DR. JOEL SLADE, APPELLANT, *v.* CAESARS ENTERTAINMENT CORPORATION; PARIS LAS VEGAS OPERATING COMPANY, LLC, DBA PARIS LAS VEGAS, RESPONDENTS.

No. 62720

May 12, 2016 373 P.3d 74

Appeal from a district court order dismissing plaintiff's complaint. Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

Customer who had been banned from casinos brought action against owner and operator of casinos alleging breach of duty of public access and seeking declaratory and injunctive relief. The district court granted owner's motion to dismiss for failure to state a claim. Customer appealed. On an issue of first impression, the supreme court, HARDESTY, J., held that gaming establishments had common-law right to exclude any person from premises, so long as reason was not discriminatory or unlawful.

Affirmed.

[Rehearing denied October 12, 2016]

PICKERING, J., with whom DOUGLAS, J., agreed, dissented. CHERRY, J., dissented.

Nersesian & Sankiewicz and *Robert A. Nersesian* and *Thea Marie Sankiewicz*, Las Vegas, for Appellant.

Santoro Whitmire and *James E. Whitmire* and *Jason D. Smith*, Las Vegas, for Respondents.

1. GAMING AND LOTTERIES.
   Statute setting forth public policy of state concerning gaming, which stated that it did not abrogate or abridge the common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason, permitted gaming establishments to exclude any person from their premises, so long as the reason for exclusion was not discriminatory or unlawful. NRS 463.0129(3)(a).
2. APPEAL AND ERROR.
   The supreme court reviews questions of statutory interpretation de novo.
3. STATUTES.
   When a statute's language is unambiguous, the supreme court does not resort to the rules of construction and will give that language its plain meaning.
4. STATUTES.
   A statute must be construed as to give meaning to all of its parts and language, and the supreme court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.

5. Courts; Statutes.
   Whenever possible, the supreme court will interpret a rule or statute in harmony with other rules and statutes.
6. Appeal and Error.
   The supreme court reviews a district court's order granting a motion to dismiss for failure to state a claim under a rigorous, de novo standard of review. NRCP 12(b)(5).
7. Pretrial Procedure.
   A complaint should be dismissed for failure to state a claim only if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief. NRCP 12(b)(5).

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

In this appeal, we are asked to consider whether common-law principles referenced in NRS 463.0129(3)(a) permit gaming establishments to exclude from their premises any person for any reason. We generally adopt the majority common-law rule permitting the exclusion of persons for any reason that is not discriminatory or otherwise unlawful.

FACTS AND PROCEDURAL HISTORY

Respondent Caesars Entertainment Corporation owns and operates a number of casinos throughout the United States, including Harrah's Tunica Hotel and Casino in Tunica, Mississippi. In 2011, appellant Dr. Joel Slade received a letter from a representative of Harrah's Tunica notifying him that he had been evicted from that casino and that the eviction would be enforced at all Caesars-owned, -operated, or -managed properties. Dr. Slade was interested in attending a medical conference that was to take place at Paris Las Vegas Hotel and Casino, a property owned and operated by Caesars. Dr. Slade contacted Caesars' corporate headquarters in Nevada about attending the conference but was informed that his eviction from Caesars' properties would be enforced at Paris LV.

Dr. Slade then filed a complaint, alleging a breach of the duty of public access and seeking declaratory and injunctive relief. Dr. Slade does not challenge the casino's right to exclude for proper cause. Instead, Dr. Slade alleged that under the common law and NRS 463.0129(1)(e), Caesars could not exclude him without cause.[1]

[1]It is unclear from the record or the briefs on appeal the reason Caesars evicted Dr. Slade from its properties. Neither party sought discovery on this issue.

He further argued that the casino owed him a duty of reasonable access either as a purveyor of a public amusement or as an innkeeper. Caesars then filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted pursuant to NRCP 12(b)(5), arguing that it has the right to exclude Dr. Slade pursuant to NRS 463.0129(3)(a) and the common law. The district court granted Caesars' motion to dismiss. This appeal followed.

DISCUSSION

[Headnotes 1-5]

This court reviews questions of statutory interpretation de novo. *V & S Ry., LLC v. White Pine Cty.*, 125 Nev. 233, 239, 211 P.3d 879, 882 (2009). When a statute's language is unambiguous, this court does not resort to the rules of construction and will give that language its plain meaning. *Id*. "A statute must be construed as to 'give meaning to all of [its] parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'" *Id.* (alteration in original) (quoting *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (internal quotation omitted)). "Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes." *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (internal quotations omitted).

