous or vexatious conduct warrants a punitive award. However, Smith first raises this argument in his reply brief. Accordingly, it is waived. *Khoury*, 132 Nev. at 530 n.2, 377 P.3d at 88 n.2.

Black's Law Dictionary (11th ed. 2019). Thus, the plain language of the statute allows the district court to award up to $10,000 to any individual against whom the action was brought. Further, Zilverberg and Eagan's joint representation is irrelevant to their entitlement to additional awards under NRS 41.670(1)(b) because NRS 41.670(1)(b) is not an attorney fees award. NRS 41.670(1)(b) (providing that a district court may award up to $10,000 "*in addition* to reasonable costs and attorney's fees" (emphasis added)). Accordingly, the district court acted within its sound discretion by awarding each $10,000 in statutory damages.

CONCLUSION

We conclude that the district court correctly determined that the Zilverberg's and Eagan's statements fall within the protections of Nevada's anti-SLAPP statutes and that Smith did not demonstrate with prima facie evidence a probability of prevailing on his claims. We further hold that NRS 41.670(1)(a) allows a prevailing defendant to recover reasonable attorney fees and costs incurred in the entire action, not just those incurred litigating the anti-SLAPP special motion to dismiss. As the district court properly considered the *Brunzell* factors and substantial evidence supports its findings, we conclude that the district court did not abuse its discretion by awarding attorney fees and costs for the entire action. Finally, we hold that NRS 41.670(1)(b) gives district courts the discretion to award up to an additional $10,000 to each individual defendant. Thus, the district court did not abuse its discretion by awarding Zilverberg and Eagan an additional $10,000 each under this statute. Accordingly, we affirm the district court's orders.

Hardesty, C.J., and Parraguirre, J., concur.

NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO, JR.; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF, APPELLANTS, *v.* CLARK COUNTY EDUCATION ASSOCIATION; JOHN VELLARDITA; AND VICTORIA COURTNEY, RESPONDENTS.

No. 79208

March 4, 2021 482 P.3d 665

Appeal from district court orders granting summary judgment in a union contract matter. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Affirmed.

Leonard Law, PC, and *Debbie A. Leonard*, Reno; *Bredhoff & Kaiser, PLLC*, and *Robert Alexander* and *Georgina Catherine Yeomans*, Washington, D.C., for Appellants.

Snell & Wilmer, LLP, and *Kelly H. Dove, John S. Delikanakis, Bradley T. Austin*, and *Michael Paretti*, Las Vegas; *Snell & Wilmer, LLP*, and *Andrew M. Jacobs*, Tucson, Arizona; *Asher, Gittler & D'Alba, Ltd.*, and *Joel A. D'Alba*, Chicago, Illinois, for Respondents.

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

OPINION

By the Court, STIGLICH, J.:

The bylaws of national- and state-level unions are contractually binding on affiliated local unions unless and until the local union disaffiliates from the parent unions. The local and parent unions may also enter into other contracts that govern certain aspects of their relationship. In this dispute between a local teachers' union and its state and national affiliates, we conclude that the parent unions' bylaws, while binding, did not by their own terms control the important issue of the transmission of dues from the local to the state affiliate. Instead, the local union's obligation to transmit dues was the subject of a separate contract. That contract contained a provision expressly permitting either party to terminate it by giving timely notice. We hold that the local union validly terminated this contract pursuant to that provision and so was not contractually obligated to continue transmitting its members' dues to the state union. Based on this, and because the parent unions' remaining tort-based claims also fail, we affirm the district court's grant of summary judgment to the local union.

BACKGROUND

The three unions' contractual relationship

The Clark County Education Association (CCEA) is a local union representing teachers and other employees of the Clark County School District. The Nevada State Education Association (NSEA) is a statewide union whose members are teachers and other school district employees throughout Nevada. The National Education Association (NEA) is a national union that represents about three million teachers and other education professionals throughout the United States. When this dispute began, these three unions had been affiliated for decades. Indeed, CCEA's bylaws required its members to join NSEA and NEA, and conversely, those unions' bylaws required members to join the appropriate local affiliate.

When a Clark County educator wished to become a union member, he or she would sign a Membership Enrollment Form. That form authorized the school district to deduct "professional dues" from the teacher's paycheck and to pay those dues to CCEA. The Membership Enrollment Form did not expressly state the amount of dues or which organizations' dues were included, but the long-standing practice was to deduct all three unions' dues and to transmit the lump sum to CCEA. Each organization set its own dues according to its own bylaws. The total dues for CCEA's members for the 2017-2018 school year were $810.50 per person, which constituted the sum total of the CCEA, NSEA, and NEA dues.

For decades before the instant dispute, CCEA would transmit to NSEA all of NSEA's and NEA's dues that it received. NSEA would, in turn, transmit NEA's portion of the dues to NEA. However, the parties vigorously dispute which contractual provision, if any, required CCEA to transmit dues. There are several overlapping possibilities.

First, there is section 2-9 of the NEA bylaws, entitled "Dues Transmittal and Enforcement Procedures." Section 2-9(a) states that "[s]tandards and contracts for transmitting dues shall be developed between the state affiliate and each local affiliate." Section 2-9(a) further states that "[l]ocal affiliates shall have the full responsibility for transmitting state and Association [i.e., NEA] dues to state affiliates on a contractual basis."[1] Section 2-9(b) further provides that "[a] local shall transmit to a state affiliate . . . at least forty (40) percent of the Association dues receivable for the year by March 15 and at least seventy (70) percent of the Association dues receivable for the year by June 1." Section 2-9(b), however, does not provide an explicit deadline to transmit one hundred percent of the NEA dues and does not address the state affiliate's dues at all.

[1]Analogous provisions govern the transmission of dues from each state affiliate to NEA.

Next, there is the Dues Transmittal Agreement (DTA), which NSEA and CCEA entered into in 1979. The DTA designated CCEA as NSEA's agent "for the purpose of collecting and transmitting NSEA and NEA dues." It required CCEA to transmit those dues within ten working days after receiving them from the school district. The contract also provided that, should any amendment to the NSEA constitution or bylaws conflict with the DTA, the DTA would be automatically amended to reflect the amendment. Finally and crucially, the contract provided that it would "remain in force for each subsequent membership year unless terminated in writing by either party prior to September 1 of any NSEA membership year, or amended by mutual consent of both parties."

Twenty years after entering the DTA, NSEA and CCEA entered into a second contract called the Service Agreement. That agreement set forth extensive services NSEA would provide to CCEA, including political action training, liability insurance coverage, and certain grant funding. The Service Agreement prominently stated that the DTA, which was included in the Service Agreement as an appendix, was to be "continued without change." Like the DTA, the Service Agreement renewed automatically each September 1, unless either party provided timely notice of termination.[2]

Finally, NSEA's bylaws also reference dues transmittal. They provide that "NSEA shall affiliate a local association when it meets the following minimum standards," with a short list of prerequisites for affiliation. One such prerequisite, added in 2015, is to "[h]ave a dues transmittal contract with NSEA."

The instant dispute

In May 2017, CCEA notified NSEA that it wanted to terminate the existing Service Agreement and negotiate new terms. Although CCEA stated that time was of the essence, NSEA initially refused to negotiate before mid-September. In a July letter, CCEA reiterated its pressing need to renegotiate before the new school year began and clarified its position that the existing Service Agreement would expire at the end of August, with or without a new agreement in place.

In early August, CCEA wrote to NSEA a third time. Therein, CCEA stated that the Service Agreement "serve[d] as the dues transmittal contract" and that there would be no agreement in place to collect and transmit dues to NSEA after August 31. CCEA firmly and clearly stated that if NSEA wanted CCEA to continue collecting and transmitting dues, then NSEA would have to negotiate a new agreement.

No new agreement was forthcoming. The September 1 deadline came and went. However, the school district continued to deduct dues for all three unions from each union member's paycheck and

[2]Unlike the DTA, the Service Agreement required thirty days' notice of termination before the September 1 renewal date.

transmit them to CCEA. CCEA kept the portion constituting its own dues, but placed the remainder—which it would previously have sent to NSEA—in an escrow account pending litigation. In turn, NSEA ceased providing CCEA with any of the services referred to in the Service Agreement.

CCEA promptly filed a declaratory judgment action, seeking a declaration that it had no obligation to transmit the money in escrow to NSEA. NSEA and NEA filed a separate action for declaratory and injunctive relief, in which they sought to have the dues in escrow disgorged to NSEA. They argued that CCEA failed to effectively terminate the DTA and was now in breach of that contract. They also argued that CCEA had breached both the NSEA and NEA bylaws. Alternatively, they argued that CCEA had unjustly enriched itself or committed conversion by retaining the members' dues. Finally, a small number of individual teachers joined NSEA and NEA, claiming that CCEA defrauded them by falsely promising to transmit their dues to NSEA. The teachers sought punitive damages. As the cases initiated by CCEA and by NSEA and NEA presented largely the same issues, the cases were consolidated.

In April 2018, the members of CCEA formally voted to disaffiliate from NSEA and NEA. CCEA, as a newly independent union, would collect $510 in annual dues per member. While this was a greater amount than CCEA's previous dues, it reflected the need to fund member services that NSEA or NEA previously provided. The school district then changed its payroll deduction to conform to CCEA's new dues, and CCEA stopped depositing money in the escrow account.

The district court disposed of this litigation with two summary judgment orders. First, in December 2018, the district court concluded that NSEA and NEA could not recover under the DTA. It found that "[t]he Service Agreement incorporates the [DTA]" and that the two documents formed "a single integrated agreement." It then concluded that CCEA's letters effectively terminated the agreements as of September 1, 2017. It is not entirely clear from the order whether the district court based that conclusion on its finding that the two contracts formed a single agreement.

Second, in July 2019, the district court granted summary judgment to CCEA on all remaining claims. The district court concluded that, as a matter of law, NEA's and NSEA's bylaws were not contractually binding on CCEA. Therefore, CCEA had no contractual obligation to transmit dues other than that imposed by the DTA. The district court further concluded that NSEA and NEA had no property interest in the escrowed funds that could give rise to a claim for conversion or unjust enrichment. Finally, the district court granted summary judgment to CCEA on the fraud claim. While litigation was pending, CCEA offered to refund to the suing individual teachers *all* of their dues for the 2017-18 school year, including the dues paid to CCEA. The district court found that this offer negated the possibility

of compensatory damages for fraud, and the teachers failed to establish any fact supporting punitive damages.

