or an entry into the court minutes in the form of an order." *Id.*; *see also Taylor v. State Indus. Ins. Sys.*, 107 Nev. 595, 598, 816 P.2d 1086, 1088 (1991) ("A stipulation is an agreement made before a judicial tribunal which requires, as does a contract, the assent of the parties to its terms.").

Here, although Michael had notice of the hearing during which the stipulation was created, he was not present at that hearing. The record does not show that Michael, as the party against whom the stipulation is now being offered, assented to the terms of the parties' stipulation. Therefore, we hold that the district court erred by approving the stipulation without Michael's presence or signature indicating Michael's assent.

It is axiomatic that a valid stipulation requires mutual assent by *all* interested parties. Without mutual assent, the stipulation is void.

CONCLUSION

We, therefore, vacate the district court order and remand for further proceedings. Upon remand, the district court will determine the source of funds in the operating account. If the source of the funds was the sale of the California property, then NRS 159.1365 applies. If the source of the funds was not the sale of the California property, the August 15, 2012, order applies, to the extent that the source of the funds was the rental income from the real property. Finally, if the funds from the operating account are determined to be from a source other than the sale of real property or Jean's excess monthly income, NRS 159.103, NRS 159.105, and NRS 159.183 apply.

HARDESTY and PICKERING, JJ., concur.

WESLEY ALLEN LEWIS, APPELLANT, *v.* MARIA DANIELA LEWIS, AKA MARIA DANIELA PERDOMO, RESPONDENT.

No. 66497

June 30, 2016 373 P.3d 878

Appeal from district court orders modifying child custody and holding appellant in contempt. Eighth Judicial District Court, Family Court Division, Clark County; Gayle Nathan, Judge.

After parties were divorced, wife filed motion to modify custody of parties' minor child and to enforce prior child support order. The district court entered order awarding wife primary physical custody of child, and held husband in contempt for failure to pay child support. Husband appealed. The supreme court, SAITTA, J., held that: (1) husband's Sixth Amendment right to counsel was violated when

contempt order was entered, (2) the district court abused its discretion in modifying its prior order of child custody, and (3) the district court did not abuse its discretion by enforcing its order requiring father to continue to pay for half of child's tutoring expenses.

Affirmed in part, reversed in part, and remanded.

Greenberg Traurig, LLP, and *Tami D. Cowden*, Las Vegas, for Appellant.

Fine & Price Law Group and *Frances-Ann Fine*, Henderson, for Respondent.

1. CONTEMPT.
   For a contempt order imposing determinate sentence to be civil in nature, it must contain a purge clause that gives defendant the opportunity to purge himself of contempt sentence by complying with contempt order's terms.
2. CHILD SUPPORT.
   The district court's contempt order in child support proceeding was criminal in nature, and thus, father's Sixth Amendment right to counsel was violated when contempt order was entered after proceedings in which he was not represented by counsel, even though order stayed jail sentence contingent upon father following all future court orders, when order did not contain purge clause that would allow father to purge himself of contempt sentence. U.S. CONST. amend. 6.
3. CHILD CUSTODY.
   The supreme court reviews child custody modifications under abuse of discretion standard.
4. CHILD CUSTODY.
   Modification of primary physical child custody is warranted only when (1) there has been substantial change in circumstances affecting child's welfare and (2) child's best interest is served by modification.
5. CHILD CUSTODY.
   When modifying a joint physical child custody arrangement, it is only necessary to consider whether modification is in child's best interest.
6. CHILD CUSTODY.
   The district court may not use changes of child custody as sword to punish parental misconduct; disobedience of court orders is punishable in other ways.
7. CHILD CUSTODY.
   The district court abused its discretion in modifying its prior child custody order granting mother primary physical custody of child, when court appeared to base its order modifying child custody, at least in part, on fact that father failed to pay child support, his portion of medical insurance for child, and his portion of tutoring costs in violation of previous court order, and court failed to adequately set forth its specific findings as to each statutory factor. NRS 125.480(4) (Repealed).
8. CHILD SUPPORT.
   The district court did not abuse its discretion by enforcing its order requiring father to continue to pay for half of child's tutoring expenses, even though child tested at or above grade level and received As and Bs at

school, when child tested below grade level in math as tested by tutoring school.

Before HARDESTY, SAITTA and PICKERING, JJ.

OPINION

By the Court, SAITTA, J.:

The Sixth Amendment's right to counsel applies only to criminal proceedings. Thus, in deciding whether that right applies to contempt proceedings, the question is whether the contempt is civil or criminal in nature. This opinion addresses whether a contempt order is required to contain a purge clause, which gives the defendant the opportunity to purge himself of the contempt sentence by complying with the terms of the contempt order, in order to be considered civil in nature and avoid invoking the Sixth Amendment's right to counsel.

We hold that a contempt order that does not contain a purge clause is criminal in nature. Because the district court's contempt order in this case did not contain a purge clause, appellant's constitutional rights were violated by imposing a criminal sentence without providing appellant with counsel. We further hold that the district court abused its discretion by improperly basing its decision to modify custody on appellant's failure to comply with a court order and by failing to consider and set forth its findings as to the NRS 125.480(4) (2009) factors for determining the child's best interest.[1]

FACTUAL AND PROCEDURAL HISTORY

Appellant Wesley Allen Lewis and respondent Maria Daniela Lewis divorced in 2011. They had one minor child at the time of the divorce. The divorce decree awarded Wesley and Maria joint physical custody of the child and imposed upon Wesley an obligation to pay child support to Maria.

In 2013, Maria filed a motion seeking to hold Wesley in contempt of court for lack of payment of child support, among other things. After a hearing, the district court issued an order on October 14, 2013, determining that Wesley had child support arrearages in the amount of $9,012.38. The district court also held Wesley in contempt of court for his failure to pay child support and ordered him to pay $500 for each month that he had failed to pay child support, for a total of $5,500. The contempt order further included a jail sentence

[1]NRS 125.480(4) has since been repealed, and the statutory factors for determining the child's best interest have been moved to NRS Chapter 125C.

of ten days for each month that he had failed to pay child support, but the sentence was stayed contingent upon Wesley making all future payments. The district court also found Wesley willfully underemployed and determined Wesley's imputed gross monthly income based on what he would make if fully employed. Based on his imputed income, the district court ordered Wesley to pay child support of $91 per month, $50 per month for one-half of the child's health insurance, and $100 per month for child support arrearages. Lastly, the order required Wesley to take the child to tutoring classes on Mondays after school and to pay one-half of the cost of the tutoring.

In 2014, Maria filed a motion to modify custody and enforce the 2013 order. After a hearing at which Wesley represented himself, the district court entered an order awarding Maria primary physical custody of the child. The order also adopted prior findings from the 2013 order that Wesley was willfully underemployed, and it used Wesley's imputed gross monthly income from that order as the basis to modify his child support obligation subsequent to the modification of the custodial arrangement. The district court's order further required Wesley to continue taking the child to tutoring classes and to pay one-half of those costs. Finally, the district court held Wesley in contempt of court for his failure to pay three months of child support and take the child to tutoring classes over the summer. The district court sentenced Wesley to 20 days in jail for each missed payment and 20 days for the missed tutoring classes, for a total of 80 days. The district court then stayed the contempt sentence on the condition that Wesley "follow the Orders of the Court."

Wesley raises the following issues on appeal: (1) whether the district court violated his Sixth Amendment right to counsel by not appointing him counsel before holding him in criminal contempt, (2) whether the district court abused its discretion by modifying the child custody arrangement, and (3) whether the district court abused its discretion by ordering Wesley to continue to pay for half of the child's tutoring expenses.

DISCUSSION

Wesley's Sixth Amendment right to counsel was violated by the district court's contempt order

Wesley argues that because the district court's order of contempt was criminal in nature, he had a Sixth Amendment right to counsel during the proceedings before the district court. We normally review an order of contempt for abuse of discretion. *In re Water Rights of the Humboldt River*, 118 Nev. 901, 907, 59 P.3d 1226, 1230 (2002). However, we review constitutional issues de novo. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012).

The district court's contempt order was criminal in nature

> [T]he Sixth Amendment guarantee of the right to counsel applies only in criminal prosecutions. Whether a contempt proceeding is classified as criminal or civil in nature depends on whether it is directed to punish the contemnor or, instead, coerce his compliance with a court directive. Criminal sanctions are punitive in that they serve the purpose of preserving the dignity and authority of the court by punishing a party for offensive behavior. In contrast, civil contempt is said to be remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance, not punishing them for past bad acts. Moreover, a civil contempt order is indeterminate or conditional; the contemnor's compliance is all that is sought and with that compliance comes the termination of any sanctions imposed. Criminal sanctions, on the other hand, are unconditional or determinate, intended as punishment for a party's past disobedience, with the contemnor's future compliance having no effect on the duration of the sentence imposed.

Rodriguez v. Eighth Judicial Dist. Court, 120 Nev. 798, 804-05, 102 P.3d 41, 45-46 (2004) (citations omitted). In *Rodriguez*, the district court issued a contempt order for Rodriguez to spend 25 days in jail for failing to pay child support, with the possibility of early release upon his payment of the outstanding arrearages. *Id*. at 804, 102 P.3d at 45. The *Rodriguez* court reasoned that the contempt order was civil in nature because "[t]he district court's intent was to compel Rodriguez's compliance with the support order for the benefit of his daughter, not to punish him for any ongoing noncompliance." *Id*. at 805, 102 P.3d at 46. Therefore, the court held that the Sixth Amendment right to counsel did not apply to the proceedings. *Id*.

[Headnote 1]

However, the United States Supreme Court has identified an additional factor in determining whether a contempt order is civil or criminal—that is, in order for a contempt order imposing a determinate sentence to be civil in nature, it must contain a purge clause. *Hicks v. Feiock*, 485 U.S. 624, 640 (1988). A purge clause gives the defendant the opportunity to purge himself of the contempt sentence by complying with the terms of the contempt order. *Id*.

[Headnote 2]

Here, the district court issued a contempt order against Wesley for failing to (1) pay child support, and (2) take the child to her tutoring classes, pursuant to a previous court order. The order directed Wesley to serve 80 days in jail, but it stayed the jail sentence contingent

upon Wesley following all future court orders. Thus, like *Rodriguez*, it appears that the district court's intent was to compel Wesley's compliance with the support order for the benefit of his daughter, not to punish him for any ongoing noncompliance. However, the order failed to contain a purge clause that would allow Wesley to purge himself of the contempt sentence. Thus, if the stay was lifted due to a missed payment by Wesley, he would have no way to purge his sentence to avoid or get out of jail. While it is possible that the district court intended for Wesley to be able to purge himself of his sentence and get out of jail in such a situation by paying any missed payment, the order does not so state. Therefore, we hold that because the district court's contempt order did not contain a purge clause, it was criminal in nature and Wesley's Sixth Amendment right to counsel was violated when the contempt order was entered after proceedings in which he was not represented by counsel.[2]

The district court abused its discretion in its order modifying child custody

[Headnotes 3-5]

This court reviews modifications of child custody under an abuse of discretion standard. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). "[A] modification of primary physical custody is warranted only when (1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Id.* at 150, 161 P.3d at 242. However, when modifying joint physical custody, it is only necessary to consider whether the modification is in the child's best interest. *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009).[3]

The district court's order stated that it was modifying custody because it was in the child's best interest "based on [Wesley's] conduct over the past ten (10) months." The order failed to specify which conduct it was referring to, although the district court did make factual findings in the order that Wesley had child support arrearages and had not followed the court's order to pay half of the child's medical insurance. The district court also (1) found that Wesley was not credible when he testified that he spent two hours a night going over the child's homework, (2) had concerns about Wesley not charging the child's phone so that Maria could have daily contact with the child, and (3) was concerned that Wesley was not taking the child

[2]Because we are vacating the district court's contempt order and remanding with instructions that Wesley be provided with counsel during any further criminal contempt proceedings if he is found to be indigent, we do not reach the other issues raised by Wesley regarding the contempt order.

[3]Appellant does not question the use in Nevada caselaw of differing requirements for modifying joint physical and primary physical custody. Therefore, we do not address that issue here.

to her tutoring classes. Lastly, the order stated that the district court found Wesley to be in contempt for failing to pay child support and half of the tutoring costs.

The district court also made oral pronouncements as to the best interest of the child, stating:

> You know, Mr. Lewis, in the space of ten months, you demonstrated to The Court by your own behavior in this—your own conduct, I should say, that it's in the best interest of the minor child that I change the custodial arrangement, from not paying your support to not taking her to [tutoring], to ignoring her medical needs, to not making yourself available with a voicemail, to not following my Court orders, even so far as making sure your child's phone stay plugged in and charged so that Mom can have access to her, and to the tardies and the absentee record, especially the tardies and the absentee records. Those are significant factors The Court looks at.

The district court abused its discretion by improperly basing its decision on Wesley's failure to pay child support, medical insurance costs, and tutoring costs

[Headnote 6]

"This court has made it clear that a court may not use changes of custody as a sword to punish parental misconduct; disobedience of court orders is punishable in other ways." *Sims v. Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993).

[Headnote 7]

Here, the district court appeared to base its order modifying child custody, at least in part, on the fact that Wesley failed to pay child support, his portion of the medical insurance for the child, and his portion of the tutoring costs in violation of a previous court order. The written order stated that the custody modification was in the child's best interest because of Wesley's actions in the months prior to the order, which included his failure to follow the court's order. In its oral pronouncement as to the best interest of the child, the district court specifically spoke of Wesley's failure to pay child support and his failure to follow court orders as factors that it considered. Because Wesley's failure to follow court orders may not be considered as a factor in determining the child's best interest during a modification of custody, we hold that the district court abused its discretion.

The district court abused its discretion by failing to consider the NRS 125.480(4) (2009) factors in determining the child's best interest

"In determining the best interest of the child, the court *shall* consider and set forth its specific findings concerning, among oth-

er things," the factors set out in NRS 125.480(4). NRS 125.480(4) (2009) (emphasis added). "Specific findings and an adequate explanation of the reasons for the custody determination are crucial to enforce or modify a custody order and for appellate review." *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015) (internal quotation marks omitted). "Without them, this court cannot say with assurance that the custody determination was made for appropriate legal reasons." *Id*.

Here, other than Wesley's failure to follow the court's order, the district court based its determination of the best interest on the finding that Wesley did not attend to the child's medical needs, was not accessible by phone or voicemail, and failed to make the child available to Maria by phone when in Wesley's custody. The district court also considered the child's school tardiness and absentee record while in Wesley's custody, and Wesley's failure to participate in child therapy sessions set up by Maria. While these findings *could* correspond to some of NRS 125.480(4) (2009)'s factors, the district court nonetheless failed to adequately set forth its specific findings as to each factor, and it is unclear from the district court's order and oral findings when read together whether every NRS 125.480(4) (2009) factor was considered. Therefore, we hold that the district court abused its discretion by failing to set forth specific findings as to all of NRS 125.480(4) (2009)'s factors in its determination of the child's best interest during a modification of custody. Because the district court abused its discretion by improperly considering Wesley's failure to comply with court orders and failing to enter specific factual findings as to each of the statutory best-interest-of-the-child factors, we reverse the district court's order modifying child custody.[4]

The district court did not abuse its discretion by ordering Wesley to continue paying for tutoring classes

Wesley argues that because the minor child tested at or above grade level on the Clark County School District's CRTs and received As and Bs at school, she had completed the conditions of the district court's 2013 order regarding additional tutoring classes. Wesley further argues that there was no evidence to support a finding that the minor child had continuing special education needs, *see* NRS 125B.080(9), and that therefore the district court abused its discretion by ordering Wesley to pay for additional tutoring classes.