NRS 463.0129 declares Nevada's public policy concerning gaming establishments. Pursuant to NRS 463.0129(1)(e), "all gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature." However, the statute also provides that "[t]his section does not . . . [a]brogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason." NRS 463.0129(3)(a).[2] "'Gaming' . . . means to deal, operate, carry on, conduct, maintain or expose for play any game . . . or to operate an inter-casino linked system." NRS 463.0153. "'Establishment'

[2]Nevada's legislative history regarding NRS 463.0129(3) is sparse, with no discussion about how the Legislature viewed the common law or why it used the term "any common-law right" in subsection 3. It does appear that one reason the language was added to the statute in 1991 was to ensure that gaming establishments in Nevada maintained the right to evict card counters. *See* Hearing on S.B. 532 Before the Senate Comm. on Judiciary, 66th Leg. (Nev., June 28, 1991) (remarks by Senator Bill O'Donnell questioning whether "section 3b of the [statute's] amendment meant the management of a casino could ask a patron to leave if the management suspected card counting"); Hearing on S.B. 532 Before the Senate Comm. on Judiciary, 66th Leg. (Nev., June 29, 1991) (explaining that the amendment would allow gaming establishments to "evict cheaters").

means any premises wherein or whereon any gaming is done." NRS 463.0148.

Whether NRS 463.0129(3)(a) permits gaming establishments to exclude any person for any reason pursuant to common-law principles is an issue of first impression in Nevada.[3] Dr. Slade argues that the Legislature has codified a common-law duty to provide reasonable access to the patrons of gaming establishments in NRS 463.0129(1)(e). In making his argument, Dr. Slade urges this court to read NRS 463.0129(1)(e) as requiring Caesars to provide him access to its Nevada establishments because he is a member of the general public. Caesars counters that NRS 463.0129(3)(a) preserves the common-law right to exclude any individual for any otherwise lawful, nondiscriminatory reason. The parties' arguments suggest that NRS 463.0129 presents competing rights to the general public and gaming establishments concerning access to a casino's premises. Therefore, we must first interpret the language in these statutory subsections and determine the common-law rule before reaching the merits of this appeal.

Construction of NRS 463.0129

The plain language of NRS 463.0129(1)(e) assures access to the general public to a gaming premises, except as provided by the Legislature. But the Legislature appears to have qualified that access by recognizing a common-law right of gaming establishments in NRS 463.0129(3)(a) to eject any person from the premises. In harmonizing NRS 463.0129(1)(e) and 3(a), we must determine the breadth of an owner's common-law right to evict patrons.

There is overwhelming authority recognizing the common-law right of a private owner of a public amusement to exclude *any person for any reason* from the premises. *See, e.g.*, *Brooks v. Chicago Downs Ass'n, Inc.*, 791 F.2d 512, 513, 516 (7th Cir. 1986) ("find[ing] that Illinois follows the common law rule" in determining that a race track operator had the absolute right to exclude a patron for any reason); *Ziskis v. Kowalski*, 726 F. Supp. 902, 908 (D. Conn. 1989) ("The weight of the case law upholds the common law rule that owners of places of amusement, like theaters and racetracks, are permitted to exclude patrons without cause."); *Donovan v. Grand Victoria Casino & Resort, LP*, 934 N.E.2d 1111, 1112,

[3]Caesars argues that this court has previously decided whether a person may be excluded from the premises of a casino for any reason. *See S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 411-14, 23 P.3d 243, 248-50 (2001); *Spilotro v. State, ex rel. Nev. Gaming Comm'n*, 99 Nev. 187, 189, 661 P.2d 467, 468 (1983). However, these cases involved an alleged constitutional right to access, not a common-law right, and in both cases we held that the reason for the exclusion was not discriminatory and therefore valid, making them inapplicable here. *S.O.C.*, 117 Nev. at 413-14, 23 P.3d at 249-50; *Spilotro*, 99 Nev. at 194, 661 P.2d 467 at 471-72.

1115-16 (Ind. 2010) (following the majority rule in holding that the owner of a riverboat casino had a common-law right to exclude any person from its premises).[4]

A narrower interpretation of the common-law rule to exclude persons stems from the Supreme Court of New Jersey's decision in *Uston v. Resorts International Hotel, Inc.*, 445 A.2d 370 (N.J. 1982). In *Uston*, a casino banned a card counter from its premises based on his method of playing blackjack. *Id*. at 371. The court held that the exclusion was invalid because the controlling gaming authority "alone has the authority to exclude patrons based upon their strategies for playing licensed casino games." *Id*. at 372. The court went on to conclude that the common-law right to exclude in New Jersey was "substantially limited by a competing common law right of reasonable access to public places." *Id*.