In conjunction with entering judgment for CCEA, the district court also ordered CCEA to return the escrowed funds to its members. This appeal followed. NSEA and NEA obtained a stay requiring CCEA to continue to hold the disputed funds in escrow pending this appeal.

DISCUSSION

NSEA and NEA (Appellants) argue that they, not CCEA, were entitled to summary judgment. First, they argue that the DTA remained in effect and bound CCEA to transmit the disputed dues. Second, they argue that even if CCEA successfully terminated the DTA, CCEA nevertheless remained obligated to transmit dues under the NEA or NSEA bylaws. Next, they argue that if neither the DTA nor the bylaws require CCEA to transmit dues, the parent unions are still entitled to the disputed dues under a theory of unjust enrichment or conversion. Finally, the individual teachers argue that the district court erred by improperly considering CCEA's offer to repay those teachers' dues in granting summary judgment on their fraud claim.

Standard of review

This court reviews a district court order granting or denying summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is warranted "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id.* at 731, 121 P.3d at 1031. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (adopted as Nevada law in *Wood*, 121 Nev. at 731-32, 121 P.3d at 1031). "[T]he pleadings and other proof must be construed in a light most favorable to the nonmoving party," and summary judgment must be reversed if such a construction shows that there is a genuine dispute as to a material fact. *Wood*, 121 Nev. at 732, 121 P.3d at 1031. This court reviews a district court's interpretation of a contract, a question of law, de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

CCEA effectively terminated the Dues Transmittal Agreement

The first issue is whether CCEA effectively terminated the DTA. We hold that it did.

While Nevada has not explicitly addressed contract termination under such facts in a published opinion, it is generally understood

that when either party has the power to unilaterally terminate the contract at the end of each period, a party wishing to exercise that power must simply give "clear and unequivocal" notice of its intent to do so. *Cedar Rapids Television Co. v. MCC Iowa LLC*, 560 F.3d 734, 740 (8th Cir. 2009) (addressing whether, under Iowa law, a party's letter adequately constituted a notice of termination of contract); *Shannon v. Civil Serv. Emps. Ins. Union*, 337 P.2d 136, 139 (Cal. Dist. Ct. App. 1959) (if notice "clearly evinces an intent to terminate the contractual relationship of the parties, [that] is all that is required for termination at will"); *see Roberts v. Second Judicial Dist. Court*, 43 Nev. 332, 341, 185 P. 1067, 1069-70 (1920) (explaining that a notice to terminate a tenancy must be "plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it, so that the other party may safely act thereon" (internal quotation marks omitted)); 17B C.J.S. *Contracts* § 614 (2020) (recognizing that "[n]otice to terminate a contract must be clear and unambiguous" (footnote omitted)). There are no magic words required for termination; rather, the court should liberally construe notice, keeping in mind "the true intent and purpose of the parties." *Cedar Rapids*, 560 F.3d at 740 (quoting *Shain v. Wash. Nat'l Ins. Co.*, 308 F.2d 611, 617 (8th Cir. 1962)).

The parties do not contest this basic rule, but Appellants argue that CCEA only gave notice of its intent to terminate the Service Agreement, not the DTA. We disagree. While CCEA's first two letters arguably referred only to the Service Agreement, the August letter had the subject line "Final Notice: Contract for Dues Remittance" and stated:

> [T]here has not been a mutual agreement to modify the Agreement, and without mutual agreement, the terms and conditions of the Agreement will be null and void upon its expiration on August 31, 2017.
>
> . . . The Agreement serves as the dues transmittal contract . . . .
>
> *To be clear, when the current Agreement between CCEA and NSEA expires on August 31, 2017 there will not be a contract in place between the two organizations to collect and remit dues to NSEA.*

(Emphasis added.) This letter clearly states that after the current period expires, there will be no contract in place to collect and remit dues. Although CCEA referred to the Service Agreement, we find it impossible to read the letter without grasping that CCEA's "true intent and purpose" was to terminate the contract that governed dues transmittal. *See Cedar Rapids*, 560 F.3d at 740 (internal quotation marks omitted). Unlike the letter in *Cedar Rapids*, which merely expressed a desire to renegotiate before the contract renewed, *see id.*, CCEA's letter unequivocally stated that the contract *will* expire

on August 31, and that no agreement would be in place after that time. NSEA's reliance on the fact that CCEA referred to the Service Agreement by name and did not use the words "Dues Transmittal Agreement" would trap CCEA into renewing a contract that it clearly intended to terminate. We decline to impose a magic-words requirement that the terminating party must refer to the specific contract by name where, as here, the party's intent is otherwise clear and unequivocal. Therefore, we hold that CCEA terminated the DTA.[3]

We are not swayed by Appellants' argument that the DTA ceased to be terminable after the 2015 amendments to NSEA's bylaws. In Appellants' view, that amendment required affiliated locals to maintain a valid dues transmittal contract at all times. So interpreted, this provision conflicts with the DTA section permitting unilateral termination, and therefore, that section would have to be stricken pursuant to the DTA's automatic-amendment provision. We disagree with Appellants' reading.[4] Article VIII of the NSEA bylaws governs affiliation. Article VIII, section 3 provides that "NSEA shall affiliate a local association when it meets the following minimum standards," including that the local must "[h]ave a dues transmittal contract with NSEA." Article VIII, Section 5 addresses CCEA's duties by providing that "NSEA local affiliates must" meet certain criteria, none of which regards transmitting dues. These sections clearly place no obligation on CCEA regarding dues, and section 3 only defines when NSEA can affiliate a local union. Therefore, these sections do not place a duty on a local to consistently maintain a dues transmittal contract, and no conflict exists between the NSEA bylaws and the DTA that would trigger the DTA's automatic amendment provision. CCEA therefore retained the ability to terminate the DTA according to its termination provision.[5]

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[3]We need not address whether the Service Agreement and DTA were a "single integrated agreement." CCEA argues they were, while NSEA and NEA argue they were not. We conclude that it makes no difference: CCEA clearly terminated the DTA whether or not it was part of the Service Agreement.

[4]Appellants ask us to defer to NSEA's interpretation of its own governing documents. Such deference may be appropriate when a union is accused of violating its own constitution or bylaws. *See, e.g.*, *Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 511 (9th Cir. 1989) (giving deference to the union's interpretation of its governing documents when a former officer sued it for breaching those documents). However, the policy of nonintervention that underlies such deference to union defendants, *see Local 334 v. United Ass'n of Journeymen*, 669 F.2d 129, 132 (3d Cir. 1982), does not counsel deference when a union plaintiff seeks to enforce compliance with its view of its bylaws via judicial intervention.

[5]For the same reason that we conclude that CCEA retained the power to terminate the DTA, we also conclude that CCEA did not breach the NSEA bylaws. Given our conclusion, we need not reach CCEA's argument that NSEA's interpretation renders the DTA an impermissible perpetual contract under *Bell v. Leven*, 120 Nev. 388, 391, 90 P.3d 1286, 1288 (2004).

The NEA bylaws do not provide a basis for relief

We turn next to Appellants' claim that CCEA breached NEA's bylaws by terminating the DTA and refusing to transmit dues after the DTA expired. As a preliminary matter, the district court erred by holding that the bylaws were not binding on CCEA after it terminated the Service Agreement and DTA. Nevada has long recognized that a union's "constitution amounts to a binding agreement between the union and its members," *Hickman v. Kline*, 71 Nev. 55, 69, 279 P.2d 662, 669 (1955), and a union's bylaws are similarly binding, *Gable v. Local Union No. 387 Int'l Ass'n of Bridge Workers*, 695 F. Supp. 1174, 1177 (N.D. Ga. 1988) (treating a union's bylaws as contract terms that were part of, or addendums to, a union's constitution and therefore seeing "no reason" to distinguish between the bylaws and the constitution as members were bound by both). The individual members are not the only parties to these agreements, however. It is well settled that the agreements also bind the local affiliated union. *See United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 620-22 (1981) (treating a union's constitution as a contract between labor organizations and recognizing that as "the prevailing state-law view"); *Harker v. McKissock*, 81 A.2d 480, 482-83 (N.J. 1951) (treating a union's constitution and laws as a contract "establish[ing] the rights of the association and the component unions and the individual members, in relation to one another"); *Int'l Union of United Brewery Workers v. Becherer*, 67 A.2d 900, 901 (N.J. Super. Ct. App. Div. 1949) ("The relationship between a parent organization and a local union federated or affiliated with it is contractual and the terms of the contract are to be found in the constitution and by-laws of the parent organization."); *see also* 51 C.J.S. Labor Relations § 178 (December 2020 update) (providing that the rights and liabilities between a national and local union are governed by the contract that binds them). CCEA did not disaffiliate from NSEA and NEA until April 2018, and until then, it remained bound by its parent unions' bylaws.

Because the bylaws are a contract, we interpret them as we would any other contract. The goal of contract interpretation is to "discern the intent of the parties." *MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019). "This court initially determines whether the 'language of the contract is clear and unambiguous; if it is, the contract will be enforced as written.'" *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (quoting *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012)). "A contract is ambiguous if its terms may reasonably be interpreted in more than one way, but ambiguity does not arise simply because the parties disagree on how to interpret their contract." *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (citation omitted). In particular, an interpretation is

not reasonable if it makes any contract provisions meaningless, or if it leads to an absurd result. *See Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 305, 396 P.3d 834, 839 (2017).

Section 2-9(a) of the NEA bylaws, entitled "Dues Transmittal and Enforcement Procedures," states that "[l]ocal affiliates [like CCEA] shall have the full responsibility for transmitting state and [NEA] dues to state affiliates on a contractual basis. Standards and contracts for transmitting dues shall be developed between the state affiliate and each local affiliate." In our view, this language can only reasonably be read as reserving any obligations regarding the transmittal of dues to a separate contract. Because the Dues Transmittal and Enforcement Procedures *begin* by requiring the parties to set up a separate contract and state that the responsibility to transmit dues will be "on a contractual basis," we conclude that the parties intended that the separate contract should govern.

This interpretation gives a plausible meaning to every word of the bylaws. In particular, the language placing "full responsibility" on the local union to abide by its contract with the state affiliate is still operative. Because it closely mirrors language placing "full responsibility" on the state affiliate to abide by its contract with the national union, we read these clauses as ensuring that neither the state union nor the local union will be penalized for the other's breach—for example, if the local timely transmitted dues to the state union, but the state union failed to forward those dues to the national union. That is a reasonable provision to include in a multi-party agreement. In contrast, if we interpreted this language to directly obligate local unions to transmit dues, as Appellants urge, the words "contractual basis" would be left with no apparent meaning.