[Headnote 8]

The district court's 2013 order stated, in relevant part, that the minor child "shall continue to receive tutoring services until she is

[4]Because the order modifying child support was based upon the order modifying child custody, the order modifying child support is also reversed and should be addressed on remand.

testing at or above grade level as tested by [the tutoring school]." Although she was found to be at or above grade level on the Clark County School District's CRTs and received As and Bs at school, she still tested below grade level in math as tested by the tutoring school. Therefore, we hold that the conditions of the district court's 2013 order were not satisfied and the district court did not abuse its discretion by enforcing its 2013 order requiring Wesley to continue to pay for half of the tutoring expenses.

CONCLUSION

If a contempt order does not contain a purge clause, it is criminal in nature and the Sixth Amendment right to counsel applies. Because the contempt order in this case did not contain a purge clause, we hold that Wesley's constitutional rights were violated when the contempt order was entered against him when he was unrepresented by counsel at the contempt proceedings. Therefore, we vacate the district court's contempt order and order that Wesley be appointed counsel if he is found to be indigent and not already otherwise represented.

We further hold that the district court abused its discretion by improperly considering Wesley's failure to comply with court orders in modifying custody and by failing to specifically set forth specific findings regarding all of NRS 125.480(4) (2009)'s factors. However, the district court did not abuse its discretion by ordering Wesley to pay for additional tutoring classes for the minor child. Therefore, we affirm in part, reverse in part, and remand this case to the district court for further proceedings consistent with this opinion.[5]

HARDESTY and PICKERING, JJ., concur.

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[5]Wesley also raises the issue of whether judicial bias denied him a right to a fair trial. Because our review of the record does not indicate that a reasonable person would harbor doubts about the district court judge's impartiality, we hold that Wesley was not denied his right to a fair trial. *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998) ("The standard for assessing judicial bias is whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [a judge's] impartiality." (alteration in original) (internal quotation marks omitted)).

RICHARD JUSTIN, DBA JUSTIN BROS BAIL BONDS; AND INTERNATIONAL FIDELITY INSURANCE COMPANY, PETITIONERS, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE JANET J. BERRY, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 67786

June 30, 2016 373 P.3d 869

Original petition for a writ of mandamus challenging the denial of a motion to exonerate a bail bond.

Defendant's bail bond was forfeited after he failed to appear at arraignment. Surety moved to exonerate the bond, and defendant was subsequently taken into custody and pleaded guilty. The district court denied the motion. Surety filed an original petition for a writ of mandamus. The supreme court, DOUGLAS, J., held that defendant's failure to appear for arraignment prohibited the district court from exonerating bail bond.

Petition denied.

[Rehearing denied September 22, 2016]

[En banc reconsideration denied November 23, 2016]

Richard F. Cornell, Reno, for Petitioners.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Respondents.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Keith G. Munro*, Deputy District Attorney, Washoe County, for Real Party in Interest.

1. MANDAMUS.
   A writ petition is the proper vehicle for challenging orders originating from ancillary bail bond proceedings.
2. MANDAMUS.
   A writ of mandamus may issue to compel the performance of an act required by the law or to control a manifest abuse of discretion.
3. APPEAL AND ERROR.
   Statutory interpretation, even in the context of a writ petition, is a question of law that is reviewed de novo.
4. STATUTES.
   When the plain language of a statute establishes the Legislature's intent, the supreme court will give effect to such intention.
5. BAIL.
   Defendant's failure to appear for arraignment prohibited the district court from exonerating bail bond, despite fact that defendant was subse-

quently surrendered through surety and pleaded guilty to charges; statute governing exoneration of bail bonds only permitted exoneration upon certain enumerated circumstances, none of which applied. NRS 178.508.

6. Bail.

Exoneration of a bail bond is prohibited after a defendant fails to appear, save certain limited circumstances. NRS 178.509.

7. Bail.

Even if one of the enumerated circumstances is met that would permit the district court to exonerate a bail bond, exoneration is not mandatory. NRS 178.509.

Before Douglas, Cherry and Gibbons, JJ.

OPINION

By the Court, Douglas, J.:

In this writ petition challenging a district court order denying exoneration of a bail bond, we are asked to consider whether Nevada's statutory scheme governing bail bonds provides for automatic exoneration of a surety bond when a defendant is remanded to custody or convicted. We conclude that NRS 178.509's plain language does not espouse such an intent. Accordingly, we deny writ relief.

FACTS

On September 18, 2013, Norman Dupree was arrested and incarcerated in Washoe County Jail. Dupree's bail bond was set at $25,000. Petitioners Justin Bros Bail Bonds and International Fidelity Insurance Company (collectively Justin Bros)[1] posted Dupree's bond (bond number one). The respective bond agreement provided that Dupree would answer to the charges specified and be amenable to the orders and process of the court. The agreement further specified that if Dupree failed to meet its conditions, Justin Bros would pay the State of Nevada $25,000.

On January 30, 2014, while out of custody on bail, Dupree appeared before the Second Judicial District Court for arraignment. During the hearing, the district court ordered Dupree to complete drug testing. Dupree tested positive, and consequently, the district court added supervision to the conditions of his bail and rescheduled his arraignment for March 18, 2014.

Dupree was remanded to custody based on a pretrial supervision violation on January 31, 2014. Bonafide Bail Bonds then posted a $20,000 bond (bond number two) on February 3, 2014, to secure Dupree's rerelease from custody. Justin Bros did not attempt to exonerate bond number one during the time Dupree was incarcerated.

[1]Justin Bros is the agent of International Fidelity Insurance Company.

On March 18, after Dupree failed to appear for his arraignment, the district court issued notices of intent to forfeit. The district court provided that bond number one and bond number two would be declared forfeited in 180 days under NRS 178.506, 178.509, and 178.514 and noted that Dupree's failure to appear for his scheduled arraignment constituted a breach of the agreed-upon conditions of bail. On March 21, the district court issued a bench warrant, and set bond at $50,000, cash only. But according to Dupree, when he attempted to surrender himself on March 21, the Washoe County Sheriff's Office did not take him into custody because the bench warrant was not entered in the justice system records.

Thereafter, Dupree surrendered himself to Bonafide. In turn, Bonafide surrendered him to the Washoe County Sheriff's Office on May 14, 2014, and bond number two was exonerated. Dupree's arraignment was rescheduled for June 10, 2014, and Justin Bros, without seeking to exonerate bond number one, posted another bond for $20,000 (bond number three) to secure Dupree's release pending the June arraignment.[2] Dupree failed to appear for the June arraignment, and the district court ordered that bond number three be forfeited.

Dupree's counsel subsequently requested a status hearing, which was scheduled for July 24, 2014. Again, Dupree failed to appear. The district court took no further action, noting that the bench warrant with bail set at $50,000 was still active.

In August 2014, Justin Bros filed a motion for exoneration of bond number one, arguing that it was never informed of Dupree's June 10 arraignment and that it was unclear whether Dupree was informed. Justin Bros also argued that notwithstanding Dupree's failure to appear in court on June 10, bond number one should have been exonerated when the court revoked Dupree's supervised bail in January or when Bonafide posted bond number two in February, allowing Dupree to be rereleased.

Respondent Second Judicial District Court Judge Janet Berry denied Justin Bros' motion, observing that: (1) Justin Bros did not attempt to exonerate bond number one while Dupree was in custody from January 31 through February 3, or after Bonafide surrendered Dupree to custody on May 14, but instead posted bond number three; (2) Dupree failed to appear for his arraignments, had yet to be arraigned, and remained out of custody despite Justin Bros' acknowledgment that it had been in contact with Dupree; and (3) a bench warrant had been issued. The court concluded that, because Dupree had not appeared before it since January 30, 2014, bond number one could not be exonerated. On October 6, 2014, the district court entered a judgment of forfeiture for bond number one.

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[2]Although the $50,000 cash only bond was still in place, because it did not appear in the justice system records, Dupree was released on a $20,000 bond.

On October 23, 2014, Justin Bros filed a motion for reconsideration or an alternative order to set aside judgment, arguing that when Dupree's release was revoked on January 31, and he was taken back into custody, bond number one should have been exonerated pursuant to NRS 178.509(1)(b)(4) (providing that the court shall not exonerate the bond before the date of forfeiture unless the defendant is "being detained by civil . . . authorities"). Justin Bros also argued that when a new bail was set for the same charges and Bonafide posted bond number two, bond number one was automatically exonerated, as custody of Dupree then belonged to Bonafide. Further, Justin Bros maintained that because the $50,000 cash-only warrant had not been entered into the justice system records, Dupree was not held in custody after Bonafide turned him in, but instead was rebailed on bond number three, which replaced bonds one and two and therefore exonerated those bonds.

While Justin Bros' motion was pending, Dupree surrendered. At that time, bond number three was exonerated. On December 8, 2014, Justin Bros filed a reply in support of its motion for reconsideration, pointing out that it had since surrendered Dupree to Washoe County authorities, and that surrender took place within the statutory 180-day forfeiture time limit. The district court denied Justin Bros' motion, finding that Justin Bros had not presented any different evidence or persuasive legal authority to support reconsideration, or demonstrated that the court's forfeiture judgment was erroneous to justify setting it aside.

Following Dupree's guilty plea conviction and sentencing, Justin Bros filed a motion to declare the bond forfeiture judgment unenforceable or completely satisfied, or to exonerate bond number one. Justin Bros argued that bond number one should have been exonerated by operation of law under NRS 178.509(1)(a), NRS 178.512(1)(a)(1), NRS 178.514, NRS 178.522, NRS 178.526, and *People v. International Fidelity Insurance Co.*, 138 Cal. Rptr. 3d 883, 886-87 (Ct. App. 2012).[3] Justin Bros maintained that the following events triggered bond number one's exoneration: Dupree's remand to custody on January 31, 2014; Dupree's attempt to surrender to the Washoe County Sheriff's Office in March 2014; Bonafide's surrender of Dupree to custody on May 14, 2014, on bond number two; Justin Bros' surrender of Dupree to custody on bond number three, which occurred within 180 days of the court's notice of intent to forfeit bond; and Dupree's guilty plea and sentencing while in custody.

[3]Justin Bros cited to *International Fidelity*, 138 Cal. Rptr. 3d at 886-87, for the proposition that because the surety's responsibilities are based on its constructive custody of the defendant, when the defendant is remanded to custody, the surety no longer has responsibility for the defendant and the court "must act on its own motion to exonerate the bond, and if it fails to do so, exoneration is accomplished by operation of law."

The district court denied the motion, finding that Justin Bros did not timely address the forfeiture of bond number one. In addition, the district court concluded that Justin Bros' reliance on *Accredited Surety* was grounded in California's penal code, providing for automatic exoneration, whereas no similar codification exists under Nevada law. Justin Bros now challenges the district court's order through an original petition for a writ of mandamus.

DISCUSSION

[Headnotes 1, 2]

A writ petition is the proper vehicle for challenging orders originating from ancillary bail bond proceedings. *All Star Bail Bonds, Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 419, 422, 326 P.3d 1107, 1109 (2014). A writ of mandamus may issue to compel the performance of an act required by the law, or to control a manifest abuse of discretion. *Id.* Therefore, the question is whether the "district court manifestly abused its discretion in deciding whether to exonerate a bail bond." *Id.*

[Headnotes 3, 4]

This petition presents an issue of statutory interpretation, namely, whether provisions of NRS Chapter 178 required the district court to exonerate bond number one or to set aside the forfeiture judgment. Statutory interpretation, even in the context of a writ petition, is a question of law that we review de novo. *See All Star Bonding v. State*, 119 Nev. 47, 49, 62 P.3d 1124, 1125 (2003). When the plain language of a statute establishes the Legislature's intent, we "will give effect to such intention." *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008).

Nevada law does not provide for automatic exoneration of a bail bond

[Headnote 5]

Justin Bros argues that various events, including Dupree's remand to custody on two occasions and his subsequent releases secured by bond numbers two and three, Dupree's attempt to surrender himself, Dupree's final surrender to Washoe County authorities through Justin Bros' bondsman, and Dupree's eventual guilty plea and sentence while in custody, required bond number one's exoneration by operation of law or that the bond forfeiture judgment be set aside. Justin Bros asserts that the district court "had no discretion and no legal authority to do anything but exonerate the [b]ond." In contrast, the State on behalf of Judge Berry argues that the district court may not exonerate a bail bond in the absence of statutory authority, and be-

cause no such authority existed here, the court was prohibited from ordering exoneration. We agree.

NRS 178.509 provides:

> 1. If the defendant fails to appear when the defendant's presence in court is lawfully required, the court shall not exonerate the surety before the date of forfeiture prescribed in NRS 178.508 unless:
>
> (a) The defendant appears before the court and the court, upon hearing the matter, determines that the defendant has presented a satisfactory excuse or that the surety did not in any way cause or aid the absence of the defendant; or
>
> (b) The surety submits an application for exoneration on the ground that the defendant is unable to appear because the defendant:
>
> (1) Is dead;
>
> (2) Is ill;
>
> (3) Is insane;
>
> (4) Is being detained by civil or military authorities; or
>
> (5) Has been deported,
>
> and the court, upon hearing the matter, determines that one or more of the grounds described in this paragraph exist and that the surety did not in any way cause or aid the absence of the defendant.
>
> 2. If the requirements of subsection 1 are met, the court may exonerate the surety upon such terms as may be just.

The language of NRS 178.509 plainly prohibits courts from exonerating a bond for any reason other than those set forth under subsection 1. *All Star Bail Bonds*, 130 Nev. at 424, 326 P.3d at 1110. It establishes a two-step approach to exonerate a bond after a defendant fails to appear for a court proceeding. In the first step, exoneration of the bond may be initiated by the defendant or the surety. The defendant may initiate the process by appearing in court before the date of forfeiture, at which time the district court must have determined that either the defendant provided a satisfactory excuse or that the surety did not aid in the defendant's absence. In the alternative, the surety may initiate the exoneration process by application. When the surety submits an application, the district court must have determined that the surety did not aid in the defendant's absence and that the defendant is unable to appear because he or she is dead, ill, insane, being detained by civil or military authorities, or has been deported. Thus, the first step is complete if the district court makes findings pursuant to either option. At step two, the district court may exonerate a bond. Importantly, if the district

court does not find that one of the conditions in the first step exists, then it "shall not" have the discretion to exonerate a bond. NRS 178.509(1).

[Headnotes 6, 7]

A plain reading of NRS 178.509 not only fails to support Justin Bros' argument that bond number one was exonerated by operation of law, but it demonstrates quite the opposite. Exoneration is, in fact, prohibited after a defendant fails to appear, save certain limited circumstances. *All Star Bail Bonds*, 130 Nev. at 424, 326 P.3d at 1110 (noting that NRS 178.509(1)'s use of the words "shall not" demonstrates the Legislature's intent to prohibit the district court's discretion to exonerate a bond for any reasons other than the five conditions listed in the statute). Indeed, even if one of the enumerated circumstances is met, exoneration is not mandatory. *State v. Stu's Bail Bonds*, 115 Nev. 436, 438, 991 P.2d 469, 470-71 (1999) ("Once the requirements of NRS 178.509(1) are met, the decision to grant exoneration of a bail bond rests within the discretion of the district court." (citing NRS 178.509(2)).