We decline to follow the more narrow position that a common-law right of reasonable access to public places limits a private owner's right to exclude because its restrictive articulation of the common law is inconsistent with the plain language of NRS 463.0129(3)(a). Thus, in harmonizing NRS 463.0129(1)(e) and NRS 463.0129(3)(a), we conclude that casino establishments are to be open to the *general public* but have the common-law right to exclude *any individual* from the premises pursuant to the majority common-law position.

We emphasize, however, the right to exclude is not without significant and important limitation. We further conclude that NRS 463.0129(3)(a) does not grant gaming establishments an unlimited right to exclude anyone for any reason as that common-law right

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[4]Dr. Slade argues that, pursuant to NRS 1.030, Nevada should not recognize the current majority position because the common law to be applied to innkeepers is that of England as it existed in either 1776, at the establishment of the Union, or in 1864 when Nevada became a state. We do not agree with his contention for three reasons. We first note that NRS 463.0129(3)(a) specifically provides that the common law to be applied is that which allows a gaming establishment to "eject any person from the premises of the establishment for any reason." Moreover, Dr. Slade does not cite to, and this court has not identified, any early cases determining a gaming establishment's common-law right to exclude. Additionally, the early common law does not appear to apply a uniform rule. Some early common-law cases did not allow a private owner of a public amusement to exclude any person for any reason, *see, e.g.*, *Donnell v. State*, 48 Miss. 661, 681 (1873), while other cases did allow such exclusions, *see, e.g.*, *Madden v. Queens Cty. Jockey Club, Inc.*, 72 N.E.2d 697, 698 (N.Y. 1947) ("At common law a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. . . . On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased."). Finally, this court has previously determined that, "[d]espite NRS 1.030, courts may reject the common law where it is not applicable to local conditions." *Rupert v. Stienne*, 90 Nev. 397, 399, 528 P.2d 1013, 1014 (1974). Accordingly, we are not persuaded by the argument.

can be abridged by other statutory provisions. For example, under NRS 651.070, "[a]ll persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of *any place of public accommodation*,[5] without discrimination or segregation on the ground of race, color, religion, national origin, disability, sexual orientation, sex, gender identity or expression."[6] (Emphasis added.) This interpretation of a gaming establishment's right to exclude is consistent with other jurisdictions that recognize the majority common-law position. *See, e.g.*, *Brooks*, 791 F.2d at 513 ("[T]he operator of a horse race track has the absolute right to exclude a patron from the track premises for any reason, or no reason, except race, color, creed, national origin, or sex."); *Ziskis*, 726 F. Supp. at 905 (recognizing that the common-law rule was limited by a state law that "deals with public accommodations, including places of amusement, creat[ing] . . . a right not to be discriminated against on the basis of race, color, religion, or national origin"); *Madden*, 72 N.E.2d at 698 ("The common-law power of exclusion . . . continues until changed by legislative enactment. In this State, a statute explicitly covering 'race courses' limits the power by prohibiting discrimination on account of race, creed, color, or national origin."). Accordingly, we conclude that while gaming establishments generally have the right to exclude any person, the reason for exclusion must not be discriminatory or otherwise unlawful. We now turn our attention to whether Dr. Slade's exclusion was for an unlawful reason.

Dr. Slade failed to demonstrate that his exclusion was for an unlawful reason

[Headnotes 6, 7]

This court reviews a district court's order granting a motion to dismiss for failure to state a claim under "a rigorous, de novo standard of review." *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012). A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff]

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[5]NRS 651.050(3)(a), (b), and (d) define "'[p]lace of public accommodation'" as "[a]ny inn, hotel, motel or other establishment which provides lodging to transient guests," as well as restaurants, bars, and theaters. Because casinos combine several of the elements, we conclude that casinos are "'place[s] of public accommodation.'"

[6]In addition, the statutes governing Nevada's gaming industry are encompassed in NRS Chapter 463. NRS 463.151 regulates the "exclusion or ejection of certain persons from licensed establishments." Pursuant to NRS 463.151(3)(a) and (c), the State Gaming Control Board has the authority to determine who may be excluded and may consider, among other things, whether the person has a "[p]rior conviction of a crime" or a "[n]otorious or unsavory reputation which would adversely affect public confidence and trust that the gaming industry is free from criminal or corruptive elements."

could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Although it is unclear from the record why Caesars initially evicted Dr. Slade from its property in Mississippi and this question was not argued or considered below, it does appear that his exclusion from Caesars' Las Vegas properties was based on that prior eviction. Dr. Slade does not argue on appeal, nor did he litigate at district court, that he was excluded from Caesars' properties for an unlawful reason. In his complaint, Dr. Slade simply argued that he never acted "disorderly" on a Caesars property or "cause[d] injury to any company affiliated with Caesars" and alleged a breach of the duty of public access and sought declaratory and injunctive relief. Dr. Slade did not ask for discovery on the reason for his exclusion, which he undoubtedly would have been entitled to. Because Dr. Slade failed to demonstrate that his exclusion from Caesars' properties was for unlawful reasons, we conclude "beyond a doubt that [he] could prove no set of facts, which, if true, would entitle [him] to relief." *Id*.