Appellants further urge that even if section 2-9(a) does not obligate CCEA to transmit dues, section 2-9(b) does. That section begins by stating that "[a] local shall transmit to a state affiliate . . . at least forty (40) percent of [NEA] dues receivable for the year by March 15 and at least seventy (70) percent of [NEA] dues receivable for the year by June 1." Read in total isolation, this provision's use of "shall" might appear to obligate the local to transmit certain percentages of dues by certain dates. But this reading would lead to the absurd result that, in the absence of a separate contract, the bylaws themselves obligate the local to transmit only 70% of the national's dues each year—not the remaining 30%, and *none* of the state affiliate's dues, which would have to be transmitted on a volunteer basis, if at all. We cannot imagine that such a piecemeal result was "the intent of the parties." *See MMAWC*, 135 Nev. at 279, 448 P.3d at 572. Instead, we conclude that these provisions are best harmonized by reading section 2-9(b) as outlining the permissible terms of the separate contracts that section 2-9(a) requires. This is a reasonable interpretation of the language, and it is consistent with the terms of the actual DTA, which required CCEA to transmit one-twelfth of the annual dues each month.

Finally, we are unpersuaded by Appellants' argument that CCEA breached the bylaws by terminating the DTA. In Appellants' view, the bylaws imposed a continuing obligation on each local not only to negotiate a dues transmittal contract with the state affiliate, but to keep that contract in effect so long as the local remained affiliated with NEA. We find no textual basis in the bylaws for this interpretation. Further, Appellants' reading would render the termination clause in the DTA meaningless. Where the parties agree that a later-negotiated contract will govern a certain aspect of their relationship, and then further agree that either party may terminate that contract on timely notice, we must give effect to that choice.[6]

In summary, while the bylaws are indeed a contract—and the district court erred by holding they were not—we enforce those bylaws according to their terms. And ultimately, there is only one reasonable interpretation of the bylaws.[7] They required CCEA to work with NSEA to develop a contract governing the transmittal of dues. CCEA did that and thereby complied with the bylaws. Therefore, while we disagree with the district court's reasoning, we affirm its judgment. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

CCEA is not liable for unjust enrichment or conversion

We turn next to Appellants' tort claims. The district court granted summary judgment for CCEA on Appellants' unjust enrichment and conversion claims because it found Appellants failed to show they had any property right in the disputed dues. We affirm, although again on slightly different grounds. *See id.*

"Conversion is 'a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein . . . .'" *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (quoting *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)). Although conversion is not excused by mere good faith, *id.*, we have long held that where there is genuine doubt as to the rightful ownership of property, a party may properly "resort to the judicial process" to resolve that doubt, *Wantz*, 74 Nev. at 198, 326 P.2d at 414. For example, in *Wantz*, the defendant Redfield asserted a third-party claim under NRS 31.070 to certain property that Wantz had attached in a separate action. *Id.* at 197, 326 P.2d at 413-14. Redfield then took possession of the property pursuant to that statute. *Id.* at 197, 326

[6]We decline to speculate as to what the parties' obligations under the bylaws would be if the DTA had *not* contained an express termination clause and CCEA had simply repudiated that contract without any legal basis for doing so.

[7]Although we do not find the bylaws ambiguous, we must acknowledge that they are not a model of clarity. We take this opportunity to note that if we did find the bylaws ambiguous, we would "construe [that] ambiguity against the drafter," *MMAWC*, 135 Nev. at 279, 448 P.3d at 572, and would accordingly reach the same result.

P.2d at 414. Ultimately, the district court determined that Redfield did not in fact own the property, and Wantz sued him for conversion. *Id.* This court held that Wantz had done nothing wrong. "In the absence of malice, which the record here does not reveal, it is not wrongful or tortious to engage in a dispute as to title nor to submit that dispute to the courts." *Id.* at 198, 326 P.2d at 414. We distinguished a California case where the claimant was held liable for conversion because "after taking possession, [it] had sold the property claimed and pocketed the proceeds of the sale." *Id.* at 199, 326 P.2d at 414 (citing *McGaffey Canning Co. v. Bank of Am.*, 294 P. 45 (Cal. Dist. Ct. App. 1930)). In contrast, Redfield had "done nothing other than to hold the property pending the outcome of the hearing." *Id.*

Although *Wantz* involved third-party claim statutes that are not at issue here, we do not think that is significant. A party does not exert wrongful dominion over property where it affirmatively submits a genuine dispute regarding the property to the courts and then appropriately holds the subject property pending the court's decision. That is especially true where, as here, the court determines that the party was never required to transmit the property to anyone else.[8] Of course, this rule would not apply if the party's claim of right is made with "malice," *see id.* at 198, 326 P.2d at 414, or if the party improperly disposes of the property, *see id.* at 199, 326 P.2d at 414.[9] But here, we hold that CCEA did not commit conversion by retaining the disputed dues in an escrow account pending litigation.

The unjust enrichment claim fails for a similar reason. "Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Certified Fire Prot. Inc. v. Precision Constr. Inc.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (internal quotation marks omitted). Here, to the extent that the dues constitute a "benefit," CCEA has only "retained" those dues pending the

[8]To the extent Appellants argue that they have a property interest in the dues that is untethered to the contracts—which we have held do not require CCEA to transmit dues—we reject this argument. Appellants' claim that a portion of the dues was always "designated" as "NSEA and NEA dues" shows nothing more than Appellants' contractual expectation. A party that has a contractual expectation of payment cannot "duplicate[ ] [the] breach of contract claim" with a conversion claim. *Wechsler v. Hunt Health Sys., Ltd.*, 330 F. Supp. 2d 383, 431-32 (S.D.N.Y. 2004); *see also Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 876 (9th Cir. 2007) (noting that duplicative remedies "add[ ] unnecessary complexity to the law" (internal quotation marks omitted)).

[9]The federal cases cited by Appellants are distinguishable on this ground. *See, e.g.*, *WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F. Supp. 2d 1180, 1194-95 (D. Nev. 2010) (finding that a conversion claim was properly pleaded when the plaintiff alleged a collections agency fraudulently collected debt and did not remit the funds to the creditor).

outcome of this litigation.[10] It is not inequitable for a party to place genuinely disputed funds in escrow while a court decides who is rightfully entitled to those funds.

Therefore, because CCEA properly placed the dues in escrow awaiting judicial determination, and because the court correctly found CCEA was not required by any contract to transmit those dues, CCEA did not commit either conversion or unjust enrichment.

The district court correctly granted summary judgment on the fraud claim

We turn finally to the appellant teachers' fraud claim alleging that CCEA induced them to join the union, and to pay dues, by falsely representing that it would continue to transmit dues to NSEA. After litigation began, CCEA offered to return to those teachers not only their escrowed dues, but also the dues that they paid to CCEA itself. CCEA made this offer in light of its view that it was "not worth the Parties' time and the Court's resources to litigate over such a nominal amount." Finding that this offer negated any damages to support a fraud claim, the district court ordered CCEA to return the escrow funds to the teachers upon entering summary judgment for CCEA. It also found that the teachers had failed to establish any facts supporting punitive damages.

To prevail on a fraud claim, a plaintiff must prove five elements by clear and convincing evidence: (1) a false representation, (2) the defendant's knowledge or belief that the representation is false, (3) the defendant's intention to induce the plaintiff's reliance, (4) the plaintiff's justifiable reliance, and (5) damages. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992). In general, punitive damages are available when the plaintiff shows "oppression, fraud or malice" by "clear and convincing evidence." NRS 42.005(1)(a).

Here, the district court erred by finding that CCEA's offer negated the element of damages. Generally, when a defendant offers to pay the *full* amount of a plaintiff's claim, the court should enter judgment for the plaintiff and against the defendant, even over the plaintiff's objections. *See Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 909 F.3d 534, 542-43 (2d Cir. 2018). But a court should not do so "unless the defendant surrenders to the *complete* relief sought by the plaintiff." *Id.* at 543 (internal quotation marks omitted). Anything less is nothing but a settlement offer that the plaintiff is free to reject. *See id.* at 541 (citing *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016)).

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[10]We note that Appellants are *not* arguing that they rendered any services and are owed the reasonable value thereof. *See Certified Fire*, 128 Nev. at 380-81, 283 P.3d at 256-57. Instead, the unjust enrichment claim is based on CCEA's retention of the dues themselves.

The language of CCEA's offer was unmistakably the language of settlement. It was not for the full amount that the teachers could have obtained if they prevailed because punitive damages and pre-judgment interest were at least potentially available under NRS 42.005 and NRS 17.130(2), respectively.[11] Furthermore, if CCEA *had* offered complete relief, the district court should have enforced the offer by entering judgment for the teachers, not for CCEA. *See Geismann*, 909 F.3d at 542 (explaining that "where a defendant surrenders to 'complete relief' in satisfaction of a plaintiff's claims, the district court may enter default judgment *against the defendant*" (emphasis added)).

Although the district court erred by enforcing CCEA's settlement offer, we conclude that summary judgment was nevertheless warranted. In order to prevail on their fraud claim, the teachers must prove by clear and convincing evidence not only that CCEA made a false statement, but also that CCEA knew or believed that the statement was false. *Bulbman*, 108 Nev. at 110-11, 825 P.2d at 592. Accordingly, to withstand summary judgment, the teachers must produce evidence "sufficient to establish the existence" of those facts, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), such that a "rational trier of fact could return a verdict" in their favor, *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). Even when we construe the teachers' evidence in the "light most favorable" to them, *id.* at 732, 121 P.3d at 1031, the teachers did not meet this burden of production.

The teachers allege that CCEA knew as early as May 2017 that it would stop transmitting dues in September 2017. The only evidence they rely on to support this, however, is CCEA's May letter stating it was terminating the Service Agreement with the intention of negotiating a successor agreement. The undisputed evidence shows that CCEA continued to seek to negotiate a new dues transmittal agreement at least through August. CCEA's letter does not support the inference that CCEA knew in May that it would stop transmitting dues after August. The teachers also allege that after August, at least one teacher was again told—by the president of CCEA—that his dues were "waiting to be sent to NSEA and NEA when a solution is reached with the contract." But although no solution was ultimately reached, no evidence suggests that CCEA's president's statement

[11]The district court's order incorrectly suggests that the teachers would have had to prove additional facts supporting punitive damages beyond those required to prove fraud. NRS 42.005(1) (permitting punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, *fraud*, or malice") (emphasis added); *see S.J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 107 Nev. 294, 297, 810 P.2d 775, 777 (1991) (explaining that no "qualifying adjective" like "aggravated" is necessary to support punitive damages for fraud).

was intended to mislead at the time it was made.[12] The evidence certainly does not establish by clear and convincing evidence that CCEA knowingly made a false statement. At best, substantial "speculation" is required. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030 (internal quotation marks omitted).[13] Therefore, while the district court erred by relying on CCEA's settlement offer, it nevertheless reached the correct result, and we affirm. *See Saavedra-Sandoval*, 126 Nev. at 599, 245 P.3d at 1202.