Here, it is undisputed that Dupree failed to appear for his arraignments, thereby breaching the agreement to answer the charges specified and to be amendable to the court process. Consequently, the district court was prohibited from exonerating bond number one, unless one of NRS 178.509(1)'s enumerated conditions materialized. But the district court did not find that Justin Bros did not aid Dupree's absence. To the contrary, the district court found that Justin Bros was admittedly in contact with Dupree, but failed to surrender him to the proper authorities. In addition, the district court did not make findings as to Dupree's reason for failing to appear at his arraignment.[4] Thus, according to the undisputed facts, and in contrast to Justin Bros' argument, the district court would have abused its discretion by proceeding to exonerate Justin Bros' bond.

Because we conclude that the district court applied NRS 178.509 properly, we deny writ relief.

CHERRY and GIBBONS, JJ., concur.

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[4]Justin Bros' argument that bond number one should have been exonerated pursuant to NRS 178.509(1)(b)(4) because he was taken into custody lacks merit. The appropriate inquiry is whether his detainment was the reason for his failure to appear.

SCENIC NEVADA, INC., Appellant, *v.* CITY OF RENO, a Political Subdivision of the State of Nevada, Respondent.

No. 65364

June 30, 2016 373 P.3d 873

Appeal from a district court order denying declaratory relief challenging the City of Reno's 2012 digital billboard ordinance. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Advocacy organization brought action to invalidate city ordinance permitting digital advertising displays. Following bench trial, the district court entered judgment in City's favor, and organization appealed. The supreme court, Pickering, J., held that: (1) state constitution's three-year moratorium on legislative amendments to voter initiatives applied to municipal initiatives, and (2) City's reenactment of invalid ordinances after three-year legislative moratorium had expired validated them.

Affirmed.

[Rehearing denied September 16, 2016]

Law Offices of Mark Wray and *Mark D. Wray*, Reno, for Appellant.

Karl S. Hall, City Attorney, and *Jonathan D. Shipman*, Deputy City Attorney, Reno, for Respondent.

1. Declaratory Judgment.
   When legal, not factual, issues are at play, the supreme court reviews de novo a district court order resolving request for declaratory relief.
2. Municipal Corporations.
   Initiative power given to municipality's electors with respect to municipal legislation is no different from initiative power given to people as a whole with respect to state matters. Const. art. 19, § 2(3).
3. Constitutional Law.
   When statute is susceptible to both constitutional and unconstitutional interpretation, the supreme court is obliged to construe statute so that it does not violate constitution.
4. Municipal Corporations.
   State constitution's three-year moratorium on legislative amendments to voter initiatives applied to municipal initiatives, and thus, city ordinances amending municipal initiative within three years of its adoption were void ab initio, notwithstanding statute providing that municipal initiative ordinances were to be treated same as ordinances adopted by City Council, and city charter that permitted ordinances to be amended at any time. Const. art. 19, § 2(3); NRS 295.220.
5. Statutes.
   Though statute may be void ab initio, reenactment may cure constitutional defect so long as reenacted bill is free of constitutional infirmities.

6. Municipal Corporations.

Although city billboard ordinances were originally adopted in violation of state constitution's three-year moratorium on legislative amendments to voter initiatives, City's reenactment of ordinances after three-year legislative moratorium had expired validated them. Const. art. 19, § 2(3).

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

The Nevada Constitution secures the right of the people to enact or repeal statutes by initiative petition, followed by direct democratic vote. To protect the initiative process, the Nevada Constitution prohibits the Legislature from amending or repealing a voter-initiated statute for three years after it takes effect. Nev. Const. art. 19, § 2(3). Although Section 2(3) refers to "statutes" enacted by initiative, Section 4 extends the initiative powers in Article 19 to "the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality." Here, we are asked to decide two questions: first, whether the three-year legislative moratorium in Article 19, Section 2(3) applies to voter-initiated municipal ordinances; and second, whether amendments to a voter-initiated ordinance during the three-year legislative moratorium may be validly incorporated into a subsequent ordinance after the three-year moratorium expires. We hold that the three-year legislative moratorium applies to municipal initiatives and, though the City of Reno enacted two ordinances amending the voters' initiative within three years of its passage, the subsequent reenactment of those ordinances after the three-year legislative moratorium cured the constitutional defect. Accordingly, we affirm the district court's order entering judgment in favor of the City of Reno.

I.

Appellant Scenic Nevada, Inc. is a volunteer organization that was formed in January 2000 to advocate for stronger billboard controls in the City of Reno (City). It qualified an initiative for submission to general-election voters in 2000 as Ballot Question R-1, which asked voters to adopt the following ordinance: "The construction of new off-premises advertising displays/billboards is prohibited, and the City of Reno may not issue permits for their construction." The initiative passed by a wide margin. After being certified by the Reno City Council on November 14, 2000, the Initiative Ordinance became effective and is now codified as Reno Municipal Code (RMC) § 18.16.902(a).

Within the first three years of the new law's effective date, the City enacted two billboard-related ordinances. The first, Ordinance No. 5295 (the Conforming Ordinance), was enacted on January 22, 2002, and interpreted the Initiative Ordinance's prohibition on new construction as a cap on the number of billboards that could be built in the City of Reno. The Conforming Ordinance stated, "In no event shall the number of off-premises advertising displays exceed the number of existing off-premises advertising displays located within the City on November 14, 2000." RMC § 18.16.902(b). The second, Ordinance No. 5461 (the Banking Ordinance), was enacted on June 11, 2003, and allowed owners of existing, legally established billboards to remove the billboard and "bank" a receipt for up to 15 years in order to relocate it to a different location. RMC § 18.16.908.

On October 24, 2012, after four years of public process, the City Council enacted a third ordinance, Ordinance No. 6258, entitled in part "Digital Off-Premises Advertising Displays, including Light-Emitting Diode (LED)" (the Digital Ordinance). Prior to the Digital Ordinance, RMC required that all lights on billboards be directed toward the billboard. However, the Digital Ordinance created an exception for digital advertising displays, along with strict standards regarding illumination, timing, and presentation. In addition to creating the exception for digital billboards, the Digital Ordinance also reenacted and amended the Conforming Ordinance and the Banking Ordinance to accord with the Digital Ordinance. RMC § 18.16.905.

On November 16, 2012, Scenic Nevada filed a complaint for judicial review, seeking to invalidate the Digital Ordinance. It alleged that any digital billboards erected pursuant to the Digital Ordinance would necessarily be "new billboards" prohibited by the 2000 Initiative Ordinance and, to the extent that they were allowed as an existing billboard under the Conforming and Banking Ordinances, those ordinances were invalidly enacted during the three-year legislative moratorium that followed enactment of the Initiative Ordinance. Of note, Scenic Nevada did not and does not on appeal seek to disturb any ostensibly vested rights arising under the 2002 and 2003 Conforming and Banking Ordinances but, rather, to invalidate the 2012 Digital Ordinance.[1] After the district court granted the City's motion to dismiss, Scenic Nevada filed an amended complaint requesting declaratory relief. The district court held a bench trial, after which it entered judgment for the City, finding that the three-year legislative moratorium under Section 2(3) of the Nevada Constitution does not

[1]In its reply brief, Scenic Nevada states as follows: "The vested rights of those holders of banked billboard receipts to relocate static billboards shall not be affected by anything decided in this appeal. Scenic Nevada has never asked for those vested rights as to static billboards to be taken away, either. This case always has aimed solely at invalidating the 2012 digital billboard ordinance."

apply to municipal initiatives and that the Conforming, Banking, and Digital Ordinances were valid exercises of the City's legislative power. Scenic Nevada appeals.

II.

[Headnote 1]

"When legal, not factual, issues are at play, this court reviews de novo a district court order resolving a request for declaratory relief." *Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 172, 208 P.3d 429, 433 (2009); *see also Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 41, 293 P.3d 874, 878 (2013).

Scenic Nevada seeks to invalidate the 2012 Digital Ordinance because it incorporated the 2002 and 2003 Conforming and Banking Ordinances, which were enacted within the first three years of the voters' 2000 Initiative Ordinance. The City argues that the three-year legislative moratorium does not apply to municipalities and, even if it did, "the initiative did not bind or limit the City Council's legislative discretion in 2012 when it adopted the digital board ordinance."

A.

The Nevada Constitution prohibits the Legislature from amending or repealing an initiative measure approved by the voters within three years from the date it takes effect. Nev. Const. art. 19, § 2(3).[2] While Section 2(3) only refers to initiative-based "statute[s]," Section 4 extends the initiative power in Article 19 to "the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality." Based on Section 4's extension of the initiative power to municipal legislation, Scenic Nevada argues that the three-year legislative moratorium applies to initiative-based municipal ordinances, equally with initiative-based statutes.

The City disagrees. It cites NRS 295.220, which provides that an approved municipal initiative ordinance "shall be treated in all respects in the same manner as ordinances of the same kind adopted

[2]Section 2(3) states in relevant part:

> If a majority of the voters voting on such question at such election votes approval of such statute or amendment to a statute, it shall become law and take effect upon completion of the canvass of votes by the Supreme Court. An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.

Nev. Const. art. 19, § 2(3).

by the council."[3] According to the City, under the authority of Reno City Charter (RCC) § 2.080, "[c]ity ordinances may be enacted on one day, and subsequently amended, annulled, repealed, set aside or suspended any time thereafter . . . ." Thus, the City maintains that, under NRS 295.220 and RCC § 2.080, an initiative-based municipal ordinance is immediately subject to amendment or repeal, equally with any other municipal ordinance.

[Headnote 2]

"[T]he initiative power given to the electors of a municipality with respect to municipal legislation is no different from the initiative power given to the people as a whole with respect to state matters." *Rea v. City of Reno*, 76 Nev. 483, 486, 357 P.2d 585, 586 (1960). Though this court has not considered whether Article 19, Section 2(3) applies to *municipal* initiatives, it has applied the three-year legislative moratorium to initiatives that passed legislation at the county level. *See Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 73, 128 P.3d 452, 466 (2006) (stating "[a]mendment of an initiative is prohibited within the first three years of its passage" when analyzing whether the legislative body needed to amend a county initiative); *Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 763, 59 P.3d 1180, 1189 (2002) ("Nevada's Constitution reserves to the people the power to propose, by initiative petition, statutes and amendments to statutes and the constitution, and to enact or reject them at the polls, and further reserves the initiative and referendum powers to the registered voters of each county and municipality as to *all local, special and municipal legislation of every kind* in and for the county or municipality.") (citing Nev. Const. art. 19, §§ 2, 4).

[Headnotes 3, 4]

Though NRS 295.220 states that municipal initiative ordinances are treated the same as ordinances adopted by the city council, the City's interpretation that NRS 295.220 provides that municipal initiative ordinances can be immediately repealed would contradict the constitutional protections afforded to voter initiatives. "Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, this court is obliged to construe the statute so that it does not violate the constitution." *Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 874, 883, 878 P.2d 913, 919 (1994). Thus, we hold that the provisions of NRS 295.220 do not circumvent the

[3]NRS 295.220 states in relevant part: "If a majority of the registered voters voting on a proposed initiative ordinance vote in its favor, it shall be considered adopted upon certification of the election results and shall be treated in all respects in the same manner as ordinances of the same kind adopted by the council."

three-year legislative moratorium for municipalities. Instead, NRS 295.220 instructs municipalities as to the legislative powers they have with respect to initiative-based ordinances *after* the three-year moratorium expires. Despite NRS 295.220, the Nevada Constitution allows voter initiatives to be protected for the three-year legislative moratorium. Thereafter, a city council can amend, repeal, set aside, or suspend the initiative as it would any other ordinance.

Here, the City Council enacted both the Conforming Ordinance and the Banking Ordinance within the three-year moratorium. The Initiative Ordinance banning new billboards went into effect on November 14, 2000, creating a three-year legislative moratorium until November 14, 2003. The Conforming and Banking Ordinances were enacted on January 22, 2002, and June 11, 2003, respectively. Because the City enacted the Conforming and Banking Ordinances within three years of the Initiative Ordinance's effective date, and the ordinances amended the meaning of the Initiative Ordinance, the Conforming and Banking Ordinances are unconstitutional, and therefore void.[4] *See Nev. Power Co. v. Metro. Dev. Corp.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163-64 (1988) ("When a statute is held to be unconstitutional, it is null and void *ab initio*; it is of no effect, affords no protection, and confers no rights.").

B.

[Headnote 5]

Though a statute may be void *ab initio*, reenactment may cure the constitutional defect so long as the reenacted bill is free of constitutional infirmities. *See* 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22.31 (7th ed. 2009) ("Any defect in a statute as originally enacted may be cured when the statute is subsequently reenacted in a bill not subject to the infirmity of the original bill."); *id.* § 22.4 ("[T]o validate an unconstitutional act by amendment, the whole act must be reenacted as amended."); *see also Belcher Oil Co. v. Dade Cty.*, 271 So. 2d 118, 121 (Fla. 1972) ("The rule in Florida is that all infirmities or defects in the title of a reenacted statute are cured by reenactment; and this is true whether the statute has been previously declared inoperative or not."); *People v. Crutchfield*, 35 N.E.3d 218, 229 (Ill. App. Ct. 2015) ("When a statute is held unconstitutional because it was adopted in violation of the single subject rule, the legislature may revive the statute by reenacting the same provision, but in a manner that does not offend the single subject rule."); *Morin v. Harrell*, 164 P.3d 495,

[4]Though the district court's order indicates that the Conforming and Banking Ordinances were clarifications based on the ambiguity of the Initiative Ordinance, the City did not make that argument on appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating this court need not consider claims that are not cogently argued or supported by relevant authority).

496 (Wash. 2007) (concluding that a challenge to either the "single subject" rule or the "subject in title" rule "is precluded when the allegedly constitutionally infirm legislation has been subsequently reenacted or amended to properly titled legislation. Such amendment or reenactment cures the [constitutional] defect").

[Headnote 6]

Here, it is undisputed that the Reno City Council enacted the Conforming and Banking Ordinances within the three-year legislative moratorium, rendering the ordinances void *ab initio*. However, when the City Council enacted the 2012 Digital Ordinance—nine years after the three-year legislative moratorium expired—it reenacted as amended both the Conforming and Banking Ordinances. *See* RMC §§ 18.16.902, 18.16.908. As the City Council had the statutory authority to treat the voters' Initiative Ordinance "in the same manner as ordinances of the same kind adopted by the council," NRS 295.220, and the Nevada Constitution did not prohibit any such action as the three-year legislative moratorium had expired, the 2012 Digital Ordinance was enacted with full constitutional and statutory authority. Thus, upon reenactment, the constitutional defects in the Conforming and Banking Ordinances were cured. Since Scenic Nevada limits the relief it seeks to the prospective invalidation of the 2012 Digital Ordinance based on antecedent infirmities in the 2002 and 2003 Conforming and Banking Ordinances, which infirmities were cured when the 2012 Digital Ordinance reenacted them outside the moratorium period, no question arises in this case as to the impact the interim invalidity of the 2002 and 2003 Conforming and Banking Ordinances may have on persons who relied on those Ordinances. *See supra* note 1.

III.