Innkeeper common law is not implicated here

One of our dissenting colleagues opines, and Dr. Slade advances a similar argument on appeal, that gaming establishments, when acting as innkeepers, have a common-law duty to allow access to any patron seeking lodging if there is not cause to exclude. We respectfully disagree. We do not believe that the Legislature intended that gaming establishments be subject to varying common-law duties. The plain meaning of the statutory definition for gaming establishment encompasses the entirety of the "premises wherein or whereon any gaming is done." NRS 463.0148; NRS 463.0153; *see also Premises*, *Black's Law Dictionary* (10th ed. 2014) (defining "premises" as a "building, along with its grounds"). Arbitrarily limiting a gaming establishment's premises to the nonhotel portions contradicts NRS 463.0148's plain meaning.

Further, the rule suggested by our colleague would result in district courts parsing out parts of a gaming establishment's premises to determine whether patrons may be excluded without cause or whether a reason for exclusion must be given. Such an inquiry would create an inconsistent application of the statutes because of the many ways a gaming establishment can be configured and the variety of reasons guests patronize hotel-casinos.

Moreover, NRS 463.0129(3)(a) specifically provides that the common-law right to exclude "any person from the premises of [a gaming] establishment for any reason" is not abridged. Had the Legislature intended that an innkeeper common-law rule be weighed against the right to exclude any person for any reason, in the context of gaming establishments, it would have provided as much in NRS 463.0129(3). *See* Antonin Scalia & Bryan A. Garner, *Reading Law:*

The Interpretation of Legal Texts 107 (2012) ("The expression of one thing implies the exclusion of others.").

According to the dissent, because hotel-casinos in Las Vegas also offer amenities such as "convention centers, shopping malls, restaurants, swimming pools, wedding halls, concert halls, nightclubs, bowling alleys, zoos, spas, and more," innkeeper common law may be implicated. But we cannot determine in any principled manner why innkeeper common law would apply to these communal spaces instead of public amusement common law. *See Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) ("[T]hey were not acting in [an innkeeper] capacity in their dealings with [the plaintiff]. The relationship was . . . one of casino owner and prospective gambler. The policies upon which the innkeeper's special common law duties rested are not present in such a relationship."). Our dissenting colleague is also concerned that our holding creates a monopolistic policy toward hotel-casino convention centers, similar to that which originally prompted the innkeeper common law. However, as noted in the dissent, innkeeper common law was created "because inns were so far and few between that travelers found themselves at the mercy of the innkeeper," raising monopolistic concerns. Access to convention space in a city such as Las Vegas, where practically every large gaming establishment has sizeable meeting areas, resulting in fierce competition, in no way implicates the concerns expressed in the original innkeeper common-law rule.

For these reasons, we conclude that innkeeper common law is not implicated in this instance.

CONCLUSION

For the reasons set forth above, we conclude that, pursuant to NRS 463.0129, gaming establishments generally have the right to exclude any person from their premises; however, the reason for exclusion must not be discriminatory or unlawful. Because Dr. Slade failed to plead or in any way demonstrate that his exclusion from Caesars' properties was for unlawful reasons and thus could prove no set of facts, which, if true, would entitle him to relief, we further conclude that the district court did not err in granting Caesars' motion to dismiss pursuant to NRCP 12(b)(5).

PARRAGUIRRE, C.J., and SAITTA and GIBBONS, JJ., concur.

PICKERING, J., with whom DOUGLAS, J., agrees, dissenting:

The district court dismissed Slade's complaint under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted. Nevada adheres to the traditional rule that an action may not be dismissed at the pleading stage "unless it appears to a certainty that the plaintiff could prove no set of facts that would entitle him or her to relief . . . drawing every inference in favor of the nonmoving par-

ty." *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 186, 300 P.3d 124, 128 (2013) (internal quotations omitted). "The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). This is not a difficult test to pass, and Slade's allegations that Caesars, as an innkeeper and convention host, violated the common law when it excluded him for no stated reason from all parts of all of its properties more than meet the mark. I also disagree with the proposition that a hotel and convention facility can exclude visitors on their say-so alone, with no reason given. For these reasons, I would reverse the district court's order of dismissal and remand, so the facts can be developed in discovery and the case narrowed or resolved by summary judgment or trial.