CONCLUSION

When unions are organized hierarchically, the parent unions' constitution and bylaws form a binding contract with the local union. Those contracts are enforced according to their terms, like any other contract. In this case, NEA's bylaws expressly reserved most of the local affiliate's obligation to transmit dues for a separate contract. CCEA validly terminated that contract and ended its obligation to transmit dues unless and until a new contract was negotiated. We also hold that CCEA did not commit unjust enrichment or conversion by not transmitting the dues. It lacked a contractual obligation to transmit the dues, was not otherwise obligated to transmit them, and properly placed the dues in escrow pending resolution of this dispute. Finally, we hold that an offer to repay a disputed sum does not absolve a defendant of liability for fraud. Nevertheless, summary judgment was warranted here because appellant teachers did not produce evidence sufficient to support a finding that CCEA knowingly made a false statement. Accordingly, the judgment of the district court is affirmed.

Parraguirre and Silver, JJ., concur.

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[12]The fact that this litigation was already ongoing at that time does not show that CCEA did not intend to negotiate a new contract. CCEA's members would not vote to disaffiliate until April. Until then, CCEA would have known that it would have to eventually transmit dues in order to remain an affiliate in good standing.

[13]To be clear, we reject CCEA's overbroad assertion that "self-serving" affidavits and declarations can *never* raise genuine issues of material fact. "Most affidavits are self-serving," *Wilson v. McRae's, Inc.*, 413 F.3d 692, 694 (7th Cir. 2005), and yet NRCP 56(c)(1)(A) expressly permits parties to rely on affidavits. The problem with the teachers' affidavits is not that they were self-serving, but that they failed to "set forth specific facts demonstrating the existence of a genuine factual issue." *Wood*, 121 Nev. at 731, 121 P.3d at 1030-31 (internal quotation marks omitted).

ARTHUR LEE SEWALL, JR., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE DAVID BARKER, Senior District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 81309

March 4, 2021 481 P.3d 1249

Original petition for a writ of mandamus challenging a district court order denying a motion for release on reasonable bail.

Petition granted.

Law Office of Christopher R. Oram and *Christopher R. Oram*, Las Vegas; *Joel M. Mann, Chtd.*, and *Joel M. Mann*, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck* and *Alexander G. Chen*, Chief Deputy District Attorneys, Clark County, for Real Party in Interest.

Before the Supreme Court, Hardesty, C.J., Parraguirre and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

The State charged petitioner Arthur Sewall, Jr., by indictment with first-degree murder with the use of a deadly weapon. Sewall successfully moved to suppress his confession and later sought release on reasonable bail. The district court denied bail, finding "that the proof [was] evident and the presumption great" that Sewall committed the charged crime. Sewall argues that the district court was required to grant his release on bail under Article 1, Section 7 of the Nevada Constitution, because the State, in opposing bail, failed to meet its burden to show with admissible evidence that he committed the elements of first-degree murder with the use of a deadly weapon.

We conclude that the evidence the State presented, which was essentially limited to Sewall's semen being found on the victim and his previous ownership of a firearm that *could* have fired the round detectives found at the crime scene, is insufficient to defeat Sewall's right to reasonable bail. This evidence does not tend to demonstrate that Sewall committed the elements of first-degree murder. District courts may not rely on conjecture and inferences in denying bail. We therefore grant the petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

In 1997, Las Vegas Metropolitan Police Department (LVMPD) detectives responded to the scene of an apparent murder. There, they found the victim lying in a pool of blood with a gunshot wound in the back of her head and abrasions on her forehead and nose. The detectives recovered a spent round on the floor, though they did not find a cartridge for the round. The medical examiner that performed the autopsy concluded that the cause of death was homicide. A crime scene analyst administered a sexual assault kit, finding semen in the victim's vagina and rectum and on the inside of her jeans. However, LVMPD was unable to solve the homicide, and the case went cold.

In 2017, LVMPD detectives received a notification that Sewall's DNA matched the DNA that the crime scene analyst found during the victim's autopsy. A ballistics examination determined that the spent round found at the scene was consistent with a .357, a .38, or a 9mm revolver. The ballistics examination also concluded that the round's rifling characteristics were consistent with, but not limited to, an INA, a Ruger, a Smith & Wesson, and a Taurus. LVMPD detectives interviewed Sewall, wherein he confessed to paying the victim for sex and related that his gun went off during the encounter and that he fled the scene afterwards. The State charged Sewall by indictment with first-degree murder with the use of a deadly weapon.

Sewall moved to suppress his confession based on a violation of his *Miranda* rights, which the district court granted and we affirmed. *State v. Sewall*, Docket No. 79437, at *1 (Order of Affirmance, Apr. 16, 2020). Thereafter, Sewall moved for a setting of reasonable bail on the basis that the State's proof was not evident, nor the presumption great, that he committed first-degree murder with the use of a deadly weapon. The State opposed, relying upon evidence that (1) Sewall claimed he did not know the victim; (2) LVMPD found Sewall's DNA in the victim's vagina, rectum, and on the inside of her jeans; (3) the victim was likely shot with a revolver because LVMPD did not find a cartridge casing at the murder scene; (4) the round that LVMPD found at the murder scene was consistent with a .357, a .38, or a 9mm revolver; and (5) Sewall owned a Ruger .357 revolver at the time of the alleged murder. After a hearing, the district court denied bail, finding that the proof was evident and the presumption great that Sewall committed murder.[1] Sewall now petitions this court for a writ of mandamus, challenging the constitutionality of the district court's bail order.[2]

[1]The Honorable David Barker, Senior District Judge, presided over Sewall's bail hearing, but The Honorable Valerie Adair, District Judge, signed the order.

[2]We previously granted this writ petition in an unpublished order. *Sewall v. Eighth Judicial Dist. Court*, Docket No. 81309 (Order Granting Petition for Writ of Mandamus, Dec. 4, 2020). Sewall filed a motion to reissue the order as an opinion, which we grant. We issue this opinion in place of our previous order. NRAP 36(f).

DISCUSSION

We elect to entertain Sewall's petition because he lacks an adequate legal remedy to challenge the district court's denial of bail and because Sewall's liberty interest is a fundamental right. *See Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 160-62, 460 P.3d 976, 983-84 (2020) (exercising discretion to entertain a petition for a writ of mandamus challenging, among other things, a district court's bail decisions).

The presumption in favor of bail

Article 1, Section 7 of the Nevada Constitution provides that criminal defendants have the right to bail prior to conviction. However, this right is limited for defendants accused of "[c]apital [o]ffenses or murders punishable by life imprisonment without [the] possibility of parole when the proof is evident or the presumption great" that the defendant committed the charged crime. Nev. Const. art. 1, § 7; *see also* NRS 178.484(4) (providing that "[a] person arrested for murder of the first degree may be admitted to bail unless the proof is evident or the presumption great" that the defendant committed first-degree murder). "The burden rests with the state to supply that proof" by competent evidence. *Howard v. Sheriff*, 83 Nev. 48, 50, 422 P.2d 538, 539 (1967); *see In re Wheeler*, 81 Nev. 495, 500, 406 P.2d 713, 716 (1965) (observing that the State must offer "competent evidence tending to prove the commission of [the] offense . . . before the accused's right to bail may be limited"). "The quantum of proof necessary to establish the presumption of guilt" for purposes of defeating a bail request "is considerably greater than that required to establish the probable cause necessary to hold a person answerable for an offense," *Hanley v. State*, 85 Nev. 154, 161, 451 P.2d 852, 857 (1969), but less than what is required at trial to prove guilt beyond a reasonable doubt, *Wheeler*, 81 Nev. at 500, 406 P.2d at 716. A district court abuses its discretion when it arrives at the conclusion to deny bail "by stacking inference upon inference" and where the connection between the evidence and charged crime is conjectural. *Howard*, 83 Nev. at 51-52, 422 P.2d at 539-40.

The State's evidence is insufficient to defeat the presumption in favor of bail

We previously observed that it is not possible to formulate a bright-line rule for what constitutes sufficient evidence to defeat bail. *Wheeler*, 81 Nev. at 500, 406 P.2d at 716. Nevertheless, existing caselaw on bail determinations informs our analysis on this fact-specific inquiry, which must be reviewed on a case-by-case basis. *Id*.

In *In re Wheeler*, the State charged the defendant with murder. *Id*. at 497-98, 406 P.2d at 715. The defendant requested release on

bail, which the district court denied. *Id*. at 498, 406 P.2d at 715. On appeal, we reviewed the State's evidence, which consisted of a dying declaration by the murder victim who told a responding police officer that the defendant shot him. *Id*. at 501, 406 P.2d at 716-17. Because there was an appropriate foundation to admit the dying declaration, and because the declaration, if true, could support "a finding of the essential components of first degree murder," we held that the State presented sufficient evidence to defeat bail. *Id*. at 501-03, 406 P.2d at 717.

In *Howard v. Sheriff*, the State charged the defendant and her husband with murder. 83 Nev. at 50, 422 P.2d at 538. The defendant requested release on bail, which the district court denied. *Id*. at 50, 422 P.2d at 538-39. On appeal, we noted that the State offered only transcripts of the testimony given during the preliminary hearing, *id*. at 50, 422 P.2d at 539, the contents of which were as follows. A pathologist testified that the murder victim, a police officer, died from three gunshot wounds, which were not self-inflicted. *Id*. at 50-51, 422 P.2d at 539. The responding officer testified that he found the defendant's husband's driver's license on the hood of the police car. *Id*. at 51, 422 P.2d at 539. A taxi driver testified that he saw the defendant's husband speaking with the victim while the defendant was seated in a car stopped in front of the victim's police car. *Id*. A church organist testified that he saw a woman "scuffling with the" victim by two stopped cars on the same road and around the same time as the taxi driver, while a man ran up to grab either the victim or the woman, after which, the victim shoved the man. *Id*. However, the church organist did not identify the woman as the defendant or the man as the defendant's husband. *Id*. We held that the district court improperly denied bail because the evidence did not tend to show the elements of first-degree murder but instead showed only that the defendant scuffled with the victim around the time the victim was fatally shot. *Id*. Therefore, any "connection between [the scuffle] and the shooting [was] left wholly to conjecture." *Id*.