We hold that the three-year legislative moratorium imposed under Nevada Constitution Article 19, Section 2(3) for voter initiatives applies to municipalities through Article 19, Section 4. After the three-year legislative moratorium expires, NRS 295.220 empowers municipalities to treat municipal initiative-based ordinances as they would any other municipal ordinance. Here, though the Conforming and Banking Ordinances were not validly enacted, their subsequent reenactment after the three-year legislative moratorium expired validated them. We therefore affirm, albeit for a different reason than that given by the district court. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

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

GOLDEN ROAD MOTOR INN, INC., A NEVADA CORPORATION DBA ATLANTIS CASINO RESORT SPA, APPELLANT/CROSS-RESPONDENT, *v.* SUMONA ISLAM, AN INDIVIDUAL, RESPONDENT/CROSS-APPELLANT, AND MEI-GSR HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY DBA GRAND SIERRA RESORT, WHICH CLAIMS TO BE THE SUCCESSOR IN INTEREST TO NAV-RENO-GS, LLC, RESPONDENT.

No. 64349

SUMONA ISLAM, AN INDIVIDUAL, APPELLANT, *v.* GOLDEN ROAD MOTOR INN, INC., A NEVADA CORPORATION DBA ATLANTIS CASINO RESORT SPA, RESPONDENT.

No. 64452

MEI-GSR HOLDINGS, LLC, DBA GRAND SIERRA RESORT, APPELLANT/CROSS-RESPONDENT, *v.* GOLDEN ROAD MOTOR INN, INC., A NEVADA CORPORATION DBA ATLANTIS CASINO RESORT SPA, RESPONDENT/CROSS-APPELLANT.

No. 65497

July 21, 2016 376 P.3d 151

Consolidated appeals and cross-appeals from district court orders in a contract and tort action (Docket No. 64349) and awarding attorney fees (Docket Nos. 64452 and 65497). Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Casino brought action against former employee, a casino host, and her new employer, alleging breach of contract, tortious interference with contractual relations, conversion, and violation of the Nevada Uniform Trade Secrets Act. The district court entered judgment finding former employee liable for breach of contract and violation of the Uniform Trade Secrets Act, and imposed a permanent injunction prohibiting employee from further use of trade secrets. Parties appealed. The supreme court, DOUGLAS, J., held that: (1) one-year noncompete agreement prohibiting employee from any employment, affiliation, or service with any gaming business or enterprise within a 150-mile radius was unreasonable and wholly unenforceable, (2) unreasonable noncompete agreement was wholly unenforceable and not subject to reformation by the court, (3) former employee's altering and concealing contact information for 87 players in employer's electronic database did not amount to conversion, (4) the district court could not properly award attorney fees to employer without permitting former employee to review itemizations, and (5) casino failed to establish that new employer knowingly misappropriated trade secrets.

Affirmed in part, reversed in part, and remanded.

HARDESTY, J., with whom PARRAGUIRRE, C.J., and PICKERING, J., agreed, dissented in part.

Dotson Law and *Robert A. Dotson*, Reno; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno, for Golden Road Motor Inn, Inc., dba Atlantis Casino Resort Spa.

Law Offices of Mark Wray and *Mark D. Wray*, Reno, for Sumona Islam.

Cohen-Johnson, LLC, and *H. Stan Johnson* and *Steven B. Cohen*, Las Vegas, for MEI-GSR Holdings, LLC, dba Grand Sierra Resort.

1. APPEAL AND ERROR.
   The supreme court reviews the district court's legal conclusions de novo on appeal.
2. APPEAL AND ERROR.
   The supreme court will not disturb a district court's findings of fact unless they are clearly erroneous and not based on substantial evidence.
3. APPEAL AND ERROR.
   Contract interpretation is a legal question considered under a de novo standard of review.
4. CONTRACTS.
   A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted.
5. CONTRACTS.
   Time and territory are important factors to consider when evaluating the reasonableness of a noncompete agreement; however, there is no inflexible formula for deciding the ubiquitous question of reasonableness.
6. CONTRACTS.
   One-year noncompete agreement prohibiting former employee, a casino host, from any employment, affiliation, or service with any gaming business or enterprise within a 150-mile radius was overly broad and presented an undue hardship for employee, and thus was unreasonable.
7. CONTRACTS; REFORMATION OF INSTRUMENTS.
   Unambiguous noncompete agreement that was overbroad and thus unreasonable was wholly unenforceable and not subject to reformation by the supreme court.
8. CONTRACTS.
   An overbroad and unreasonable provision in a noncompete agreement renders the agreement wholly unenforceable.
9. CONTRACTS.
   A court is not free to modify or vary the terms of an unambiguous agreement, and this rule has no exception for overbroad noncompete agreements.
10. CONTRACTS.
    The terms of a noncompete agreement must be construed in the employee's favor.

11. CONTRACTS.
    The district court did not abuse its discretion in refusing to redraft an unambiguously overbroad noncompete agreement.
12. CONTRACTS.
    Parties are not entitled to make an agreement that they will be bound by whatever contract the courts may make for them at some time in the future; courts are not empowered to make private agreements.
13. LABOR AND EMPLOYMENT.
    Where underlying noncompete agreement was unreasonable and wholly unenforceable, former employer had no cause of action against former employee's new employer for tortious interference with a contractual relationship.
14. CONVERSION AND CIVIL THEFT.
    Former casino host's conduct in altering and concealing the contact information for 87 players in casino employer's electronic database did not amount to conversion; the information was not lost and was properly restored at relatively minimal cost.
15. CONVERSION AND CIVIL THEFT.
    Conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his or her title or rights therein or in derogation, exclusion, or defiance of such title or rights.
16. CONVERSION AND CIVIL THEFT.
    Conversion generally is limited to those severe, major, and important interferences with the right to control personal property that justify requiring the actor to pay the property's full value.
17. COSTS.
    The district court could not properly award attorney fees to plaintiff without permitting defendant to review itemizations. NRCP 54.
18. ANTITRUST AND TRADE REGULATION.
    Casino, having established that former employee misappropriated trade secrets by entering certain player information she had copied from casino's electronic database into the database of her new employer, failed to establish that new employer also knowingly misappropriated trade secrets; new employer's hiring personnel advised employee before she began working to bring only herself and her relationships when she left casino, new employer's management sought and gained employee's reassurance that the player information she communicated was built on her own relationships, and casino's letter to new employer regarding "potential trade secret violations" did not sufficiently put new employer on notice that it was using wrongfully obtained player information. NRS 600A.030(2).

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we are asked to consider (1) whether a noncompete agreement is reasonable and enforceable, (2) whether an alteration of electronic information amounts to conversion, and (3) whether one gaming establishment misappropriated another gaming establishment's trade secrets.

Casino host Sumona Islam entered into an agreement with her employer, Atlantis Casino Resort Spa, to refrain from employment, association, or service with any other gaming establishment within 150 miles of Atlantis for one year following the end of her employment. Islam eventually grew dissatisfied with her work at Atlantis and, while searching for work elsewhere, altered and copied gaming customers' information from Atlantis' computer management system. Soon after, she resigned from Atlantis and began working as a casino host at Grand Sierra Resort (GSR), where she accessed the computer management system to enter the copied information. Without knowing the information was wrongfully obtained, GSR used this and other information conveyed by Islam to market to those customers.

As to the noncompete agreement, we affirm the district court, concluding that the type of work from which Islam is prohibited is unreasonable because it extends beyond what is necessary to protect Atlantis' interests and is an undue hardship on Islam. We further conclude that because the work exclusion term is unreasonable, the agreement is wholly unenforceable, as we do not modify or "blue pencil" contracts. With regard to Atlantis' conversion claim based on Islam's alteration of electronic customer information, which Atlantis quickly restored, we affirm the district court's denial. The minimal disruption and expense incurred were insufficient to require Islam to pay the full value of the information. Finally, as to the misappropriation of trade secrets claim, we conclude that Atlantis failed to demonstrate that GSR knew or should have known the player information was obtained by improper means and therefore affirm the district court's finding of nonliability.[1]

BACKGROUND

While working as a casino host at Atlantis, Islam executed several agreements pertaining to her employment. Pursuant to those agreements, Atlantis restricted Islam from sharing confidential information, disseminating intellectual property, and downloading or uploading information without authorization. Additionally, a noncompete agreement prohibited Islam from employment, affiliation, or service with any gaming operation within 150 miles of Atlantis for one year following the end of her employment.[2]

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[1]We also affirm the parties' appeals from attorney fees awards, except that we reverse the award to Atlantis against Islam because the district court erred by prohibiting Islam's review of the itemized attorney fees.

[2]In particular, the noncompete agreement provides as follows:

> In the event that the employment relationship between Atlantis and Team Member ends for any reason, either voluntary or non-voluntary, Team Member agrees that (s)he will not, without the prior written consent of Atlantis, be employed by, in any way affiliated with, or provide any

After more than three years at Atlantis, Islam became dissatisfied with her work environment. As Islam pursued employment elsewhere, she altered and concealed the contact information for 87 players in Atlantis' electronic database. She also hand-copied players' names, contact information, level of play, game preferences, credit limits, and other proprietary information from the database onto notebook paper. Soon after, she resigned, and when newly assigned casino hosts attempted to contact players formerly assigned to Islam, they discovered that the information had been altered. Despite Islam's actions, Atlantis was able to fully restore the correct contact information for its players, incurring $2,117 in repair expenses.

Meanwhile, GSR interviewed Islam for a position as a casino host. During the hiring process, GSR personnel advised Islam not to bring anything from Atlantis but herself and her established relationships. Despite GSR's request, when Islam began working at GSR, she entered certain player information she had copied from Atlantis' database into GSR's database. Evidence adduced at trial also indicated that Islam communicated copied information to GSR by email. However, Islam never presented to GSR personnel the notebooks containing the copied information and repeatedly insisted that the information she provided was from her own "book of trade."[3] Thus, GSR used the information it received from Islam to market to Atlantis players.

Thereafter, Atlantis became aware that GSR hired Islam and that GSR was marketing to its players. Atlantis sent a letter to GSR, informing GSR of Islam's noncompete agreement, that Islam may have confidential information, and that GSR was to refrain from using that information. In response, GSR sent a letter to Atlantis advising that it was not in possession of trade secret information and that the information provided by Islam came from her book of trade. GSR additionally requested that Atlantis provide more specific information as to what Atlantis believed was protectable as a trade secret. Atlantis did not comply with GSR's request.

Subsequently, Atlantis filed a complaint against both Islam and GSR, alleging seven causes of action and requesting a restraining order. The district court issued a restraining order prohibiting Islam from employment with GSR. The parties later stipulated to a preliminary injunction pending resolution of the case, and GSR served Atlantis with an offer of judgment. However, Atlantis rejected the offer and a bench trial ensued.

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services to, any gaming business or enterprise located within 150 miles of Atlantis Casino Resort for a period of one (1) year after the date that the employment relationship between Atlantis and Team Member ends.

[3]The district court found that a casino host's "book of trade" is a collection of "names and contact information of guests with whom the host has developed relationships through [the host's] own efforts."

As between Atlantis and Islam, the district court found Islam liable for breach of contract and violation of the Nevada Uniform Trade Secrets Act and imposed a permanent injunction prohibiting Islam from further use of Atlantis' trade secrets. The district court awarded Atlantis compensatory and punitive damages, in addition to attorney fees and costs. However, the district court also found that Islam was not liable for tortious interference with contractual relations or conversion and ruled that the noncompete agreement was unenforceable. As to Atlantis' claims against GSR, the district court found that GSR was not liable for tortious interference with contractual relations or misappropriation of trade secrets and awarded GSR attorney fees and costs based on its offer of judgment, but denied fees requested under NRS 600A.060.

All three parties appealed. Atlantis challenges the noncompete and conversion rulings in its claims against Islam, and the tortious interference and attorney fees rulings in its claims against GSR. Islam's appeal challenges the award of attorney fees to Atlantis. GSR challenges the denial of attorney fees under NRS 600A.060.

DISCUSSION

[Headnotes 1, 2]

"We review the district court's legal conclusions de novo." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). However, "this court will not disturb a district court's findings of fact unless they are clearly erroneous and not based on substantial evidence." *Int'l Fid. Ins. Co. v. State*, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2006).

Atlantis v. Islam

Noncompete agreement

Atlantis argues that the noncompete agreement signed by Islam was reasonable and enforceable. Even if the noncompete agreement was unenforceable as written, Atlantis argues that the agreement should be preserved by judicial modification of provisions that are decidedly too broad. In contrast, Islam and GSR argue that the court properly found the noncompete agreement unreasonable and correctly determined that the proper remedy was to void the contract as a whole. Further, Islam and GSR contend that courts may not create a contract for the parties that the parties did not intend.

Reasonableness

[Headnotes 3-5]

Contract interpretation is a legal question we consider under a de novo standard of review. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Under Nevada law, "[a] restraint of trade is unreasonable, in the absence of statutory authorization or

dominant social or economic justification, if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted." *Hansen v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967). Time and territory are important factors to consider when evaluating the reasonableness of a noncompete agreement. *Id.* at 192, 426 P.2d at 793. However, "[t]here is no inflexible formula for deciding the ubiquitous question of reasonableness." *Ellis v. McDaniel*, 95 Nev. 455, 458-59, 596 P.2d 222, 224 (1979). Thus, we look to our caselaw.

In *Jones v. Deeter*, an employer that performed lighting services hired an assistant, who agreed in writing not to compete within 100 miles of Reno/Sparks for five years subsequent to the end of his employment. 112 Nev. 291, 292, 913 P.2d 1272, 1273 (1996). After three months, the employer fired his assistant and, when the assistant sought work elsewhere, the employer brought suit against him to enforce the noncompete agreement. *Id.* at 293, 913 P.2d at 1273. We concluded that the five-year restriction imposed too great a hardship for the employee and was not necessary to protect the employer's interests, even in light of the employer's argument that developing a customer base in the industry was difficult. *Id.* at 296, 913 P.2d at 1275.

Also, in *Camco, Inc. v. Baker*, we held that a noncompete agreement term of two years and "within fifty miles of any area which was the 'target of a corporate plan for expansion'" was unreasonable. 113 Nev. 512, 519-20, 936 P.2d 829, 833-34 (1997). We explained "that the covenant at issue [was] overly broad as to future territory for possible expansion," and thus, operated "as a greater restraint on trade than [was] necessary to protect [the former employer's] interests." *Id.*

[Headnote 6]

In this case, similar to *Jones* and *Camco*, we conclude that the term prohibiting Islam from employment, affiliation, or service with any gaming business or enterprise is overly broad, as it extends beyond what is necessary to protect Atlantis' interests. According to the term, Islam is prohibited from being employed, for instance, as a custodian, at every casino within a 150-mile radius. Yet, in such a hypothetical, it is unlikely that Islam would be luring players from Atlantis; thus, Atlantis' interests would remain protected. Additionally, similar to *Jones*, the work exclusion term presents an undue hardship for Islam. The agreement's prohibition of *all* types of employment with gaming establishments severely restricts Islam's ability to be gainfully employed. For these reasons, we deem the term to be overbroad and unreasonable.[4]

[4]In accord with this conclusion, the Georgia Court of Appeals has stated that "[a] noncompete covenant is too broad and indefinite to be enforceable where

Enforceability

[Headnotes 7-9]

Under Nevada law, such an unreasonable provision renders the noncompete agreement wholly unenforceable. *See Jones*, 112 Nev. at 296, 913 P.2d at 1275 (holding that the noncompete agreement as a whole was unenforceable after concluding that a particular provision was unreasonable). Rightfully, we have long refrained from reforming or "blue penciling"[5] private parties' contracts. *See Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947) ("This would be virtually creating a new contract for the parties, which . . . under well-settled rules of construction, the court has no power to do."). In *All Star Bonding v. State*, we reaffirmed that "[w]e are not free to modify or vary the terms of an unambiguous agreement." 119 Nev. 47, 51, 62 P.3d 1124, 1126 (2003) (internal quotation omitted); *see Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (2001) ("It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." (internal quotation omitted)). Under Nevada law, this rule has no exception for overbroad noncompete agreements, thus Atlantis' failure to suggest that the noncompete agreement is ambiguous leaves us only to apply our clear precedent. However, our precedent appears inconsequential to the dissent's blue penciling advocacy, as they, too, fail to charge the contract with ambiguity before picking up the pencil. But even if an argument as to the contract's ambiguity were offered, and even if it had merit, reformation may still be inappropriate, as the dissent points to no Nevada case reforming ambiguous noncompete agreements. Thus, we act in conformance with our precedent when we refrain from rewriting the parties' contract.