In his complaint, Slade alleges that he is a doctor who wanted to visit a Caesars property in Las Vegas for a medical convention—a non-gaming activity. Another Caesars' property, this one in Mississippi, had sent Slade an "eviction" letter, stating without explanation that he was excluded from *all parts* of *all* Caesars' properties in the United States. In his complaint, Slade alleges: "As an innkeeper operating an inn in conjunction with a casino, defendants are bound by the common law obligations of an innkeeper to accept all suitable travelers, and the common law actually restricts the action (rather than allows the action) taken by the defendants." Further, in Slade's opposition to Caesars' motion to dismiss, Slade stated that he "would likely be staying at defendants' inn." These allegations and argument render dismissal inappropriate.

By statute, the Nevada Legislature has directed Nevada courts to follow the common law in deciding when, and under what circumstances, a property holding a gaming license can exclude or eject a person from its premises. NRS 463.0129(1)(e) states the general rule: "[A]ll gaming establishments in this state must remain open to the general public and the access of the general public to gaming activities must not be restricted in any manner except as provided by the Legislature." However, in addition to the general application of common law under NRS 1.030,[1] NRS 463.0129(3)(a) states: "This section does not . . . [a]brogate or abridge any common-law right of a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason." The question thus becomes one of determining the

[1]NRS 1.030 provides: "The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State."

scope and extent of the common-law right of a gaming establishment to exclude a person from gaming activities or to eject a person from the premises.

The common law differentiates between innkeepers and proprietors of places of public amusement in terms of their ability to exclude persons for any reason, or no reason. While the common law did "not confer[ ] any right of access to places of public amusement," it held that innkeepers, by virtue of the dependency their establishment induced in members of the traveling public, could not refuse service without good reason. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). "At common law a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they please[ ]." *Madden v. Queens Cty. Jockey Club*, 72 N.E.2d 697, 698 (N.Y. 1947) (citations omitted).

The policies that led the common law to limit the right of an innkeeper to exclude a member of the traveling public still have force today. Originally, innkeepers had a duty to serve guests absent good cause to exclude because inns were so far and few between that travelers found themselves at the mercy of the innkeeper and were vulnerable to extortion from the innkeeper. *See* Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 159 (1904). Thus, innkeepers were viewed as having a "virtual monopoly" over a market serving the essential needs of the traveling public. *Id.* at 158. A place of public amusement, by contrast, provided entertainment, not necessary shelter, and so the law accorded the proprietor more leeway. *See id.*

The majority correctly notes that, drawing on this common-law distinction, several courts have deemed gaming establishments, such as race tracks, to be places of public amusement. *See, e.g.*, *Brooks v. Chi. Downs Ass'n, Inc.*, 791 F.2d 512, 516-17 (7th Cir. 1986); *Madden*, 72 N.E.2d at 698. But these cases did not involve properties like Caesars that have gaming and, in addition, offer vast convention and hotel space. From a common-law perspective, hotel-casino-convention-centers implicate both the innkeeper rule and the rule regarding places of public amusement, a distinction the majority rejects. Yet, it is a fact that hotel-casinos offer many amenities beyond gambling: hotel rooms, convention centers, shopping malls, restaurants, swimming pools, wedding halls, concert halls, nightclubs, bowling alleys, zoos, spas, and more. Neither this court nor any other has endorsed the proposition that the mere presence of a casino exempts a hotel/convention center from the common-law

rule of inclusivity applicable to innkeepers. *See Spilotro v. State, ex rel. Nev. Gaming Comm'n*, 99 Nev. 187, 196, 661 P.2d 467, 473 (1983) (Gunderson, J., concurring) (emphasizing that the Nevada Gaming Commission's authority to exclude certain individuals from gaming establishments did not mean that: an " 'excluded person' could not even enter the Union Plaza Hotel in Las Vegas en route to the railway station, which is situated within that hotel, [nor] lawfully attend political events on the non-gaming portion of a gaming licensee's premises, . . . nor pursue any other legitimate pursuits on the non-gaming portion of a gaming licensee's premises"; noting that such a holding would be deeply problematic, for it would mean that an " 'excluded person' traveling by bus through Nevada could not even visit the lavatories in several of our established bus stations, or eat at the lunch counters during rest stops, because those facilities are in buildings also occupied by casinos").