In *Hanley v. State*, the State charged the defendant with murder. 85 Nev. at 155, 451 P.2d at 853. The defendant moved for bail, which the district court denied. *Id*. at 161, 451 P.2d at 857. The State proffered the following evidence during the preliminary hearing. A deputy sheriff testified that he found footprints from a single person going from the victim's home to a truck parked in the victim's yard and that the footprints around the truck suggested the person waited at that location for some time. *Id*. at 157, 451 P.2d at 854. Additionally, the deputy sheriff testified that he followed the footprints into the desert, where he found shotgun parts. *Id*. A witness who knew the defendant for several years testified that the shotgun parts belonged to the defendant. *Id*. The witness also testified that the defendant discussed hiring somebody to murder the victim with him. *Id*.

at 157-59, 451 P.2d at 854-55. Recognizing that the State must offer more than a mere inference of guilt of some crime, we held that the State's proffered evidence was insufficient to defeat the defendant's motion for bail. *Id*. at 162, 451 P.2d at 857.

The presumption was not great, nor was the proof evident, that Sewall committed first-degree murder

Applying the analysis from those cases, we hold that the evidence the State presented here—that Sewall's semen was found on the victim and that a firearm owned by Sewall was one of several models that *could* have fired the round that LVMPD detectives found at the crime scene—is insufficient to defeat Sewall's right to reasonable bail under Article 1, Section 7 of the Nevada Constitution because it does not tend to demonstrate that Sewall committed the elements of first-degree murder.

The evidence clearly demonstrates that Sewall had sexual intercourse with the victim prior to her apparent murder. However, the State failed to present convincing evidence that tends to prove that a .357 Ruger revolver *was* the murder weapon, much less that it was Sewall's .357 Ruger revolver. Furthermore, the State's proffered evidence does not tend to prove the elements of first-degree murder under a "willful, deliberate and premeditated killing" theory, NRS 200.030(1)(a), or under a felony-murder theory, NRS 200.030(1)(b). Therefore, we conclude that the district court's finding "that the proof [was] evident and the presumption great" that Sewall committed first-degree murder relies upon inference or conjecture rather than convincing evidence.

Sewall is awaiting trial and presumed to be innocent until found guilty. *Wheeler*, 81 Nev. at 499, 406 P.2d at 715. In our criminal justice system, "punishment should follow conviction, not precede it." *Id*. Accordingly, we hold that the district court's denial of Sewall's request for release on reasonable bail is contrary to the law, given the State's failure to rebut the presumption in favor of bail under Article 1, Section 7 of the Nevada Constitution.[3] *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (observing that a district court's decision constitutes an arbitrary or capricious exercise of discretion warranting mandamus relief where it is "contrary to the evidence or established rules of law") (internal quotation marks omitted). Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to grant Sewall's motion for release on reasonable bail in an amount and under conditions that the district court determines, after an adversarial hearing in accordance with

[3]Because we are resolving Sewall's petition on these grounds, we decline to address his remaining arguments.

Valdez-Jimenez v. Eighth Judicial District Court, 136 Nev. 155, 460 P.3d 976 (2020), are necessary to ensure Sewall's presence at trial and the safety of the community.[4]

Hardesty, C.J., and Parraguirre, J., concur.

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[4]Because the clerk of this court issued the writ of mandamus upon entry of the original order granting the petition, the clerk of this court shall not reissue the writ.

NAUTILUS INSURANCE COMPANY, Appellant, *v.* ACCESS MEDICAL, LLC; ROBERT CLARK WOOD, II; and FLOURNOY MANAGEMENT LLC, Respondents.

No. 79130

March 11, 2021 482 P.3d 683

Certified question under NRAP 5 concerning an insurer's right to reimbursement. United States Court of Appeals for the Ninth Circuit; Ronald M. Gould, Sandra S. Ikuta, and Ryan D. Nelson, Circuit Judges.

Question answered.

[Rehearing denied May 7, 2021]

Cadish, J., with whom Parraguirre and Silver, JJ., agreed, dissented.

Selman Breitman, LLP, and *Gil Glancz*, Las Vegas; *Linda Wendell Hsu*, San Francisco, California; *Peter W. Bloom*, Oakland, California, for Appellant.

Harper Selim and *James E. Harper*, Las Vegas, for Respondent Flournoy Management LLC.

The Schnitzer Law Firm and *Jordan P. Schnitzer*, Las Vegas, for Respondents Access Medical, LLC, and Robert Clark Wood, II.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Crowell & Moring LLP* and *Laura Anne Foggan*, Washington, D.C., for Amici Curiae Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

Under most standard liability insurance policies, the insurer owes a duty to defend its policyholder against suits by third parties seeking damages covered by the policy. Insurers and policyholders sometimes disagree as to whether the insurer's duty to defend is triggered by a particular suit. As a practical matter, those coverage disputes can rarely be resolved before it becomes necessary to actively defend the third party's suit. Accordingly, an insurer often offers to pay for the defense, while reserving its right to seek relief from the duty to do so.

In this case, the Ninth Circuit Court of Appeals certified the following question to this court:

> Is an insurer entitled to reimbursement of costs already expended in defense of its insureds where a determination has been made that the insurer owed no duty to defend and the insurer expressly reserved its right to seek reimbursement in writing after defense has been tendered but where the insurance policy contains no reservation of rights?

We conclude that the answer is yes. When a party to a contract performs a disputed obligation under protest and a court later determines that the contract did not require performance, the party may ordinarily recover in restitution. This rule gives effect to the terms of the parties' bargain. It applies to an insurance policy as it would to any other contract.

FACTS AND PROCEDURAL BACKGROUND

The following facts are drawn from the Ninth Circuit's order certifying this question. *See Nautilus Ins. Co. v. Access Med., LLC*, Docket No. 79130 (Order Certifying Question to the Nevada Supreme Court, July 10, 2019). "[T]his court's review is limited to the facts provided by the certifying court, and we must answer the questions of law posed to us based on those facts." *In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 953, 267 P.3d 786, 793 (2011).

Ted Switzer and respondents were former business partners who worked together to sell medical devices. After the partnership soured, Switzer filed a cross-complaint against respondents in California state court. Among Switzer's thirty-one claims was one for "interference with prospective economic advantage," based on respondents' alleged interference with Switzer's business relationships with hospitals. During discovery, respondents uncovered an email that was not mentioned in the complaint. In the email, Jacqueline Weide, respondents' representative, approached a hospital administrator to discuss the sale of certain spinal implants. Weide stated that the current California distributor had been "banned from selling [those] implants." Switzer was the referenced distributor, but he was not named in the email.

Respondents tendered defense of the suit to their insurer, Nautilus. Under the insurance policy, Nautilus is required to defend respondents against "any 'suit' seeking . . . damages" because of a "personal and advertising injury," "arising out of . . . [o]ral or written publication, in any manner, of material that slanders or libels a person or organization." Nautilus initially declined to defend, but eventually decided to defend the suit while expressly reserving its rights. In particular, in multiple letters, it reserved the right to dis-

claim coverage, withdraw from defense, and obtain a reimbursement of defense fees if a court determined that no potential for coverage existed for the claims. Respondents did not object, and Nautilus began to defend respondents against Switzer's suit. Simultaneously, Nautilus sought a declaratory judgment in a Nevada federal district court, stating that it had no duty to defend respondents.

Nautilus eventually obtained the declaratory judgment it sought. The federal court found that Nautilus's duty to defend under the insurance policy was never triggered because Switzer's cross-complaint did not allege—and the Weide email did not contain—a false statement that would support a claim for defamation, libel, or slander under California law.[1]

Nautilus then moved for further relief under the Declaratory Judgment Act, 28 U.S.C. § 2202, seeking reimbursement of the expenses it had already incurred defending the original California suit. The district court concluded that Nautilus was not entitled to further relief because Nautilus did not (1) include a claim for reimbursement or damages in its complaint, (2) show it was entitled to relief under 28 U.S.C. § 2202, or (3) establish that it was entitled to reimbursement under Nevada law.[2]

On appeal, the Ninth Circuit Court of Appeals affirmed that Switzer's suit did not trigger a duty to defend. *Nautilus Ins. Co. v. Access Med., LLC*, 780 F. App'x 457, 459 (9th Cir. 2019). However, it reserved judgment on whether Nautilus could seek further relief. It explained that Nautilus's entitlement to further relief turned on an unresolved issue of Nevada state law, because this court has not spoken directly on the issue of an insurer's entitlement to reimbursement under these circumstances. *Id.* at 459-60. The Ninth Circuit noted a split of authority among other state courts. Order Certifying Question, at 6-8 (citing *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 468 (Cal. 2005) (providing that "the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense, which, under its contract of insurance, it was never obliged to furnish"); *Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092, 1103 (Ill. 2005) (concluding that an insurer cannot obtain reimbursement because, by paying defense costs, "the insurer is protecting itself at least as much as it is protecting its insured"); and *Shoshone First Bank v. Pac. Emp'rs Ins. Co.*, 2 P.3d 510, 515-16 (Wyo. 2000) (holding that the "insurer is not permit-

[1]The Ninth Circuit's certification order does not clearly indicate whether the statement that Switzer was banned from selling implants was not false, or whether it was false but nevertheless did not support a claim for defamation, libel, or slander.

[2]Although choice-of-law issues in multistate coverage cases can be complex, none are presented for our review. The federal district court determined that California law governs the underlying allegedly tortious conduct, while Nevada law governs Nautilus's alleged right to reimbursement.

ted to unilaterally modify and change policy coverage" by seeking reimbursement)).

The Ninth Circuit therefore certified the question to this court. We accepted the certified question because we agree that it presents an issue of first impression in this state.

DISCUSSION

Standard of review

We only accept certification of "questions of law." NRAP 5. We decide those questions of law de novo, *see, e.g.*, *Nev. Dep't of Corrs. v. York Claims Servs. Inc.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015), in accordance with the purpose of a certified question, which is to clarify our state's law "when there is no controlling precedent," *see* NRAP 5(a). However, our "role is limited to answering the question[ ] of law posed" to us. *Fontainebleau*, 127 Nev. at 955, 267 P.3d at 794-95. Accordingly, we do not revisit the certifying court's factual determinations. *Id.* at 953, 267 P.3d at 793.