Importantly, we have not overturned or abrogated our caselaw establishing our refusal to reform parties' contracts where they are unambiguous. Nonetheless, citing to *Hansen*, 83 Nev. at 192, 426 P.2d at 793-94, and *Ellis*, 95 Nev. at 458, 596 P.2d at 224, Atlantis contends that if the noncompete agreement was overly broad and unreasonable, the district court was required to modify it. In opposition, GSR contends that Atlantis misconstrues *Hansen* and *Ellis* because the cases do not allow for the court's modification of a noncompete agreement. According to GSR, the cases provide for modi-

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it contains no limit on the work restricted and effectively prohibits an employee from working for a competitor in any capacity." *Lapolla Indus., Inc. v. Hess*, 750 S.E.2d 467, 474 (Ga. Ct. App. 2013).

[5]"The 'blue-pencil test' is '[a] judicial standard for deciding whether to invalidate the whole contract or only the offending words.'" Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. 672, 681 (2008) (quoting *Blue-pencil test*, *Black's Law Dictionary* (8th ed. 2004)).

fication of a preliminary injunction rather than the original contract. We agree with GSR.

The procedural posture of the case at bar distinguishes it from *Hansen* and *Ellis*, and likens it to *Jones*. Both *Hansen*, 83 Nev. at 191, 426 P.2d at 793, and *Ellis*, 95 Nev. at 457, 596 P.2d at 223, were appeals from district court orders granting preliminary injunctions. The particular thing modified after finding the terms of the employment contracts unreasonable were the injunctions, not the employment contracts. *See, e.g.*, *Hansen*, 83 Nev. at 193, 426 P.2d at 794 ("We deem the restriction thus modified to be reasonable."). Thus, the blue pencil was not taken up. In contrast, in *Jones*, the appeal followed a final judgment on the merits of the noncompete agreement's reasonableness and enforceability. 112 Nev. at 293, 913 P.2d at 1274. We held that the entire agreement was unenforceable after concluding that the five-year time restriction provision was unreasonable. *Id.* at 296, 913 P.2d at 1275. Thus, here, as in *Jones*, the unreasonable work exclusion term renders the contract as a whole unenforceable. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 681-82 (1960) ("[M]ost courts either issue an injunction which is regarded as reasonable, even though narrower than the terms of the restraining covenant, or refuse enforcement altogether." (footnote omitted)).

The dissent cites to caselaw from other jurisdictions to argue that Nevada should similarly indulge. Other states are divided on whether to reform parties' contracts. *Compare Federated Mut. Ins. Co. v. Whitaker*, 209 S.E.2d 161, 164 (Ga. 1974) (holding that the entire "covenant must fall because this court has refused to apply the 'Blue-pencil theory of severability'" (internal quotations omitted)), *with Farm Bureau Serv. Co. of Maynard v. Kohls*, 203 N.W.2d 209, 212 (Iowa 1972) (upholding a lower court's finding that a noncompete agreement was unreasonable, but rejecting its conclusion that the contract as a whole was therefore void). Georgia courts explicitly considered and adamantly rejected the blue pencil way:

> We have given careful consideration to the severance theory, and we decline to apply it. . . .
>
> "Courts and writers have engaged in hot debate over whether severance should ever be applied to an employee restraint. The argument against doing so is persuasive. For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers

> can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. . . ."
>
> There are some good reasons in support of the doctrine of severance. However, we conclude that those reasons are not of sufficient weight to offset those reasons for refusing to apply the doctrine. In short, we have weighed the "blue-pencil" doctrine in the balance, and found it wanting.

Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot, 191 S.E.2d 79, 81 (Ga. 1972) (quoting Blake, *supra*, at 682-83).[6] We are persuaded by Georgia's rationale, but there are additional reasons for abstaining.

Our exercise of judicial restraint when confronted with the urge to pick up the pencil is sound public policy. Restraint avoids the possibility of trampling the parties' contractual intent. *See* Pivateau, *supra*, at 674 ("[T]he blue pencil doctrine . . . creates an agreement that the parties did not actually agree to."); *Reno Club*, 64 Nev. at 323, 182 P.2d at 1016 (concluding that creating a contractual term operates beyond the parties' intent and the court's power). Even assuming only minimal infringement on the parties' intent, as the dissent suggests, a trespass at all is indefensible, as our use of the pencil should not lead us to the place of drafting. Our place is in interpreting. Moreover, although the transgression may be minimal here, setting a precedent that establishes the judiciary's willingness to partake in drafting would simply be inappropriate public policy as it conflicts with the impartiality that is required of the bench, irrespective of some jurisdictions' willingness to overreach.

Restraint also preserves judicial resources. Pivateau, *supra*, at 674 ("Both [types of blue penciling] essentially turn courts into attorneys after the fact."). And restraint is consistent with basic principles of contract law that hold the drafter to a higher standard. *Williams v. Waldman*, 108 Nev. 466, 473, 836 P.2d 614, 619 (1992) ("[I]t is a well settled rule that '[i]n cases of doubt or ambiguity,

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[6]We note that the Georgia Legislature implemented laws attempting to advance blue penciling in Georgia courts. *See* Ga. Code Ann. § 13-8-2.1 (repealed 2009); Ga. Code Ann. § 13-8-53(d) (2010). However, the Legislature's first attempt, Ga. Code Ann. § 13-8-2.1 (1990), providing that courts *must* reform unlawful contracts, was held unconstitutional by *Jackson & Coker, Inc. v. Hart*, 405 S.E.2d 253, 255 (Ga. 1991). *See Atlanta Bread Co. Int'l, Inc. v. Lupton-Smith*, 679 S.E.2d 722, 724-25 (Ga. 2009) ("[T]his Court has rejected a legislative attempt to usurp the application of standards of reasonableness to noncompetition covenants in employment agreements."). Another legislative attempt, Ga. Code Ann. § 13-8-53(d) (2010), providing that courts *may* blue pencil, did not affect Georgia's precedent. The Georgia Court of Appeals reiterated that "the rule is that the court will not sever or 'blue pencil' an unenforceable noncompete covenant and enforce reasonable restrictions in other noncompete covenants, but will declare all the noncompete covenants unenforceable." *Lapolla*, 750 S.E.2d at 473.

a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language.'" (alteration in original) (quoting *Jacobson v. Sassower*, 489 N.E.2d 1283, 1284 (N.Y. 1985))).

[Headnote 10]

We have been especially cognizant of the care that must be taken in drafting contracts that are in restraint of trade. *Hansen*, 83 Nev. at 191, 426 P.2d at 793 ("An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable."). A strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight. Ferdinand S. Tinio, Annotation, *Enforceability, Insofar as Restrictions Would Be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61 A.L.R. 3d 397, § 2b (1975). "One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable." *Menter Co. v. Brock*, 180 N.W. 553, 555 (Minn. 1920). Hence, leniency must favor the employee and the terms of the contract must be construed in the employee's favor.

Conversely, blue penciling favors the employer by presuming the employer's good faith.[7] Demonstrating compassion for the employer, one professor offered that "in most such cases, the employer does not require the promise because the employer is a hardhearted oppressor of the poor," instead, "the employer is engaged in the struggle for prosperity and must utilize all avenues to gain and retain the good will of customers." 15 Grace McLane Giesel, *Corbin on Contracts* § 80.15, at 120 (rev. ed. 2003). Further, "[t]he function of the law is to maintain a reasonable balance" because "a former employee may compete unfairly and an employer may oppress unreasonably." *Id.* This analysis sympathizes with employers at most and equivocates the employer's and employee's plight at least. However, it is plain that the scales are most imbalanced when the party who holds a superior bargaining position, and who is the contract drafter, drafts a contract that is greater than required for its protection and is thereafter rewarded with the court's legal drafting aid, as the other party faces economic impairment, restrained in his trade. In the context of an agreement that is in restraint of trade, a good-faith presumption benefiting the employer is unwarranted.

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[7]Although we acknowledge that some courts only allow blue penciling "if the party who seeks to enforce the term obtained it in good faith," *Ellis v. James V. Hurson Associates, Inc.*, 565 A.2d 615, 617 (D.C. 1989) (internal quotations omitted), still other courts do not make good faith a condition of reformation, *see, e.g.*, *Farm Bureau*, 203 N.W.2d at 212.

At the outset, the bargaining positions of the employer and employee are generally unequal. *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 924 n.10 (Wis. 2009). When an employment contract is made, the party seeking employment must consent to almost any restrictive covenant if he or she desires employment. *Id.* Hence, even an employer-drafted contract containing unenforceable provisions will likely be signed by the employee. Under a blue pencil doctrine, "[t]he employer then receives what amounts to a free ride on" the provision, perhaps knowing full well that it would never be enforced. Pivateau, *supra*, at 690. Consequently, the practice encourages employers with superior bargaining power "to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full." *Streiff v. Am. Family Mut. Ins. Co.*, 348 N.W.2d 505, 509 (Wis. 1984).[8] It thereby forces the employee to bear the burden as employers carelessly, or intentionally, overreach. Pivateau, *supra*, at 689. "In the words of one commentator, '[t]his smacks of having one's employee's cake, and eating it too.'" *Id.* at 690 (quoting Blake, *supra*, at 683).

[Headnote 11]

The dissent argues that refusal to blue pencil is antiquated. However, it has been noted that "eliminating the blue pencil doctrine comports with recent trends as courts have indicated a greater willingness to refuse to reform agreements that are not reasonable on their face." *Id.* at 674. Some states, such as Wisconsin, have even codified the "no modification rule." *See* Wis. Stat. § 103.465 (2012).[9] Based on the argument of antiquity, and the rule of law in other ju-

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[8]A California court explains:

> Many, perhaps most, employees would honor these clauses without consulting counsel or challenging the clause in court, thus directly undermining the statutory policy favoring competition. Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation.

Kolani v. Gluska, 75 Cal. Rptr. 2d 257, 260 (Ct. App. 1998). On the other hand, the "all or nothing" approach encourages employers to carefully draft agreements devoid of "overreaching terms for fear that the entire agreement will be voided." Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 Hofstra Lab. & Emp. L.J. 223, 246 (2007).

[9]Wis. Stat. § 103.465 provides:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

risdictions, the dissent would force the district court to change the contract to only prohibit Islam from being employed as a casino host.[10] The dissent's overreach in such an indulgent application of the doctrine is troubling.

[Headnote 12]

Under a strict application of the blue pencil doctrine, "only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words." Pivateau, *supra*, at 681 (internal quotation omitted). The dissent purports to reword the provision by changing the work exclusion term to limit it to employment as a casino host. Thus, the dissent embraces the most liberal form of the blue pencil doctrine, *id.* at 682, a use of judicial resources that is unwarranted and blurs the line between the bench and the bar.[11] As explained by the Supreme Court of Arkansas, "[w]e are firmly convinced that parties are not entitled to make an agreement, as these litigants have tried to do, that they will be bound by whatever contract the courts may make for them at some time in the future." *Rector-Phillips-Morse, Inc. v. Vroman*, 489 S.W.2d 1, 4 (Ark. 1973). Courts are not empowered to make private agreements. *Id.* Such actions are simply not within the judicial province. *Id.*

[Headnote 13]

In light of Nevada's caselaw and stated public policy concerns, we will not reform the contract to change the type of employment from which Islam is prohibited. As written, the contract is an unenforceable restraint of trade. *See Hansen*, 83 Nev. at 191, 426 P.2d at 793 (recognizing that contracts in restraint of trade will not be enforced unless the terms are reasonable). Without a contract, there was no violation.[12] Accordingly, we affirm the district court's ruling as to the noncompete agreement.

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[10]Even assuming that the blue pencil doctrine is not contrary to Nevada precedent and stated public policy, reformation is certainly not a mandate placed on a district court. Laura J. Thalacker & Hartwell Thalacker, *Non-Compete Laws: Nevada, Practical Law State Q&A* § 6 (2015) (suggesting that "[c]ourts in Nevada may, but are not required to, modify or blue pencil the terms in noncompete agreements and may enforce them as modified"). Under a review for discretion, the district court certainly did not abuse its discretion in refusing to redraft a noncompete agreement that banned the employer from "employment, affiliation, or service with any gaming operation." *See Dowell v. Biosense Webster, Inc.*, 102 Cal. Rptr. 3d 1, 11 (Ct. App. 2009) (affirming a lower court's invalidation of an overbroad noncompete clause prohibiting "an employee from rendering services, directly or indirectly, to a competitor").

[11]Redrafting the contract, rather than striking the offending work exclusion term, is the dissent's only option because striking the term renders the agreement unintelligible.

[12]Based on our determination that the noncompete agreement was unenforceable, we also conclude that Atlantis' cause of action for tortious interference

Conversion

[Headnote 14]

Atlantis claims the district court erred by determining that Islam was not liable for conversion. According to Atlantis, Islam converted its property when she altered the player contact information for 87 guests, taking control of its data in a form that was inconsistent with its property rights. Islam and GSR contend that conversion requires a more serious interference with property rights.

[Headnotes 15, 16]

Nevada law defines conversion "as a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title *or* rights therein or in derogation, exclusion, or defiance of such title or rights." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) (internal quotations omitted). Furthermore, "conversion generally is limited to those severe, major, and important interferences with the right to control personal property that justify requiring the actor to pay the property's full value." *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 328-29, 130 P.3d 1280, 1287 (2006).

We conclude that Islam's act of altering the player contact information in Atlantis' gaming database did not amount to conversion. The information was not lost, and with relatively minimal cost, the contact information was properly restored. To be sure, the interruption in marketing caused by Islam's conduct was not severe enough to justify requiring her to pay the full value of the information, which was estimated to be much more valuable than the cost of repair.[13] Therefore, we also affirm the district court's finding of no liability as to Atlantis' conversion claim against Islam.

Attorney fees awarded to Atlantis against Islam

[Headnote 17]

Islam contends that the district court violated her right to due process by awarding Atlantis $308,711 in attorney fees without allowing her to view the itemized fees. In response, Atlantis contends that NRCP 54 does not require the detailed documentation that Islam sought.

We conclude that the district court's award of attorney fees to Atlantis against Islam without permitting Islam to review the itemizations was improper. *See Love v. Love*, 114 Nev. 572, 582, 959

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with a contractual relationship against GSR was properly dismissed as a matter of law. *See J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003) (requiring a valid and existing contract to establish an intentional interference with contractual relations claim).

[13]We note that the district court awarded Atlantis the cost of repair as compensation in its breach of contract claim.

P.2d 523, 529 (1998) (concluding that the district court's grant of attorney fees based upon sealed billing statements unfairly precluded the opposing party from disputing the legitimacy of the award). Therefore, as to the award of attorney fees against Islam, we reverse and remand with instructions to allow Islam to review the itemized attorney fees.