The majority dismisses this important common-law distinction and its public policy implications by relying solely on its statutory interpretation of NRS 463.0129(3)(a), arguing: "Had the Legislature intended that an innkeeper common-law rule be weighed against the right to exclude any person for any reason, in the context of gaming establishments, it would have provided as much in NRS 463.0129(3)." But, the same argument can apply to the majority's interpretation. Had the Legislature intended that the entire premises of a hotel-casino or any gaming establishment have the absolute statutory right to exclude any person for any reason, it would have provided as much in NRS 463.0129(3). However, the Legislature did not simply state that rule, as the majority seems to believe. Rather, the Legislature incorporated and preserved the common law in NRS 463.0129(3)(a), which requires a legal analysis into the common-law rights and duties of innkeepers versus places of public amusements.[2]

The majority also takes issue with the concept that innkeeper common law would apply to the many different facilities located within the hotel-casino that arguably invoke public amusement common-law rules. Besides common law, statutory authority provides that all the different facilities, such as restaurants, swimming pools, wedding halls, etc., are within the premises of innkeepers. *See*

[2]The majority is construing NRS 463.0129(3)(a) as altering the common-law duties of innkeepers by applying the right to exclude for public amusements to the entire premises of a hotel-casino. I cannot reconcile this interpretation with established canons of statutory interpretation. *See First Fin. Bank v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) ("This court will not read a statute to abrogate the common law without clear legislative instruction to do so."); *Cunningham v. Washoe Cty.*, 66 Nev. 60, 65, 203 P.2d 611, 613 (1949) (requiring "the plainest and most necessary implication in the statute itself" for the modification of common law by statutory enactment "where such acts are not authorized by the express terms of the statute").

NRS 651.005 (defining "premises," under the section "Duties and Liabilities of Innkeepers," to include, but not exhaustively, "all buildings, improvements, equipment and facilities, including any parking lot, recreational facility or other land, used or maintained in connection with a hotel, inn, motel, motor court, boardinghouse or lodging house"). Moreover, under common law, places of public amusement that are located within an innkeeper's premises may be subject to the same common-law duties governing innkeepers. *See Odom v. E. Ave. Corp.*, 34 N.Y.S.2d 312, 316-17 (N.Y. Sup. Ct. 1942) (applying the common-law duties of innkeepers to a restaurant located within the hotel, concluding that the common law provides that a "guest has the implied right to the use of such facilities as the character of the inn will afford"); 43A C.J.S. *Inns, Hotels, and Eating Places* § 23 (2014) ("[A]n innkeeper is bound to provide a guest with such facilities as the character of the inn afford.").

But, even assuming that the common-law duties of innkeepers should not apply to the entire premises of a hotel-casino, the majority rejects the concept of "parsing out parts of a gaming establishment's premises." This rejection directly contradicts the common-law interpretation of mixed premises, which requires a factual analysis regarding whether the patron intended to stay at the inn. *See Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (recognizing that the hotel-casino may be considered an innkeeper, but the patron was only challenging access to the casino for the opportunity to play blackjack, and thus, "[t]he relationship was not one of innkeeper and patron, but rather one of casino owner and prospective gambler"); *Freudenheim v. Eppley*, 88 F.2d 280, 283 (3d Cir. 1937) (vacating lower court's conclusion that plaintiff was not a guest as a matter of law after plaintiff frequented the restaurant inside the hotel, concluding that the determination of one's guest status is based on intent, which is a question of fact for the jury); *Alpaugh v. Wolverton*, 36 S.E.2d 906, 908-09 (Va. 1946) ("[W]here a hotel operator operates a restaurant for the accommodation both of its guests and of the public in general, he may be an innkeeper as to some of his patrons and a restaurateur as to others. . . . [T]he controlling factor in determining whether the relationship of innkeeper and guest has been established is the intent of the parties."); 40A Am. Jur. 2d *Hotels, Motels, Etc.* § 18 (2008) ("A person claiming to be a guest must have the intention to become a guest and be received in that capacity by the innkeeper. . . . In litigation, there may be a jury question whether an innkeeper understood that a person intended to occupy a room.").

Here, Slade alleged that Caesars violated the common-law duty of innkeepers and, drawing every inference in his favor, he sufficiently alleged that he intended to patronize the inn. Moreover, even if he only wanted to attend the convention, it is not clear that the public

amusement rule, rather than the innkeeper rule, should apply. As Las Vegas continues to market itself as a convention-center destination, a policy that would allow a hotel-casino to become the exclusive venue for conventions, yet retain unfettered discretion to exclude persons who want to attend those conventions, invokes the same concerns that drove the innkeeper common law—a theory based on the monopolistic nature of the inn.