No contract governs the right to reimbursement here

Nautilus contends that it is entitled to reimbursement under a theory of unjust enrichment or quasi-contract. However, respondents answer that "unjust enrichment is not available when there is an express, written contract" covering the same subject matter. *LeasePartners Corp. v. Robert L. Brooks Tr.*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). Respondents contend that the insurance policy, and only the insurance policy, governs this dispute. We disagree.

Insurance policies are, of course, contracts, and they are treated like other contracts. *Century Sur. Co. v. Andrew*, 134 Nev. 819, 821, 432 P.3d 180, 183 (2018). "An insurance policy [typically] creates two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend."[3] *Id.* at 822, 432 P.3d at 183. These duties are distinct, but related. "[A]n insurer's duty to defend is triggered whenever the potential for indemnification arises, and it continues until this potential for indemnification ceases." *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412, 254 P.3d 617, 621 (2011). There is a potential for indemnification when the allegations in the third party's complaint show that there is "arguable or possi-

[3]On one occasion, this court stated that the duty to defend is a "legal duty that arises under the law, as opposed to a contractual duty arising from the policy." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 318, 212 P.3d 318, 330 (2009). In context, it appears the *Allstate* court meant to refer to the implied duty of good faith and fair dealing. *Cf. id.* at 309, 212 P.3d at 324 (framing issue as "the relationship between an insurer's duty to defend and the implied covenant of good faith and fair dealing"). When an insurer has a contractual duty to defend, the law implies a duty to do so in a reasonable manner. *Id.* at 311-12, 212 P.3d at 326. But the duty to defend arises, in the first place, from the contract.

ble coverage," *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004), or when the insurer "ascertains facts which give rise to the potential of liability under the policy," *Century Sur.*, 134 Nev. at 822, 432 P.3d at 183 (internal quotation marks omitted).

"However, 'the duty to defend is not absolute.'" *United Nat'l*, 120 Nev. at 687, 99 P.3d at 1158 (quoting *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988)). If neither the allegations of the complaint nor the facts known to the insurer show any possibility of coverage, then there is no duty to defend. In such a case, the insurance policy simply does not apply.

In this case, the federal district court held, and the Ninth Circuit affirmed, that the duty to defend was "not triggered," as the Weide email did not contain a false statement that would support a claim for defamation, libel, or slander. Order Certifying Question, at 4; *see Nautilus*, 780 F. App'x at 459. Because this case is a certified question, not an appeal, we are not concerned with whether we would have reached the same conclusion. We accept the judgment of the federal courts that there was never even "arguable or possible coverage." *See United Nat'l*, 120 Nev. at 687, 99 P.3d at 1158. We are concerned here only with the consequences of that judgment.

Accordingly, we give no weight to respondents' arguments concerning the scope of the insurer's duty to defend in the first instance. To be sure, it is true that insurance policies are "broadly interpreted," *United Nat'l*, 120 Nev. at 684, 99 P.3d at 1156; that doubts regarding coverage should be resolved in favor of the policyholder, *id.* at 687, 99 P.3d at 1158; and that policies should be construed to achieve the policyholder's reasonable expectations, *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011). But this court is not tasked with construing the policy. The federal courts have already done that, and they have determined that under the policy, Nautilus never owed a duty to defend.[4] Nautilus would not have had any contractual duty to indemnify respondents even if Switzer had prevailed at trial. *See Century Sur.*, 134 Nev. at 822, 432 P.3d at 184. Therefore, the contract between the parties does not apply to the instant dispute, and the existence of that contract does not foreclose an unjust enrichment claim.

[4]In some cases, the duty to defend is triggered when the complaint is filed, but that duty later ceases due to changed circumstances. *Great Am. Ins. Co. v. Superior Court*, 100 Cal. Rptr. 3d 258, 269 (Ct. App. 2009) (stating that the duty to defend may terminate due to "(1) the discovery of new or additional evidence, (2) a narrowing or partial resolution of claims in the underlying action, or (3) the exhaustion of the policy"); *see Benchmark*, 127 Nev. at 412, 254 P.3d at 621 (noting that the duty to defend "continues until th[e] potential for indemnification ceases"). That is not what the district court determined happened here.

A party that performs a disputed obligation under protest, and does not in fact have a duty to perform, is entitled to reimbursement

Having concluded that the contract does not govern, we turn to the merits of Nautilus's unjust enrichment claim. Unjust enrichment has three elements: "the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." *Cert. Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (internal quotation marks omitted). When the insurer furnishes a defense, it is clear that the insurer has conferred a benefit on the policyholder, and that the policyholder appreciates it. The issue is whether equity requires the policyholder to pay.

This situation, although arising here in the context of an insurance policy, arises more generally in contract law. Even reasonable parties to a contract may disagree as to the application of their contract to an unforeseen situation. In particular, one party may believe in good faith that performance is due, while the other party—also in good faith—disagrees. A court will ultimately have to decide who is right and who is wrong. But in the meantime, it can be inefficient and inequitable to require those parties to obtain a declaratory judgment before proceeding. *See generally* Mark P. Gergen, *Restitution as a Bridge Over Troubled Contractual Waters*, 71 Fordham L. Rev. 709 (2002); *see also id.* at 718-19 (noting that "[t]here are no preliminary declaratory judgments").

That is especially true in the insurance context. An insurer that refuses to defend a claim and then loses the coverage dispute may be subject to significant liability, which can vastly exceed the policy limits. *See Century Sur.*, 134 Nev. at 820, 432 P.3d at 182 (holding that "an insurer's liability where it breaches its contractual duty to defend is not capped at the policy limits plus the insured's defense costs, and instead, an insurer may be liable for any consequential damages caused by its breach"). This creates a significant disincentive for the insurer to deny a defense outright when there is *any* possibility—even a relatively remote one—that the claim may turn out to be covered.

These situations arise frequently enough that scholars have devised solutions. The Restatement (Third) of Restitution and Unjust Enrichment provides that:

> If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the disputed obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, pre-

> serving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.

Restatement (Third) of Restitution & Unjust Enrichment (hereinafter Restatement (Third)), § 35 (2011).[5] The Restatement provides illustrations applying this reasoning to insurance coverage disputes much like the present one.

We are persuaded by the Restatement's reasoning. When time is precious, it makes sense for the parties to decide quickly *what to do*, and to litigate later *who must pay*. Because an insurer risks unbounded liability if it loses the coverage dispute after refusing to defend a suit, it is generally "reasonable [for the insurer] to accede to the demand rather than to insist on an immediate test of the disputed obligation." *See id.* Under these circumstances, we conclude that when a court determines that the insurer never had a duty to defend, and the insurer clearly and expressly reserved its right to seek reimbursement, it is equitable to require the policyholder to pay.[6] Therefore, we hold that when a court finally determines that the insurer had no contractual duty to defend, the insurer may ordinarily recover in restitution if it has clearly reserved its right to do so in writing.

Our decision today accords with the approach in California, which has historically been the majority approach. *See Scottsdale*, 115 P.3d at 471; Order Certifying Question, at 7; *see also* Angela R. Elbert & Stanley C. Nardoni, Buss *Stop: A Policy Language Based Analysis*, 13 Conn. Ins. L.J. 61, 90 (2006) (referring to California's approach as the majority rule); Restatement of Liability Insurance, § 21, cmt. a (2019) (adopting rule against reimbursement "while recognizing that a slightly greater number of state courts have espoused contrary views").[7] In California, the *Scottsdale* court noted the sound policies behind reimbursement:

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[5]The authors of the Restatement have likened this to the Uniform Commercial Code's "machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute." Restatement (Third) § 35 reporter's note cmt. a (quoting UCC § 1-308, cmt. 1). The UCC has been adopted in Nevada. NRS 104.1308 (adopting UCC § 1-308). However, the UCC does not apply to insurance contracts.

[6]Respondents argue that the insurer also benefits from exercising its right to defend a suit. *See Gen. Agents*, 828 N.E.2d at 1103. That may well be true, but in our view, that does not make it less equitable to require the policyholder to pay. The insurer benefits only by managing its risk and limiting its potential losses; it does not profit, but rather expends money. Any benefit is shared by the policyholder. Requiring the policyholder to pay for the defense would not provide a windfall or double benefit to the insurer.

[7]We note that the Restatement of Liability Insurance justifies its departure from the usual rule by reference to "special considerations of insurance law" that make insurance policies fundamentally different from other contracts. Restatement of Liability Insurance, § 21, cmt. b. That reasoning is inconsistent with our precedent that "legal principles applicable to contracts generally are applicable to insurance policies." *Century Sur.*, 134 Nev. at 821, 432 P.3d at 183.

> An insurer facing unsettled law concerning its policies' potential coverage of the third party's claims should not be forced either to deny a defense outright, and risk a bad faith suit by the insured, or to provide a defense where it owes none without any recourse against the insured for costs thus expended.

Scottsdale, 115 P.3d at 470 (discussing *Buss v. Superior Court*, 939 P.2d 766, 778 (Cal. 1997)). We agree. As our law has more forcefully encouraged insurers to offer to defend doubtful claims, *see Century Sur.*, 134 Nev. at 822 n.4, 432 P.3d at 184 n.4, it is only fair to permit those insurers to recover costs that they never agreed to bear.

Restitution does not modify the contract

We are unpersuaded by respondents' arguments against reimbursement. However, as the Ninth Circuit noted in its certification order, several state courts have found those arguments persuasive, and our opinion today has also inspired a dissent. Accordingly, we take this opportunity to explain why we have rejected the contrary viewpoint.

Some courts have held that reimbursement is "tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract." *Gen. Agents*, 828 N.E.2d at 1102 (internal quotation marks omitted); *see Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 544 (Pa. 2010) (holding that insurer cannot "reserve a right it does not have pursuant to the contract"). In those courts' view, an insurer can only seek reimbursement if the policy expressly permits it. Relatedly, respondents argue that the policy's express language requires Nautilus to bear "all expenses [it] incur[s]" for any claim it chooses to defend, whether or not the policy required it to defend that claim in the first place. *Cf.* Buss *Stop*, *supra*, 13 Conn. Ins. L.J. at 93-98 (arguing that "if the insurer defends (whether it acted because its duty was clear or it thought that the question of coverage was close enough so that it would be dangerous to refuse to defend), it must bear those costs").