Atlantis v. GSR

Nevada Uniform Trade Secrets Act

Atlantis contends that the district court's conclusions that GSR did not misappropriate its trade secrets, but that Islam did, are irreconcilable with one another. Thus, Atlantis claims that GSR is also liable for misappropriation. GSR argues that it did not misappropriate Atlantis' trade secrets because it reasonably relied on Islam's representation that she had relationships with each of the players she put in its database, and thus, GSR had no knowledge that the information was a trade secret.

We conclude that the district court's conclusion was not clearly erroneous because Atlantis failed to establish the essential elements of its misappropriation claim against GSR. The following was set forth by the United States District Court for the Northern District of California in interpreting California's almost identical Uniform Trade Secrets Act:

> The elements of a claim of indirect trade secret misappropriation . . . are: (1) the plaintiff is the owner of a valid trade secret; (2) the defendant acquired the trade secret from someone other than the plaintiff and (a) knew or had reason to know before the use or disclosure that the information was a trade secret and knew or had reason to know that the disclosing party had acquired it through improper means or was breaching a duty of confidentiality by disclosing it; or (b) knew or had reason to know it was a trade secret and that the disclosure was a mistake; (3) the defendant used or disclosed the trade secret without plaintiff's authorization; and (4) the plaintiff suffered harm as a direct and proximate result of the defendant's use or disclosure of the trade secret, or the defendant benefitted from such use or disclosure.

MedioStream, Inc. v. Microsoft Corp., 869 F. Supp. 2d 1095, 1114 (N.D. Cal. 2012). *Compare* Cal. Civ. Code § 3426.1 (2012), *with* NRS 600A.030(2).[14]

[14]NRS 600A.030(2) provides that "misappropriation" means as follows:

> (a) Acquisition of the trade secret of another by a person by improper means;
>
> (b) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

[Headnote 18]

Atlantis failed to establish that GSR knew or should have known that the information Islam provided was a trade secret. GSR took steps to ensure that it did not receive trade secret information from Islam. GSR's hiring personnel advised Islam before she began working to bring only herself and her relationships when she left Atlantis. Additionally, GSR management sought and gained Islam's reassurance that the player information she communicated was built on her own relationships. Based on Islam's representations, there was no reason for GSR to know that it was using trade secrets that belonged to Atlantis.

Furthermore, Atlantis' letter to GSR did not sufficiently put GSR on notice that it was using wrongfully obtained player information. The letter expressed doubt as to whether GSR was in fact in possession of Atlantis' trade secrets and failed to identify the trade secrets. Atlantis' letter advised that there were "[p]otential [t]rade [s]ecret [v]iolations" and, rather elusively, communicated that "[i]f GSR has incorporated into its data base . . . confidential information that is the property of the Atlantis, we demand that GSR immediately advise us of the same." In addition to the uncertainty communicated by Atlantis' use of the terms "potential" and "if," Atlantis placed the onus on GSR to know what trade secrets GSR had in its possession that belonged to Atlantis. However, without Atlantis' player list, or Islam's candid insight, it was nearly impossible for GSR to know whether it was using Atlantis' trade secrets. Moreover, when GSR requested more specific information, Atlantis failed to provide it. Because GSR received both trade secret and nontrade secret information from Islam without knowing which, if any, information was protected, it cannot be said that GSR sufficiently knew or should have known that the information provided to it was a trade secret. *See MicroStrategy Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 431 (E.D. Va. 2004) (limiting scope of protected documents to those identified as trade secrets).

(c) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(1) Used improper means to acquire knowledge of the trade secret;

(2) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(I) Derived from or through a person who had used improper means to acquire it;

(II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(3) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

An alternative result, which establishes the sufficiency of GSR's knowledge based on these facts, would be harmful to the casino host trade. To protect Atlantis' potential trade secrets, GSR would need to cease marketing to all players communicated to by Islam. This result would encourage all casino hosts' former employers to send letters accusing the host's new employer of trade secret violations, knowing that with no real claim of misappropriation, they could quash competition. The consequences would suffocate a casino host's very purpose, whose trade is built on providing its employer with relationships established with customers. Hosts provide a unique advantage to casinos by expanding a casino's client base, *Choctaw Resort Development Enterprise v. Applequist*, 161 So. 3d 1134, 1136 (Miss. Ct. App. 2015), and the result the dissent and Atlantis seek could stifle the trade.

Our holding considers the nature of the casino host's trade. With more specific information about which players were improperly solicited, GSR could have ceased its use of information improperly obtained while continuing its use of information rightfully obtained. We deem this to be the best outcome.

Therefore, we reject the assertion that GSR knew, or had reason to know, from Atlantis' vague accusations, that it was using information improperly obtained. We conclude that, without more, GSR appropriately relied on Islam's statements that the information she relayed was based on her own relationships and her book of trade. The district court properly held Islam responsible for her actions but distinguished Islam's conduct from that of GSR. Because the district court's determination that GSR did not misappropriate Atlantis' trade secrets was not clearly erroneous, we affirm.

Attorney fees awarded to GSR against Atlantis

Atlantis claims the district court's award of attorney fees in favor of GSR in the amount of $190,124.50, pursuant to GSR's NRCP 68 offer of judgment, is unsupported and should be vacated. GSR contends that it was entitled to the award of attorney fees based on the offer of judgment, but that it is additionally entitled to an award of attorney fees based on Atlantis' bad faith, pursuant to NRS 600A.060. We conclude that the district court properly awarded attorney fees pursuant to the offer of judgment. GSR made an offer that Atlantis rejected, and Atlantis failed to receive a more favorable judgment.[15] Upon a review of the record, we also conclude that the district court properly refused to award fees under NRS 600A.060 because Atlantis' claim was not brought in bad faith.[16] Thus, as to

[15]We note that Atlantis' argument that the offer of judgment was invalid because it was made by a nonparty lacks merit.

[16]In the district court's order dated September 27, 2013, it found that Atlantis acted in bad faith in pursuing the misappropriation claim against GSR.

the district court's award of attorney fees between Atlantis and GSR, we affirm.

Based on the foregoing, we affirm the district court's judgment and attorney fees orders except as to the order awarding fees against Islam in favor of Atlantis. With respect to that order, we reverse and remand to the district court for further proceedings consistent with this opinion.

CHERRY, SAITTA, and GIBBONS, JJ., concur.

HARDESTY, J., with whom PARRAGUIRRE, C.J., and PICKERING, J., agree, dissenting in part:

While I agree that the non-compete agreement was written too broadly, there is no doubt that Islam and Atlantis agreed to restrict Islam's future employment as a casino host and that such a restriction is reasonable. Absent some showing of bad faith on Atlantis' part, of which there was none, I would follow the approach taken by this court and a majority of other courts and preserve the non-compete agreement by modifying or severing the overly broad provision and thereby maintain the restriction on Islam's future employment in a competing casino host position. Reformation is an equitable remedy, and here, the equities run in favor of Atlantis and against the employee who admittedly stole trade secret information from her employer to use in her new casino host job for a competitor. I therefore dissent from the majority's adoption of a minority view to invalidate the entire agreement. I also dissent from the majority's determination that GSR did not violate the Uniform Trade Secret Act. GSR had knowledge of the Islam/Atlantis non-compete and trade secret agreements soon after GSR hired Islam. As a result, GSR had reason to know that its new employee had acquired trade secrets by "improper means." NRS 600A.030(2)(a)-(c). Invalidating the non-compete agreement does not provide a defense to the use of trade secret information appropriated in violation of the enforceable trade secret agreement.

Non-compete agreement

A majority of courts agree that overly broad non-compete agreements should be altered, where possible, to recognize the intent of the parties and bring them within reasonable parameters. *See* Ferdinand S. Tinio, Annotation, *Enforceability, Insofar as Restrictions Would Be Reasonable, of Contract Containing Unreasonable Restrictions on Competition*, 61 A.L.R. 3d 397, §§ 4-5 (1975) (outlining jurisdictions that allow some form of modification and those that do not).

However, the district court later denied the fees under NRS 600A.060 because it had already awarded attorney fees based on the offer of judgment. We conclude that substantial evidence did not support the district court's bad-faith finding, but we affirm because the district court reached the right result.

The modification test has been adopted by "most United States jurisdictions." *Data Mgmt., Inc. v. Greene*, 757 P.2d 62, 64 (Alaska 1988) (adopting the approach that allows a court to reasonably alter a non-compete agreement so long as the agreement was drafted in good faith). *See, e.g.*, *Hilligoss v. Cargill*, *Inc*., 649 N.W.2d 142, 147 n.8 (Minn. 2002) (explaining that "a court at its discretion [can] modify unreasonable restrictions on competition in employment agreements by enforcing them to the extent reasonable"); *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 844 (Mo. 2012) ("[W]hen the provisions of a non-compete clause impose a restraint that is unreasonably broad, appellate courts still can give effect to its purpose by refusing to give effect to the unreasonable terms or modifying the terms of the contract to be reasonable."); *Merrimack Valley Wood Prods., Inc. v. Near*, 876 A.2d 757, 764 (N.H. 2005) ("Courts have the power to reform overly broad restrictive covenants if the employer shows that it acted in good faith in the execution of the employment contract."); *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 61 P.3d 210, 213 (Okla. 2002) ("To cure an overly broad and thus unreasonable restraint of trade, an Oklahoma court may impose reasonable limitations concerning the activities embraced, time, or geographical limitation but it will refuse to supply material terms of a contract." (internal quotation marks omitted)); *Durapin, Inc. v. Am. Prods., Inc.*, 559 A.2d 1051, 1058 (R.I. 1989) ("We believe this is the appropriate time to choose the route that permits unreasonable restraints to be modified and enforced, whether or not their terms are divisible, unless the circumstances indicate bad faith or deliberate overreaching on the part of the promisee."); *Simpson v. C & R Supply, Inc.*, 598 N.W.2d 914, 920 (S.D. 1999) (allowing modification of "noncompetition provisions to conform to the statutory mandate . . . via partial enforcement"). The policy behind this approach is that "[a]n otherwise reasonable restrictive covenant should not be held invalid because it is unreasonable solely as to [breadth] where voiding the agreement, rather than enforcing it in a reasonable way, would be contrary to legislative intent, and frustrate the intent of the parties." 17A C.J.S. *Contracts* § 381 (2011); *see also* Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 Hofstra Lab. & Emp. L.J. 223, 249-50 (2007) (explaining that this test allows "courts [to] exercise their inherent equity powers to the extent necessary to protect the employer's legitimate business interest").

In addition to the modification test, the "blue-pencil test" also allows modification by permitting a court to delete an overly broad portion of a non-compete covenant and to enforce the remainder. *Id*.; *see also* 17A Am. Jur. 2d *Contracts* § 318 (2004) ("While recognizing that illegal contracts are generally unenforceable or void, a

court may, where possible, sever the illegal portion of the agreement and enforce the remainder." (footnotes omitted)). Several jurisdictions have embraced this test. *See, e.g.*, *Ellis v. James V. Hurson Assocs., Inc.*, 565 A.2d 615, 617 (D.C. 1989); *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 730 (Ind. 2008); *Hartman v. W.H. Odell & Assocs., Inc.*, 450 S.E.2d 912, 920 (N.C. Ct. App. 1994); *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 916 (Wis. 2009).

Contrarily, the draconian all-or-nothing rule invalidates the entire contract if any part of the non-compete agreement is overly broad. 17A C.J.S. *Contracts* § 381 (2011). Only a few jurisdictions still use this approach. *See, e.g.*, *Rector-Phillips-Morse, Inc. v. Vroman*, 489 S.W.2d 1, 5 (Ark. 1973); *Rollins Protective Servs. Co. v. Palermo*, 287 S.E.2d 546, 549 (Ga. 1982).

In this case, Islam signed a non-compete agreement more than a year after beginning her employment as a casino host with Atlantis. Pursuant to the non-compete agreement:

> In the event that the employment relationship between Atlantis and [Islam] ends for any reason, either voluntary or non-voluntary, [Islam] agrees that (s)he will not, without the prior written consent of Atlantis, *be employed by, in any way affiliated with, or provide any services to*, any gaming business or enterprise located within 150 miles of Atlantis Casino Resort for a period of one (1) year after the date that the employment relationship between Atlantis and [Islam] ends.

(Emphasis added.)

By modifying and narrowing the broad language describing the scope of Islam's future employment, this court can give effect to the admitted intent of the parties to restrict her future employment as a casino host. Therefore, the text "be employed by, in any way affiliated with, or provide any services to" should be narrowed to "be employed as a casino host," allowing the non-compete provision to survive.

The majority based its decision to invalidate the entire non-compete agreement on *Reno Club v. Young Investment Co.*, 64 Nev. 312, 182 P.2d 1011 (1947); *All Star Bonding v. State*, 119 Nev. 47, 62 P.3d 1124 (2003); *Kaldi v. Farmers Insurance Exchange*, 117 Nev. 273, 21 P.3d 16 (2001); and *Jones v. Deeter*, 112 Nev. 291, 913 P.2d 1272 (1996). The majority's reliance on *Reno Club*, *All Star Bonding*, and *Kaldi* is unfounded. Not only do *Reno Club*, *All Star Bonding*, and *Kaldi* fail to discuss non-compete agreements, they also focus on ambiguity (not overbreadth), a factor that does not apply when deciding to alter a non-compete agreement. *See Reno Club*, 64 Nev. at 325, 182 P.2d at 1017 ("[T]here is no ambiguity or uncertainty in the meaning of the language employed in the option agreement . . . , and hence no room for judicial construction.");

All Star Bonding, 119 Nev. at 51, 62 P.3d at 1126 (explaining that this court is "not free to modify or vary the terms of an unambiguous agreement" (internal quotation marks omitted)); *Kaldi*, 117 Nev. at 281, 21 P.3d at 21 (same); *see also* 17A C.J.S. *Contracts* § 381 (2011) (explaining that the three approaches to altering a non-compete agreement are used when the agreement is overly broad). Further, in *Jones*, this court determined that a five-year restriction was improper and, thus, concluded that the non-compete "covenant [was] per se unreasonable and therefore, unenforceable." 112 Nev. at 296, 913 P.2d at 1275. This conclusory determination should not be construed as establishing a strict rule against modifying and limiting unreasonable portions of non-compete agreements. In fact, this court has allowed preliminary injunctions based on non-compete agreements to be modified in order to make restrictions reasonable. *See, e.g.*, *Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 225 (1979) (declining to enforce a preliminary injunction based on a non-compete agreement that "purport[ed] to prohibit [appellant] from practicing orthopedic surgery," but modifying the restriction to prohibit appellant "from engaging in the *general practice* of medicine"); *Hansen v. Edwards*, 83 Nev. 189, 191, 193, 426 P.2d 792, 793-94 (1967) (modifying an employment restriction from 100 miles outside of Reno with no time limitation to Reno's boundary limits for one year because "[a] preliminary injunction may be modified at any time whenever the ends of justice require such action"). The procedural postures of *Ellis* and *Hansen* differ from this case as explained by the majority. While *Ellis* and *Hansen* did not use the expression "blue pencil," they effectively applied the doctrine by modifying the restrictions placed on the employee. Accordingly, I conclude that *Ellis* and *Hansen* demonstrate this court's willingness to preserve a non-compete agreement's reasonable terms.