The majority incorrectly interprets the monopolistic nature of convention centers, arguing that "practically every large gaming establishment has sizeable meeting areas, resulting in fierce competition, [which] in no way implicates the concerns expressed in the original innkeeper common-law rule." This interpretation fails to address the exclusivity of a particular convention. While venue-shopping, a business wishing to host a convention has many options, but once that business selects a particular venue, it becomes the exclusive venue for that convention. As is the case here, the medical convention Slade wished to attend was hosted by a Caesars property. After being excluded, Slade could not attend the same convention at another location because that particular Caesars' property was the exclusive venue for the convention. Thus, the concept of a virtual monopoly is arguably as present, if not more, for conventions than for innkeepers. But even assuming the public amusement rule, not the innkeeper rule, applies to the pure convention-goer, it is not possible to draw this much from the record below at this stage of the case, where, on the face of the pleadings, Slade alleges that he was invoking the common-law right not to be excluded by an innkeeper from the inn.

The majority correctly observes that, under NRS 651.070, Caesars cannot illegally discriminate against Slade or other prospective patrons on the basis of race or other protected status. But this statutory prohibition requires the excluded patron to plead and prove the illegal discrimination. The common law, by contrast, requires the innkeeper to give a reason for the exclusion, rather than rest on the right to exclude for any reason, or no given reason at all. The difference is meaningful, as the common law recognized.

The record in this case is wholly undeveloped. We do not know, for example, why Caesars sent Slade the letter it did, or whether Slade could attend the medical convention without walking across the casino floor. Without more than the bare allegations in Slade's complaint, though, I cannot reconcile an absolute right to exclude for any reason or no reason at all to the entire premises of a hotel-casino with the common-law duty of innkeepers, which only allows exclusion for good cause. Thus, I would reverse the district court's dismissal of Slade's complaint and remand for further proceedings.

I dissent.

CHERRY, J., dissenting:

I join in the dissent authored by Justice Pickering, but I write separately because I cannot support the majority's conclusion that a plaintiff bears the responsibility of proving, prior to conducting discovery, that a gaming and entertainment corporation has chosen to discriminate against him for an unlawful reason.[1]

The majority correctly commences with the plain language of the statute. NRS 463.0129(3)(a) certainly permits "a gaming establishment to exclude any person from gaming activities or eject any person from the premises of the establishment for any reason." The majority's opinion today, if not narrowly read, could be interpreted to say that a casino can exclude any person for any reason or for no reason at all, which is contrary to Nevada law.

This distinction is important here because in its majority opinion today, this court has precluded Dr. Slade from ascertaining why Caesars Entertainment excluded him from its properties. The reason for Dr. Slade's exclusion is crucial. Although the statute allows Caesars to exclude him for any reason, NRS 651.070 prevents "any place of public accommodation" from discriminating "on the ground of race, color, religion, national origin, disability, sexual orientation, sex, gender identity or expression."

This case is not the first time that this court or the United States Supreme Court has held that a right to exclude for any reason is not without its limits. In the arena of jury selection, for example, although an attorney may exercise any number of peremptory challenges to excuse a juror without cause, it is a long-standing principle that an attorney may not do so on the basis of race or gender. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994). More recently, the United States Court of Appeals for the Ninth Circuit extended this principle to exclusions on the basis of sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014). In the aftermath of these cases, if a party alleges a violation, then that party is not required to prove it; rather, the burden shifts to the other party to proffer a nondiscriminatory reason for the dismissal.

The principles of *Batson*, *J.E.B.*, and *SmithKline* are no different here, which is why the Legislature enacted NRS 651.070. I do

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[1]This matter came before the district court as an NRCP 12(b)(5) motion to dismiss. Given the procedural posture of the case, the court below was obligated to accept as true everything in the complaint as it existed at that time and draw all inferences in favor of the plaintiff. *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 328-29 (2013). It does not appear that such consideration was given to appellant. Granting dismissal with nothing more than the complaint was error. Allowing some discovery on this issue might have provided significant information to appellant.

not believe Nevada law allows (or that the Nevada Legislature ever intended) for Caesars Entertainment, or any other gaming establishment, to engage in *potentially* unlawful discrimination simply because it chooses not to give a reason for its actions.[2] For these reasons, I would allow this case to proceed to discovery.[3] Accordingly, I respectfully dissent.

JOSUE TERRONES VALDEZ, APPELLANT, *v.*
PATRICIA SOTO AGUILAR, RESPONDENT.

No. 66854

May 26, 2016 373 P.3d 84

Appeal from a district court order affirming in part and denying in part a master's findings and recommendations in a child support matter. Second Judicial District Court, Family Court Division, Washoe County; Bridget E. Robb, Judge.

Father moved for enforcement of child support order. The district court stayed mother's child support obligation during time in which she received public assistance on behalf of the child. Father appealed. The supreme court, HARDESTY, J., held that court-ordered child support obligation owed by noncustodial parent receiving public assistance to a custodial parent is not suspended by statute providing that debts for support may not be incurred by a parent or any other person who is recipient of public assistance for benefit of a dependent child for period when parent or other person is a recipient.