We disagree. As explained above, when a court holds that there never was a duty to defend, it is holding that the claims were never even potentially covered by the policy. Therefore, when the insurer reserved its right to seek reimbursement, it was not extracting an amendment to a contract that would otherwise govern its defense. *No* contract governed its defense. In these circumstances, there is no reason it cannot reserve a right it has, not pursuant to the contract, but pursuant to the law of restitution. *See* Restatement § 35 cmt. a (recognizing that "the 'rights reserved' by a performing party—'where one party is claiming as of right something which the other believes to be unwarranted'—include a claim in restitution for the value of any benefit conferred in excess of the recipient's contractual entitlement" (quoting UCC § 1-308 cmt. 2)).

Similarly, while we decline to consider specific insurance policy language that was not included in the certifying order, *see Fontainebleau*, 127 Nev. at 953, 267 P.3d at 793, any such policy language would not control. Nautilus did not have any contractual duty to defend respondents, so it could properly condition its provision of a defense on a reservation of its rights. In short, Nautilus agreed to defend against certain kinds of allegations, and not others. Allowing reimbursement does not modify the policy, but rather gives effect to the parties' agreement. *See Scottsdale*, 115 P.3d at 469 (concluding that because "the insurer does not bargain to assume the cost of defense of claims that are not even potentially covered[,] . . . shift[ing] these costs to the insured does not upset the contractual arrangement between the parties").

Restitution does not erode the duty to defend

We also strongly disagree with the view that permitting reimbursement "would amount to a retroactive erosion of the broad duty to defend" and would "narrow [the] long-standing view that the duty to defend is broader than the duty to indemnify." *See Am. & Foreign Ins. Co.*, 2 A.3d at 543-44. In Nevada, the duty to defend is indeed broadly construed, and doubts are resolved in favor of the policyholder. *United Nat'l*, 120 Nev. at 684, 687, 99 P.3d at 1156, 1158; *see Powell*, 127 Nev. at 162, 252 P.3d at 672. It is "broader than the duty to indemnify" because an insurer must defend even claims that the third party does not ultimately prove. *United Nat'l*, 120 Nev. at 686, 99 P.3d at 1158. But the duty to defend is "not absolute." *Id.* at 687, 99 P.3d at 1158 (internal quotation marks omitted). When a court concludes that a claim was never even potentially covered, then the court should hold that the duty to defend never arose. *Cf. Makarka v. Great Am. Ins. Co.*, 14 P.3d 964, 969 (Alaska 2000) (recognizing that "a duty to defend does not arise whenever an insurer and an insured have a dispute over coverage"). As we have explained above, a consequence of that holding is that the insurer may be entitled to reimbursement if it properly reserved its rights.

In contrast, the courts which deny reimbursement appear to reason that—at least in general—a court *cannot* hold that there never was a duty to defend. Rather, if the duty was disputed and the insurer defended under a reservation of rights, the court can only hold that there is *no longer* a duty to defend. *See Gen. Agents*, 828 N.E.2d at 1104 (concluding that an insurer is "obligated to defend [its policyholder] as long as any questions remain[ ] concerning whether the underlying claims were covered by the policies"); *Am. & Foreign Ins. Co.*, 2 A.3d at 542 (holding that when the "court resolves the question of coverage[,] . . . [that] does not, however, retroactively eliminate the insurer's duty to defend its insured during the period

of uncertainty").[8] In those states' view, any time an insurer agrees to defend a claim—even under a reservation of rights—the claim is "potentially covered" and thus triggers the duty to defend. *See Am. & Foreign Ins. Co.*, 2 A.3d at 543 ("That [Insurer] was uncertain about coverage, or, more precisely, believed the claim against Insured in the [third-party] action was potentially covered, *is apparent from its action in furnishing a defense* . . . ." (emphasis added)). In this construction, an insurer's reservation of the right to seek a declaration that the duty to defend never arose in the first place would be ineffective at best, and nonsense at worst.

Because an insurer in those states necessarily has a *duty* to defend any time it *does* defend, it may be true that permitting reimbursement would narrow that duty. But the duty to defend in Nevada has never been that expansive. An insurance policy is a contract, and we do not "force upon parties contractual obligations, terms or conditions which they have not voluntarily assumed." *See McCall v. Carlson*, 63 Nev. 390, 424, 172 P.2d 171, 187 (1946). "[W]here, as here, there was never a duty to defend, this limited remedy [i.e., extinguishing the insurer's obligation to pay only prospectively from the date of the judgment] provides the insured more, and the insurer less, than the parties' bargain contemplated." *Scottsdale*, 115 P.3d at 470-71. Here, the parties bargained for Nautilus to defend against certain kinds of allegations, and the federal courts have determined that Switzer's allegations were not of that kind. We do not erode the duty to defend by acknowledging its existing limits.

CONCLUSION

When a court determines that an insurer never owed a duty to defend, the insurer expressly reserved its right to seek reimbursement in writing after defense was tendered, and the policyholder accepted the defense from the insurer, then the insurer is entitled to that reimbursement. Under generally applicable principles of unjust enrichment and restitution, the insurer has conferred a benefit on the policyholder; the policyholder appreciated the benefit; and, because it is reasonable for the insurer to accede to the policyholder's demand, it is equitable to require the policyholder to pay. This result gives effect to the parties' agreement, as well as the court's

[8]The *American & Foreign Insurance* court concluded its opinion by "hold[ing] that an insurer may not obtain reimbursement of defense costs for a claim for which a court later determines there was no duty to defend." 2 A.3d at 546. We think those final lines are not consistent with the reasoning of the case as a whole. As we read it, *American & Foreign Insurance* holds—along the same lines as *General Agents*—*not* that an insurer cannot obtain reimbursement when there was never a duty to defend, but instead that an insurer ordinarily *does* have a duty to defend claims pending a declaratory judgment action. *See Gen. Agents*, 828 N.E.2d at 1104; *Am. & Foreign Ins. Co.*, 2 A.3d at 542.

judgment, by recognizing that the insurer was never contractually obligated to furnish a defense.

HARDESTY, C.J., and PICKERING and HERNDON, JJ., concur.

CADISH, J., with whom PARRAGUIRRE and SILVER, JJ., agree, dissenting:

Relying upon *Scottsdale Insurance Co. v. MV Transportation*, 115 P.3d 460, 468 (Cal. 2005), and the Restatement (Third) of Restitution and Unjust Enrichment section 35 (Am. Law Inst. 2011), the majority holds that Nautilus has the right to reimbursement for the costs it spent defending its insureds in litigation, even though the insurance policy does not contain a reimbursement provision, because Nautilus tendered defense under an express reservation of rights and because the insureds' claims were not potentially covered by the insurance policy. While this may be the majority approach among jurisdictions that have addressed this issue, this rule is contrary to Nevada precedent and long-standing legal principles. Therefore, I must dissent.

Theories of unjust enrichment and quasi-contract are not available when there is an express, written contract

The authority relied on by the majority is expressly predicated on a theory of unjust enrichment or quasi-contract. In *Scottsdale Insurance*, the Supreme Court of California held that an "insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract of insurance, it was never obliged to furnish." 115 P.3d at 468. In so holding, the court relied upon its prior ruling in *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997). *Scottsdale Ins. Co.*, 115 P.3d at 468. In *Buss*, the court expressly stated that its holding was predicated upon a theory of unjust enrichment or quasi-contract. 939 P.2d at 776-77. Similarly, the Restatement (Third) of Restitution and Unjust Enrichment section 35 is also predicated on a theory of unjust enrichment. *See* Restatement (Third) of Restitution and Unjust Enrichment § 35 cmt. a (Am. Law Inst. 2011) ("Where a valid contract defines the scope of the parties' respective performance obligations, a performance in excess of contractual requirements—neither gratuitous, nor pursuant to compromise—results in the unjustified enrichment of the recipient and a prima facie claim in restitution.").[1]

[1]Even if it were to be adopted in Nevada, the record demonstrates that application of the Restatement (Third) of Restitution and Unjust Enrichment section 35 to the underlying dispute here is inappropriate. Comment a to section 35 states that restitution is only appropriate where it is impossible to obtain a legal determination "before the claimed performance is due," thereby compelling a party to overperform. Restatement (Third) of Restitution and Unjust Enrichment § 35 cmt. a (Am. Law Inst. 2011). Here, Access Medical sent numerous letters to Nautilus requesting that Nautilus tender defense. Nautilus accepted the request

However, under Nevada law, "a theory of unjust enrichment *is not available* when there is an express, written contract." *LeasePartners Corp. v. Robert L. Brooks Tr.*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (emphasis added). Similarly, recovery by quasi-contract is not available when there is an express, written contract. *Id*. at 756, 942 P.2d at 187. As we noted, "permit[ting] recovery by quasi-contract where a written agreement exists would constitute a *subversion of contractual principles*." *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) (emphasis added). Indeed, this is a generally accepted fundamental legal principle across the country. *See Cty. Comm'rs v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607-08, 608 n.8 (Md. 2000) (collecting cases). Therefore, this court should reject Nautilus's reliance on *Scottsdale Insurance* and the Restatement (Third) of Restitution and Unjust Enrichment section 35, which are contrary to established Nevada law.

An express, written contract exists between Nautilus and its insureds

To avoid this binding authority that precludes restitution under a theory of unjust enrichment or quasi-contract when an express contract exists between parties, *LeasePartners Corp.*, 113 Nev. at 755, 942 P.2d at 187, the majority holds that no contract between Nautilus and Access Medical governed the dispute prompting the instant certified question. But Nautilus and Access Medical had a lengthy, detailed contract drafted by Nautilus that covered the entire insurer-insured relationship and set out the parties' rights and obligations. The contract did not contain *any* provision allowing for the recoupment of costs expended if a court later determined that Nautilus never had a duty to defend Access Medical. Furthermore, the contract contained an integration clause, making it clear that the contract constituted the parties' entire agreement governing their insurer-insured relationship.[2] The record demonstrates that Access

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under a reservation of rights in May 2014. However, Nautilus did not undertake the defense until October 2014 and did not seek a declaratory judgment from the federal district court until February 2015. In sum, Nautilus *waited at least nine months* even after accepting the tender under a reservation of rights before it sought a legal determination of its duty to defend. I am not convinced that it would have been impossible for Nautilus to obtain a legal determination of its obligation to defend its insureds in that period. Therefore, application of the Restatement (Third) of Restitution and Unjust Enrichment section 35 is inappropriate for this independent reason.