Moreover, the majority's apparent adoption of the wholesale invalidation rule is a reversion to an antiquated, ill-favored rule. *See Durapin*, 559 A.2d at 1058 (explaining that "[m]ore recent court decisions . . . reject this all-or-nothing rule in favor of some form of judicial modification"); *see also Data Mgmt.*, 757 P.2d at 64 ("There is a need to strike a balance between protecting the rights of parties to enter into contracts, and the need to protect parties from illegal contracts. Obliterating all overbroad covenants not to compete, regardless of their factual settings, is too mechanistic and may produce unduly harsh results."). Quoting a law review article, the majority alleges that the " 'recent trend[ ]' " of courts is to reject the blue pencil doctrine. Majority opinion *ante* at 487 (quoting Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. 672, 674 (2008)). Interestingly, this recent trend only includes six United States District Court cases, two of which are unpublished, issued from 2003 to 2007. *See* Pivateau, *supra*, at 694-97.

The majority provides several public policy arguments for refusing to adopt the blue pencil test: (1) altering the non-compete agreement may violate the parties' intent, (2) requiring a court to modify or blue pencil a non-compete agreement wastes judicial resources, and (3) leniency favors the employee because a non-compete agreement should be construed against the employer who drafted it. I address each of these arguments in turn.

First, the court takes evidence of the parties' intent into consideration when modifying a non-compete agreement, so any infringement on the parties' intent should be minimal. And contrary to the majority's assertion that modification conflicts with the bench's impartiality, *see* majority opinion *ante* at 485, this evidence allows the modification of a non-compete agreement to be based on objective criteria. In fact, the court is able to accurately modify the non-compete agreement in this case because Islam and Atlantis acknowledge their intent to limit Islam's future employment as a casino host and protect Atlantis' gaming trade secrets. The trade secret agreement, which the majority does not invalidate, prohibits Islam from using or disseminating any intellectual property, including customer lists. The ethics and code of conduct agreement, which the majority also does not invalidate, prohibits Islam from disclosing confidential information, including customer lists. The non-compete agreement is an extension of this intent: it protects customer lists from being exploited by competing casinos in the event an employment relationship fails. Because the three agreements relate to each other, this court need not speculate as to the parties' intent. Applying the wholesale invalidation rule completely ignores, rather than violates, the parties' intent in this case.

Second, because the court is already tasked with determining whether the non-compete agreement is overbroad, deciding how to modify an agreement is a natural next step, such that only a negligible amount of extrajudicial resources are being expended. Additionally, the court will not always be charged with modifying an agreement, as such a decision is discretionary. *See* Swift, *supra*, at 251. For example, "clear overreaching on the part of the employer may preclude a" court from exercising its discretion to modify. *Id*. Use of that discretion rejects the majority's suggestion that modification allows an employer to receive a " 'free ride.' " Majority opinion *ante* at 487 (quoting Pivateau, *supra*, at 690). Instead of incentivizing an employer to draft a stricter-than-necessary non-compete agreement with the knowledge that the court will simply limit it, as the majority asserts, modification discourages bad faith while also providing a safety net to protect agreements that were inadvertently drafted too broadly. And in this case, there is no evidence to suggest Atlantis acted in bad faith in preparing the agreements or seeks to enforce the non-complete agreement against Islam in an overly broad way. Atlantis' claim is directed to Islam's future employment as a casino

host and does not seek to limit her employment in another capacity with another casino.

Finally, while the majority focuses on the unfairness to the employee, it is important to note that non-compete agreements are intended to balance the employer's and the employee's interests. *See Employers May Face New Challenges in Drafting Noncompetes*, 19 No. 2 Nev. Emp. L. Letter 4 (2013) ("[R]estrictive covenants strike a delicate balance between employers' interests—protecting confidential information and institutional knowledge, preserving hard-won customer and client relationships, and incentivizing key talent to remain loyal—and employees' interests in maintaining work mobility and the freedom to command competitive compensation for their skills."). Thus, we must not forget that non-compete agreements are extraordinarily important to Nevada businesses, especially in industries that rely on proprietary client lists, such as Atlantis. *See Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004) ("Employers commonly rely upon restrictive covenants . . . to safeguard important business interests."). On this note, the majority also contends that modification favors the employer. While the all-or-nothing rule ultimately favors the employee—to the extreme disadvantage of the employer—by removing any restriction placed on future employment, modification also favors the employee by appropriately limiting the restriction.

Moreover, it is difficult to reconcile the majority's concern for Islam in this case when the facts demonstrate that Islam sought to compete as a casino host using trade secret information she appropriated from Atlantis. Islam committed theft, and GSR sanctioned Islam's behavior.

Uniform Trade Secret Act

Atlantis' cease and desist letter informed GSR that Islam was improperly soliciting guests in violation of its trade secret agreement, a copy of which was enclosed with the letter. The letter did not "express[ ] doubt," as the majority depicts. *See* majority opinion *ante* at 491. The letter stated that Atlantis "reasonably believe[d] that [Islam's] contact with these guests was facilitated by improper use of Atlantis' information." In response, GSR merely rejected Atlantis' assertions, maintained that there was no wrongdoing, and wrongly asserted that it did not possess any of Atlantis' property. Importantly, during her interview process, Islam provided GSR with a copy of her non-compete agreement with Atlantis. Because the non-compete agreement sought to restrict Islam from employment and, as such, using her book of trade in a competing casino, GSR was on notice that using any information provided by Islam may be improper.

The non-compete agreement and the cease and desist letter play a crucial role in Atlantis' claim against GSR for violation of the Uniform Trade Secret Act. The majority concluded that GSR did not know, or have a reason to know, that it had used improperly obtained information. I disagree.

As defined in NRS 600A.030(2):

> "Misappropriation" means:
>
> . . . .
>
> (c) . . . use of a trade secret of another without express or implied consent by a person who:
>
> . . . .
>
> (2) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
>
> (I) Derived from or through a person who had used improper means to acquire it;
>
> (II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>
> (III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

As stated previously, the non-compete and trade secret agreements sought to restrict Islam from employment *and* using any guest information in a competing casino for one year. Because GSR had knowledge of the non-compete and trade secret agreements soon after it hired Islam, it "had reason to know" that it was potentially using trade secret information "[d]erived from or through a person who owed a duty to . . . maintain its secrecy."[1] NRS 600A.030(2)(c)(2)(III). Accordingly, I conclude that any use of Atlantis' guest information after it hired Islam and decidedly after receiving the cease and desist letter constituted misappropriation in violation of the Uniform Trade Secret Act.

The majority contends that this conclusion incentivizes employers to accuse their former employees' new employers of violating trade secrets. *See* majority opinion *ante* at 492. This dubious risk of dishonesty is outweighed by the culture of distrust that the majority

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[1]The majority highlights the fact that Atlantis failed to provide GSR with specific information upon GSR's request. *See* majority opinion *ante* at 492. Misappropriation only requires a "reason to know," NRS 600A.030(2)(c)(2), so Atlantis was under no obligation to provide evidence to GSR. Atlantis' letter to Islam, which was enclosed with Atlantis' letter to GSR, explained that it possessed electronic records showing Islam's sabotage, and its guests who were not a part of Islam's book of trade had been contacted by GSR. This information sufficiently demonstrates that GSR "had reason to know" about the trade secret violation. NRS 600A.030(2)(c)(2).

is creating by holding that a casino can ignore another casino's report of wrongdoing.

Conclusion

Because (1) the non-compete agreement can and should be narrowed instead of being invalidated and (2) GSR misappropriated Atlantis' trade secrets, I believe that the district court erred in dismissing Atlantis' breach of the non-compete agreement claim against Islam, tortious interference with a contractual relationship claim against GSR, and violation of the Uniform Trade Secret Act claim against GSR. Therefore, I would reverse the judgment of the district court with regard to these claims.

LERON TERRELL BLANKENSHIP, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 66118

FERNANDO BRIONES, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 66944

July 21, 2016 375 P.3d 407

Appeals from separate district court judgments of conviction, pursuant to guilty pleas, in Docket No. 66118, of destroying or injuring real or personal property of another, Second Judicial District Court, Washoe County; Patrick Flanagan, Judge; and in Docket No. 66944 of burglary, Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Defendant pleaded guilty in the district court of destroying or injuring real or personal property of another, and in a separate case, another defendant pleaded guilty in the district court to burglary. Defendants appealed, and the appeals were consolidated. The supreme court, HARDESTY, J., held that: (1) defendant's Presentence Investigation Report recommendation was tainted because defendant's disabilities were not mitigating factors considered by the Division of Parole and Probation when it formulated the sentencing scale calculation; (2) sentencing forms must, at a minimum, include considerations for legitimate mental disabilities; and (3) defendant's prior offenses were a rational basis for Division's sentencing recommendation to deviate from the sentencing scale.

Conviction affirmed, sentence vacated, and remanded with instructions (Docket No. 66118); conviction affirmed (Docket No. 66944).

Jeremy T. Bosler, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Evelyn A. Grosenick*, Deputy Public Defender, Washoe County, for Appellants Leron Terrell Blankenship and Fernando Briones.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Terrence P. McCarthy*, Chief Deputy District Attorney, Washoe County, for Respondents.

1. Criminal Law; Sentencing and Punishment.
   Presentence Investigation Report recommendation was in error because Probation Success Probability (PSP) failed to properly account for the defendant's mental disabilities in scoring his ability to be employed, and the defendant was prejudiced because the district court did not correct the errors in the PSP prior to sentencing and implicitly relied upon them.
2. Sentencing and Punishment.
   The district court abused its sentencing discretion by relying on impalpable and highly suspect evidence, namely Presentence Investigation Report recommendation, which failed to properly account for the defendant's mental disabilities in scoring his ability to be employed.
3. Sentencing and Punishment.
   It was not error for the Presentence Investigation Report sentencing recommendation to deviate above the sentencing scale calculation because the Division of Parole and Probation had a rational basis to make an upward adjustment to the recommended sentence.
4. Criminal Law.
   Defendant's sentence was not prejudiced by potential errors in the Presentence Investigation Report (PSI); the district court expressly disclaimed reliance on the PSI recommendation, reaching an independent sentencing decision.
5. Sentencing and Punishment.
   The supreme court would examine the statutory scheme pertaining to sentencing recommendations and look at the forms the Division of Parole and Probation generated to assist in formulating its sentencing recommendations, the Presentence Investigation Report (PSI), and the sentencing scales, and the court would then consider whether the information in the Probation Success Probability forms and PSIs in defendants' appeals amounted to impalpable or highly suspect evidence and whether the district courts abused their discretion in sentencing defendants by relying on the impalpable or highly suspect evidence.
6. Sentencing and Punishment.
   Division of Parole and Probation must prepare a Presentence Investigation Report to be used at sentencing for any defendant who pleads guilty to or is found guilty of a felony. NRS 176.135(1).
7. Sentencing and Punishment.
   Presentence Investigation Report contains information about the defendant's prior criminal record, the circumstances affecting the defendant's behavior and the offense, and the impact of the offense on the victim.
8. Sentencing and Punishment.
   Probation Success Probability (PSP) are separated into four broad categories: prior criminal history, present offenses, social history, and community impact. These four categories include a total of 35 independent considerations, and these 35 considerations are independently scored in the PSP, using a separate form to guide the Division of Parole and Probation when

assigning points, and the points assigned to the 35 considerations are then added to arrive at an overall PSP score.

9. Sentencing and Punishment.
Overall Probation Success Probability (PSP) scores below 55 result in an automatic recommendation of prison, scores ranging between 55 and 64 are considered borderline, and scores above 64 allow for a recommendation of probation, and when an overall PSP score warrants a recommendation of prison or when the Division of Parole and Probation decides to recommend prison for a borderline candidate, a raw score is computed consisting of the scores from the considerations in the prior criminal history and the present offense categories.

10. Sentencing and Punishment.
Defendant has the right to object to factual or methodological errors in sentencing forms, so long as he or she objects before sentencing and allows the district court to strike information that is based on impalpable or highly suspect evidence.

11. Sentencing and Punishment.
Any sentencing objections that the defendant has must be resolved prior to sentencing.

12. Criminal Law.
To decide whether any errors in defendants' sentencing forms provided a basis for new sentencing hearings, the supreme court had to determine whether those errors constituted impalpable or highly suspect evidence, and, if so, whether prejudice resulted from the district court's consideration of information founded upon such evidence.

13. Criminal Law; Sentencing and Punishment.
Defendant's Presentence Investigation Report recommendation was tainted because defendant's disabilities were not considered as mitigating factors by the Division of Parole and Probation when it formulated the sentencing scale calculation, and therefore, the sentencing forms constituted impalpable or highly suspect evidence, and defendant's sentence was prejudiced; defendant's bipolar disorder and paranoid schizophrenia prevented him from working, and scoring sheet demonstrated that defendant was penalized six points in the Probation Success Probability for being unemployable with a nonexistent work history, and had defendant not been penalized six points, he would have scored high enough on the sentencing scale to justify a recommendation for probation, but instead, he was placed in the borderline category, and the Division recommended prison. NRS 176.145(1)(b).

14. Sentencing and Punishment.
Mental disability affects a defendant's behavior and is relevant when weighing recidivism probability.

15. Sentencing and Punishment.
Sentencing forms must, at a minimum, include considerations for legitimate mental disabilities, and the Probation Success Probability categories should not penalize a defendant as a result of a disability.

16. Criminal Law.
Simple error in a Probation Success Probability does not constitute impalpable or highly suspect evidence; rather, the error must be such that it taints the Presentence Investigation Report sentencing recommendation considered by the district court.

17. Criminal Law.
Scoring error in a Probation Success Probability or sentencing scale can taint the Presentence Investigation Report's recommendation because

the Division of Parole and Probation's overall recommendation could change from probation to borderline or from borderline to prison or, just as harmful, the wrong sentencing range could be identified on the sentencing scale, causing the Division to recommend a more severe sentence than was justified.

18. Sentencing and Punishment.
Statutes afford the Division of Parole and Probation some discretion to deviate from the sentencing scale calculations in making a sentencing recommendation in the Presentence Investigation Report, so long as a rational basis for doing so is sufficiently articulated. NRS 176.145(1)(g), (2), 213.10988(3).

19. Sentencing and Punishment.
Defendant's prior offenses was a rational basis for Division of Parole and Probation's sentencing recommendation to deviate from the sentencing scale.

20. Criminal Law.
Defendant's sentence was not prejudiced because the district court did not rely on impalpable or highly suspect evidence, given that defendant's sentencing forms did not constitute impalpable or highly suspect evidence.

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

The Division of Parole and Probation (the Division) makes sentencing recommendations to district courts in a Presentence Investigation Report (PSI). In making its sentencing recommendations, the Division uses a Probation Success Probability (PSP) form that scores 35 factors. The total score places the defendant within a range of sentences on a Sentence Recommendation Selection Scale (Sentencing Scale) and provides the basis for the sentence recommendation in the PSI. In these appeals, we consider whether scoring errors in the defendants' PSPs amounted to impalpable or highly suspect evidence that caused improper placement of these defendants in the Sentencing Scales and adversely influenced the Division's sentencing recommendations in the PSIs.[1]

[Headnotes 1, 2]

In Docket No. 66118, we conclude that the PSP failed to properly account for the defendant's mental disabilities in scoring his ability to be employed, and, as a result, the PSI recommendation was in error. Furthermore, the defendant's sentence was prejudiced because the district court did not correct the errors in the PSP prior to sentencing and implicitly relied upon them. Thus, we conclude the district court abused its sentencing discretion by relying on im-

[1]Given the overlapping issues, we consolidate these appeals for disposition. *See* NRAP 3(b).

palpable and highly suspect evidence, and we remand for a new sentencing hearing.

[Headnotes 3, 4]

In Docket No. 66944, we conclude that it was not error for the PSI sentencing recommendation to deviate above the Sentencing Scale calculation because the Division had a rational basis to make an upward adjustment to the recommended sentence. Additionally, the defendant's sentence was not prejudiced by potential errors because the district court expressly disclaimed reliance on the PSI recommendation, reaching an independent sentencing decision.

FACTS AND PROCEDURAL HISTORY

Factual and procedural history regarding Docket No. 66118

Appellant Leron Blankenship and his wife rented an apartment in Sparks, Nevada, in a complex owned by Douglas Carling. Following a dispute between Blankenship and Carling, Blankenship moved out of the apartment without informing Carling. Carling inspected the apartment the next day and discovered damages to the interior of the apartment totaling approximately $7,600.

Carling filed a police report with the Sparks Police Department. Blankenship was arrested and charged with a felony—destroying or injuring real or personal property of another amounting to $5,000 or more pursuant to NRS 193.155 and NRS 206.310.

Blankenship pleaded guilty, and the State agreed to concur in the Division's sentencing recommendation. In calculating Blankenship's PSP score to determine his placement on the Sentencing Scale, the Division found Blankenship unemployable with no employment history. As a result, Blankenship's overall PSP score was 60, 6 points lower than a continuously employed individual. If he had received the additional six points, he would have been placed in the probation recommendation range on the Sentencing Scale. Instead, a score of 60 placed him in the borderline range between prison and probation, and the Division recommended a sentence of 12-32 months in prison in the PSI.

At sentencing, Blankenship objected to the PSP conclusion that he was unemployable with a nonexistent employment history. Blankenship informed the district court that he had been diagnosed with bipolar disorder and paranoid schizophrenia and that he has been receiving Social Security disability due to these mental health conditions since 2003. He argued that the PSP and Sentencing Scale produced impalpable or highly suspect evidence by failing to take into account his mental disabilities and improperly characterized him as unemployed resulting in a recommendation for prison instead of probation.

The district court did not resolve Blankenship's objections to the PSP or PSI prior to sentencing him. The district court followed the PSI, sentencing Blankenship to prison for a term of 12-32 months and ordering him to pay $3,150 in restitution.

Factual and procedural history regarding Docket No. 66944

Appellant Fernando Briones served a five-year prison term in Susanville, California. Upon being released, he was transported to downtown Reno, Nevada, left with $200 and thereafter resumed drug and alcohol use. After being in Reno for 26 days, he used a rock to break a car window, stole approximately $2 in change, and was later arrested on burglary charges. Prior to this arrest, he had been convicted 11 times, imprisoned 6 times, had probation granted and revoked 1 time, and had each of his 10 parole opportunities revoked.

Briones pleaded guilty to the charges, and the State reserved the right to argue for an appropriate sentence. The overall PSP score placed Briones in a category on the Sentencing Scale that recommended prison. His raw score was calculated to be 21, which led to a Sentencing Scale calculation of 16-72 months. However, the Division recommended in the PSI that Briones be incarcerated for 48-120 months.

At the sentencing hearing, Briones requested probation or a prison term of 12-30 months. Briones objected to the PSI recommendation because he believed the discrepancy between the Sentencing Scale calculation and the PSI recommendation was due to the Division unlawfully considering subjective criteria. Briones' attorney stated that the PSI author had indicated in a prior discussion that "there were no specific guidelines for" the Division to follow when making a recommendation.

The district court addressed these objections on the record but found that Briones' extensive criminal history warranted a sentence of 48-120 months in prison. Although the sentence is the same as that recommended in the PSI, the district court expressly noted that it was not bound by the PSI's recommendation and the sentence was "based on [the district court's] independent determination that [48-120 months] is the appropriate sentence."

DISCUSSION

On appeal, Blankenship argues that the Division's PSI recommendation[2] relied on calculations within the PSP, which constituted

[2]The State argues that Blankenship waived his arguments as to the validity of the PSI because he never moved to strike the PSI in district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point

impalpable and highly suspect evidence. As a part of this argument, he contends that the PSP failed to score his mental disabilities and unlawfully penalized him for being unemployed without an employment history. Briones argues that his PSI constituted impalpable or highly suspect evidence because the Division subjectively increased its PSI recommendation beyond the Sentencing Scale calculation.[3]

[Headnote 5]

To resolve these appeals, we first generally examine the statutory scheme pertaining to sentencing recommendations and look at the forms the Division generates to assist in formulating its sentencing recommendations—the PSP and the Sentencing Scales. We then consider whether the information in the PSPs and PSIs in these appeals amounted to impalpable or highly suspect evidence and whether the district courts abused their discretion in sentencing Blankenship and Briones by relying on the impalpable or highly suspect evidence.

The statutory scheme regarding the Division's sentencing recommendations

[Headnotes 6, 7]

Pursuant to NRS 176.135(1), the Division must "prepare a PSI to be used at sentencing for any defendant who pleads guilty to or is found guilty of a felony." *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011). "A PSI contains information about the defendant's prior criminal record, the circumstances affecting the defendant's behavior and the offense, and the impact of the offense on the victim." *Id.* at 248, 255 P.3d at 212-13. Additionally, a PSI must contain "[a] recommendation of a minimum term and a maximum term of imprisonment or other term of imprisonment authorized by statute, or a fine, or both." NRS 176.145(1)(g). The PSI may also include "any additional information that [the Division] believes may be helpful in imposing a sentence, in granting probation or in correctional treatment." NRS 176.145(2).

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not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). However, Blankenship did object to the PSP in district court, and we thus conclude that the issue has been preserved for appeal.

[3]Briones also contends that the district court's sentence was arbitrary and capricious because the district court focused on the potential that Briones could qualify as a habitual criminal. While the district court did state that Briones would qualify as a habitual criminal, the district court did not adjudicate Briones a habitual criminal. Instead, the district court was simply commenting on Briones' extensive criminal history. This consideration is clearly within the district court's discretion. *Parrish v. State*, 116 Nev. 982, 988, 12 P.3d 953, 957 (2000) ("[T]he district court is afforded wide discretion when sentencing a defendant.").

When considering whether to recommend probation or prison, NRS 213.10988(1) obligates the Chief Parole and Probation Officer to adopt "standards to assist him or her in formulating a recommendation . . . . The standards must be based upon objective criteria for determining the person's probability of success on parole or probation." Pursuant to NRS 213.10988(1)'s grant of regulatory authority, the Division adopted NAC 213.590, creating 27 objective factors that should be considered when preparing a PSP.

NRS 213.10988(2) permits the Division Chief to "first consider all factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law." Furthermore, NRS 213.10988(3) requires the Division Chief to "adjust the standards to provide a recommendation of greater punishment for a convicted person who has a history of repetitive criminal conduct or who commits a serious crime."

The sentencing forms

[Headnotes 8, 9]

PSPs are separated into four broad categories—prior criminal history, present offenses, social history, and community impact. These four categories include a total of 35 independent considerations,[4] which are based upon NAC 213.590's 27 objective factors.[5] Notably, none of the 35 considerations or the 27 factors take into account a defendant's mental disabilities. The 35 considerations are independently scored in the PSP, using a separate form to guide the Division when assigning points (the Scoring Sheet). The points assigned to the 35 considerations are then added to arrive at an overall PSP score. Overall scores below 55 result in an automatic recommendation of prison, scores ranging between 55 and 64 are considered borderline, and scores above 64 allow for a recommendation of probation. When an overall PSP score warrants a recommendation of prison or when the Division decides to recommend prison for a borderline candidate, a raw score is computed consisting of the

[4]The prior criminal history category has ten considerations: felony convictions, misdemeanor convictions, pending unrelated cases, subsequent criminal history, prior incarcerations, juvenile commitments, number of years free of conviction, prior formal supervision, and criminal patterns. The present offense category has ten considerations: circumstances of arrest, type of offense, psychological or medical impact on victim, weapon, controlled substances, sophistication/premeditation, plea bargain benefits, financial impact, co-offender, and motive. The social history category has seven considerations: age, employment/program, financial, employability, family situation, education, and military. The community impact category has eight considerations: commitment/ties, program participation, honesty/cooperation, attitude/supervision, resource availability, substance drug, substance alcohol, and attitude/offense.

[5]NAC 213.590 and its companion, NAC 213.600, are currently under review and may be deleted from the Nevada Administrative Code.

scores from the considerations in the prior criminal history and the present offense categories. The raw score is translated into a sentencing range using the Sentencing Scale. NAC 213.600.

[Headnotes 10, 11]

"[A] defendant [has] the right to object to factual [or methodological] errors in [sentencing forms], so long as he or she objects before sentencing, and allows the district court to strike information that is based on 'impalpable or highly suspect evidence.'" *Sasser v. State*, 130 Nev. 387, 394-95, 324 P.3d 1221, 1226 (2014) (quoting *Stockmeier*, 127 Nev. at 248, 255 P.3d at 213 (internal quotations omitted)). "[I]t is clear that 'any objections [that the defendant has] must be resolved prior to sentencing.'" *Id*. at 390, 324 P.3d at 1223 (alteration in original) (quoting *Stockmeier*, 127 Nev. at 250, 255 P.3d at 214).

In *Goodson v. State*, the defendant objected to a "disputed portion" of the PSI used by the district court at sentencing. 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982). "This court recognize[d] the discretion vested in the district court with regard to imposing sentence[s] on the criminals before it." *Id*. However, we concluded that "an abuse of discretion will be found when the defendant's sentence is prejudiced from consideration of information or accusations founded on impalpable or highly suspect evidence." *Id.* at 495-96, 654 P.2d at 1007; *see also Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) ("So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed.").

[Headnote 12]

Accordingly, to decide whether any errors in Blankenship's and Briones' sentencing forms provide a basis for new sentencing hearings, we must determine (1) whether those errors constituted impalpable or highly suspect evidence, and (2) if so, whether prejudice resulted from the district court's consideration of information founded upon such evidence.

Blankenship's sentencing forms

[Headnote 13]

Blankenship argues that the PSP and PSI penalized him for having bipolar disorder and paranoid schizophrenia, which prevented him from working, because he was characterized as unemployed with a nonexistent work history. NRS 176.145(1)(b) states that a PSI "must contain . . . [i]nformation concerning . . . the circumstances

affecting the defendant's behavior." NRS 213.10988(2) provides that when creating standards for sentencing forms, the Division Chief must "first consider all factors which are relevant in determining the probability that a convicted person" will violate the law if granted probation.

[Headnotes 14, 15]

Undoubtedly, a mental disability affects a defendant's behavior and is relevant when weighing recidivism probability. *See, e.g.*, *People v. Watters*, 595 N.E.2d 1369, 1379 (Ill. App. Ct. 1992) (recognizing that a disability is a significant mitigating factor in sentencing). Therefore, we conclude that sentencing forms must, at a minimum, include considerations for legitimate mental disabilities and the current PSP categories should not penalize a defendant as a result of a disability.

Because neither NAC 213.590's 27 factors nor the PSP's 35 considerations take into account a defendant's mental disabilities, Blankenship's disabilities were not mitigating factors considered by the Division when it formulated the Sentencing Scale calculation. While the PSI does summarize Blankenship's mental health history, the PSP and Sentencing Scale scoring mechanisms failed to address his disabilities. Thus, this factual reference had no effect on the Division's sentencing recommendation in the PSI. Rather, the record reflects that Blankenship's disabilities actually worked against him. The Scoring Sheet demonstrates that Blankenship was penalized six points in the PSP for being unemployable with a nonexistent work history.

[Headnotes 16, 17]

A simple error in a PSP does not constitute impalpable or highly suspect evidence. Rather, the error must be such that it taints the PSI sentencing recommendation considered by the district court.[6] For example, a scoring error in a PSP or Sentencing Scale can taint the PSI's recommendation because the Division's overall recommendation could change from probation to borderline or from borderline to prison; or, just as harmful, the wrong sentencing range could be identified on the Sentencing Scale, causing the Division to recommend a more severe sentence than was justified.

Here, had Blankenship not been penalized six points, he would have scored high enough on the Sentencing Scale to justify a recommendation for probation. Instead, Blankenship was placed in the

[6]We stress the importance of accurate PSI sentencing recommendations for a number of reasons, including, as in Blankenship's case, the fact that the State may stipulate in a plea agreement to concur with the PSI recommendation, and that same PSI recommendation may later be considered by the Pardons Board.

borderline category, and the Division recommended prison. Accordingly, we conclude that Blankenship's PSI recommendation was tainted as a result of the error, and, therefore, the sentencing forms constituted impalpable or highly suspect evidence.[7]

Blankenship's attorney objected to the PSP prior to and during the sentencing hearing because it did not account for his disabilities. The district court did not rule on his objection; rather, the court discussed other justifications for the sentence and then sentenced Blankenship to a term of incarceration consistent with the PSI recommendation. Because we conclude that the sentencing forms constituted impalpable or highly suspect evidence and because the district court failed to rule on the objection, we further conclude the district court abused its discretion when it considered information in the PSI based on that impalpable or highly suspect evidence. *Goodson*, 98 Nev. at 495-96, 654 P.2d at 1007. As such, Blankenship's sentence was prejudiced. We therefore vacate his sentence and remand for resentencing.

Briones' sentencing forms

Briones argues that the Division's PSI recommendation was unlawfully elevated beyond the Sentencing Scale calculation. We disagree.

[Headnote 18]

NRS 176.145(1)(g) provides that a PSI must contain a recommended sentencing range but in no way limits the recommendation to what is provided for in a PSP or Sentencing Scale. Additionally, NRS 176.145(2) allows the Division to account for "any additional information that it believes may be helpful" when reaching a sentencing recommendation. And, NRS 213.10988(3) expressly permits the Division to recommend greater punishment based on repetitive criminal conduct by the defendant. Accordingly, we conclude that the statutes afford the Division some discretion to deviate from the Sentencing Scale calculations in making a sentencing recommendation in the PSI, so long as a rational basis for doing so is sufficiently articulated.

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[7]Blankenship also argues that the PSP subjectively characterized his family situation as being disruptive, and the PSI subjectively characterized his interview with the Division as hostile. We initially note that the Division's consideration of these two factors falls within NAC 213.590(1)(r) and (z). Furthermore, Blankenship failed to call the Division employee who created the forms as a witness in the district court proceedings. Had this witness been called, he or she likely would have provided objective facts to sufficiently support the forms' characterizations. *See Objective*, *Black's Law Dictionary* (10th ed. 2014) (defining "objective" as "based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions"). Thus, we conclude that this argument is without merit.

[Headnotes 19, 20]

On the bottom of Briones' Sentencing Scale form, the Division indicated that its sentencing recommendation deviated from the Sentencing Scale based on Briones' prior offenses. We conclude that this was a rational basis to deviate from and that Briones' sentencing forms did not constitute impalpable or highly suspect evidence. As a result, we cannot say that Briones' sentence was prejudiced because the district court did not rely on impalpable or highly suspect evidence, and, in fact, the court expressly disclaimed reliance on the PSI sentencing recommendation in reaching its "independent [sentencing] determination."

CONCLUSION

Based on the foregoing, we confirm Blankenship's judgment of conviction but vacate his sentence and remand his case for a new sentencing hearing. We instruct the district court that, prior to conducting a new sentencing hearing, the PSP, Sentencing Scale, and PSI must be amended to account for and score Blankenship's mental disabilities and their impact on his employability. However, because the district court in Briones' case did not abuse its sentencing discretion, we affirm his judgment of conviction.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.