[2]The majority relies upon *In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 267 P.3d 786 (2011), to disregard the contract's integration clause. In *Fontainebleau*, we held that, when answering a certified question pursuant to NRAP 5, we "may not use information in the appendix to contradict the certification order." 127 Nev. at 956, 267 P.3d at 795. Here, the order certifying question makes no mention of the contract's integration clause or whether one exists. Therefore, relying on this express contract language does not contradict anything in the certifying court's order.

Medical believed there was a potential for coverage triggering Nautilus's duty to defend under the terms of the insurance contract when it asked Nautilus to defend the underlying suit. Furthermore, the record demonstrates that Nautilus believed a court might determine there was a duty to defend under the terms of the insurance contract because it chose to tender a defense—albeit under a reservation of rights—rather than refuse. Accordingly, the majority's holding that there was no contract governing the subject matter of the underlying dispute between Nautilus and Access Medical is belied by the record. Plainly, this was not an extra-contractual undertaking by Nautilus, but rather a defense undertaken based on the very existence of the parties' contract.

The fact that a contract does not provide for a particular remedy—here, reimbursement of defense costs—does not mean that the contract is inapplicable and thus extra-contractual remedies are available; to the contrary, it represents a considered choice, presumably by Nautilus as the contract's drafter, not to provide for this remedy.[3] Allowing extra-contractual remedies in this circumstance would upend the fundamental principles established by these cases. *See Indus. Lift Truck Serv. Corp. v. Mitsubishi Int'l Corp.*, 432 N.E.2d 999, 1002 (Ill. App. Ct. 1982) ("If a quasi-contract action could be brought every time a party under contract performs a service not precisely covered by the contract, then the rule preventing quasi-contract actions when a contract exists would have little meaning."). The fact that the duty to defend was found not to exist in this circumstance does not equate to dissolution of the entire contractual relationship or allow us to disregard it.

There is a special relationship of trust and reliance between an insurer and its insured

Rather than relying on these extra-contractual remedies, this court should look to Nevada insurance law precedent and the plain language of the insurance policy to determine whether Nautilus is entitled to reimbursement. "An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). We construe the language in a contract "from the perspective of one not trained in law and give plain and ordinary meaning to the terms." *Id*. (internal quotations and citation omit-

[3]The heading in the majority opinion, "No contract governs the right to reimbursement here," is simply incorrect. The insurance contract governs the parties' entire relationship, including the duty to defend, and the fact that this recoupment remedy is not provided means it is not available, not that there is no applicable contract. The conclusion by the federal court that there is no duty to defend, which we must accept, does not lead to the conclusion that there is no contract.

ted). Additionally, we will not rewrite unambiguous provisions of a contract. *Id*. at 65, 64 P.3d at 473. Furthermore, because insurance contracts are contracts of adhesion, we construe ambiguity in an insurance contract "against the drafting party and in favor of the insured." *Farmers Ins. Grp. v. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994).

Importantly, we have long recognized that "[t]he relationship of an insured to an insurer is one of special confidence."[4] *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988). Consumers purchase insurance to protect against risk and obtain "security, protection, and peace of mind." *Id*. The duty to defend is part of this protection, relieving the insured from the financial burden of litigation. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324 (2009). Accordingly, the duty to defend is broad, arising whenever an insurer "ascertains facts which give rise to the *potential* of liability under the policy." *Century Sur. Co. v. Andrew*, 134 Nev. 819, 822, 432 P.3d 180, 183 (2018) (emphasis added) (internal quotations omitted). Once triggered, the duty to defend continues throughout the litigation, *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004), or until the "potential for indemnification ceases," *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412, 254 P.3d 617, 621 (2011).

Nautilus is not entitled to reimbursement

The at-issue insurance contract does not contain *any* provision that entitles Nautilus to reimbursement if it incorrectly chooses to defend a suit for which it did not owe a duty to defend. Nautilus drafted this complicated insurance contract, and it certainly could have included a provision that provides for recoupment of costs spent if a court later determines that it never had a duty to defend its insureds. Therefore, because Nautilus drafted the insurance contract and because insurance contracts are contracts of adhesion, we must construe the insurance contract's silence on recoupment against Nautilus. *Farmers Ins. Grp.*, 110 Nev. at 67, 867 P.2d at 391. Furthermore, the plain language of the contract provides that both Nau-

[4]The majority flatly states that insurance policies are treated like other contracts. However, we have long recognized that the relationship between an insurer and insured is akin to a fiduciary relationship. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 700, 962 P.2d 596, 602 (1998). Therefore, the majority's reliance on generally applicable basic contract principles without addressing the special relationship between an insurer and its insureds is contrary to Nevada precedent. *See Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 462, 134 P.3d 698, 702 (2006) (recognizing that an insurer has "vastly superior bargaining power" than its insureds, that its relationship with its insureds involves "a special element of reliance," and that in such situations, we will "protect the weak from the insults of the stronger" (internal quotations omitted)).

tilus and the insured must approve any amendments to the contract.[5] Therefore, Nautilus may not use a reservation of rights letter to unilaterally create new rights for itself at the expense of the insured.[6] *See Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 539 (Pa. 2010) (noting that several courts have found "that a unilateral reservation of rights letter cannot create rights not contained in the insurance policy itself"); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 45 (Tex. 2008) (stating that an insurer "could only reserve rights that were expressed in the policy"); *Shoshone First Bank v. Pac. Emp'rs Ins. Co.*, 2 P.3d 510, 515 (Wyo. 2000) (rejecting the ability of an insurer to modify an existing contract through a reservation of rights letter). Accordingly, Nautilus is not entitled to reimbursement based on a reservation of rights theory.

This position is consistent with a growing number of jurisdictions that reject *Scottsdale Insurance*.[7] The Supreme Court of Pennsylvania succinctly summarized the rationales that it and other jurisdictions relied on in so doing. *Am. & Foreign Ins. Co.*, 2 A.3d at 538-39.

First, reimbursing an insurer for costs it expended defending a claim that is not potentially covered by the terms of the insurance contract "is inconsistent with the broad duty to defend." *Id*. at 538-39. The majority's position will narrow this broad duty to defend by making it contingent upon a subsequent judicial determination

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[5]The majority, again relying upon *Fontainebleau*, 127 Nev. at 953, 267 P.3d at 793, ignores the contract's express language that precludes Nautilus from unilaterally amending the insurance contract. Here, the order certifying question makes no mention of the contract's amendment clause. Therefore, relying on this express contract language does not contradict anything in the certifying court's order.

[6]Our decision in *Century Surety Co. v. Andrew*, 134 Nev. 819, 432 P.3d 180 (2018), is not to the contrary. There, we noted that an "insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage based on the terms of the insurance policy under a reservation of rights." 134 Nev. at 822 n.4, 432 P.3d at 184 n.4. First, our comment concerned the denial of coverage and did not contemplate reimbursement of costs that the insurer incurred defending its insured. Second, our comment is clear that a reservation of rights in the context of an insurance contract preserves *existing* rights contained within the insurance contract. *See Reservation-of-rights letter*, *Black's Law Dictionary* (11th ed. 2019) (defining a reservation-of-rights letter as "notice of an insurer's intention not to waive its *contractual rights* to contest coverage or to apply an exclusion that negates an insured's claim" (emphasis added)).

[7]This position is also consistent with the Restatement of Liability Insurance section 21 (Am. Law Inst. 2019) (providing that "an insurer may not obtain recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs," unless the right to recoupment is "stated in the insurance policy or otherwise agreed to by the insured").

rather than whether there is potential for liability. Here, Nautilus had *some* doubt as to whether the insureds' claim was covered. Otherwise, it would have simply declined to defend the insureds without worrying about the risk of breaching the insurance contract. While this may be a difficult decision, "it is a decision the insurer must make" in the first instance. *Am. & Foreign Ins. Co.*, 2 A.3d at 542. After all, "[i]nsurers are in the business of making this decision." *Id*. Once the insurer chooses to defend, it is bound by that decision until it obtains a declaratory judgment terminating the duty to defend. *Id*. I recognize it has now been determined by the federal court that Nautilus never had a duty to defend here, but the retroactive imposition of a recoupment obligation on the insureds would limit the benefit it contracted for pursuant to the duty to defend.

Second, when an insurer chooses to defend a claim that the insurance contract may not cover, it "voluntarily under[takes] the defense for its own interest," even though it may have made the payments "under some rudimentary form of protestation." *Id*. at 539. Specifically, "the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach." *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 460 (Wash. 2007). Therefore, the insurer is not defending for the benefit of the insured, thus justifying reimbursement; instead, it is doing so to protect itself from potentially greater liability if it is found to have breached its duty to defend. Having weighed those risks and determined the balance favored defending, it should not be able to then reallocate those costs to the insured once it gets a favorable court declaration.

Third, "concerns of equity and fairness weigh against reimbursement, because an insurer benefits unfairly if it can hedge on its defense obligations by reserving its right to reimbursement while potentially controlling the defense and avoiding a bad faith claim." *Am. & Foreign Ins. Co.*, 2 A.3d at 539. Here, insureds were precluded by the terms of the insurance policy from having any control over the defense of their claim. Under the majority's position, an insurer may defend under a reservation of rights, amass a substantial legal bill, obtain a declaratory judgment absolving the duty to defend, and then seek to recoup the costs of the defense from the insured. Such a rule does not comport with our long-standing recognition of the inherent power disparity between insurers and insureds. *Ins. Co. of the W. v. Gibson Tile Co., Inc.*, 122 Nev. 455, 461-62, 134 P.3d 698, 702 (2006).

Accordingly, the majority's position should not be the rule in Nevada, as it is contrary to our precedent governing contractual relationships generally and insurance relationships in particular. Instead, the default rule should be that an insurer is not entitled to a recoupment of defense costs under these circumstances, unless such

recoupment is explicitly provided for in the insurance policy.[8] Having recognized the disparity in bargaining power between an insurer and insured, providing this remedy to the insurer—this remedy for which it did not contract—is utterly inconsistent with our established Nevada law. Based on the foregoing, I respectfully dissent.

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[8]The following passage further supports adopting this rule:

> First, because this rule is merely a default, if it turns out that the recoupment rule would be relatively easy to administer or that the costs justify the expense, insurers can incorporate an express right to recoupment in their policies. Second, situating the right to recoupment in the insurance policy carries significant advantages; it puts the legal basis of the insurer's entitlement beyond dispute, and it specifies the contours of that entitlement in advance of a dispute, making it easier to evaluate for all parties concerned. Third, a default rule of no recoupment places the burden of contracting around the rule on the party best able to do so.

Restatement of Liability Insurance § 21 cmt. a (Am. Law Inst. 2019).