Reversed and remanded.

Jonathan H. King, Reno, for Appellant.

Patricia Soto Aguilar, Reno, in Pro Se.

Christopher J. Hicks, District Attorney, and *Susan D. Hallahan*, Deputy District Attorney, Family Support Division, Washoe County, for Washoe County District Attorney's Office.

1. APPEAL AND ERROR.
The supreme court reviews issues of statutory interpretation de novo.

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[2]Nothing in this dissent should be read as an accusation that Caesars Entertainment actually engaged in unlawful discrimination. The point is that without discovery, we cannot be sure.

[3]The better practice would have been for the court *sua sponte* to require respondents to file a more definite statement rather than grant dismissal outright.

2. STATUTES.
When interpreting a statute, the supreme court gives effect to statute's plain meaning and when its language is plain and unambiguous, such that it is capable of only one meaning, the court does not construe that statute otherwise.
3. STATUTES.
Ambiguous statute that is susceptible to differing reasonable interpretations should be construed consistently with what reason and public policy would indicate the Legislature intended.
4. CHILD SUPPORT; PUBLIC ASSISTANCE.
Court-ordered child support obligation owed by noncustodial parent receiving public assistance to a custodial parent is not suspended by statute providing that debts for support may not be incurred by a parent or any other person who is recipient of public assistance for benefit of a dependent child for period when parent or other person is a recipient; the statutory provision is only implicated when public assistance has created a debt for support to the Division of Welfare and Supportive Services of the Department of Health and Human Services. NRS 425.360(4).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we must determine whether a court-ordered child support obligation owed by a noncustodial parent receiving public assistance to a custodial parent is suspended by NRS 425.360(4). We conclude that the support obligation is not suspended. The provisions of NRS 425.360 are only implicated when public assistance has "creat[ed] a debt for support to the Division" of Welfare and Supportive Services of the Department of Health and Human Services. It does not apply to suspend child support payments owed by one parent to another. Accordingly, we reverse the district court order and remand for a recalculation of child support arrearages.

FACTS AND PROCEDURAL HISTORY

Josue Terrones Valdez and Patricia Soto Aguilar are the parents of a minor child. As the custodial parent, Valdez sought child support payments from Aguilar. The district court entered a child support order effective December 2010 requiring Aguilar to pay $531 per month. Aguilar failed to make payments, so on August 12, 2013, Valdez moved for enforcement of the child support order, alleging that Aguilar had child support arrearages of over $19,000.

In defense, Aguilar, who had received public assistance during a portion of the time she owed support, asserted that her child support obligation to Valdez should be suspended pursuant to NRS 425.360(4), which provides that "[d]ebts for support may not be in-

curred by a parent or any other person who is the recipient of public assistance for the benefit of a dependent child for the period when the parent or other person is a recipient." However, Aguilar received public assistance for the benefit of her dependent children, but not the child fathered by Valdez.

The family court master conducted a hearing and issued findings and recommendations staying Aguilar's child support obligation to Valdez during the time periods in which she received public assistance on behalf of a child. The family court master determined that NRS 425.360(4) does not act as a retroactive modification of Aguilar's child support obligation and does not constitute a "taking." Valdez objected, but the district court agreed with the court master's finding and denied Valdez's objection. This appeal followed.

DISCUSSION

[Headnotes 1-3]

We review issues of statutory interpretation de novo. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006). When interpreting a statute, we "give effect to the statute's plain meaning" and when its language "is plain and unambiguous, such that it is capable of only one meaning, [we do] not construe that statute otherwise." *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 228-29, 209 P.3d 766, 769 (2009). But an ambiguous statute that "is susceptible to differing reasonable interpretations, . . . should be construed consistently with what reason and public policy would indicate the Legislature intended." *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006) (internal quotation marks omitted).

Valdez argues that NRS 425.360(4) results in an impermissible retroactive modification of child support and is unconstitutional. Before we reach Valdez's arguments, we must first determine whether NRS 425.360(4) is applicable.[1]

[Headnote 4]

NRS 425.360(4) must be read in the context of the statute as a whole. *C. Nicholas Pereos, Ltd. v. Bank of Am.*, 131 Nev. 436, 441, 352 P.3d 1133, 1136 (2015) ("When interpreting a statute, this court considers the statute's multiple legislative provisions as a whole." (internal quotation marks omitted)). NRS 425.360(1) provides that "[a]ny payment of public assistance pursuant to this chapter creates a debt for support to the Division by the responsible parent, whether or not the parent received prior notice that the child of the parent was receiving public assistance." " '[P]ublic assistance' mean[s] any payment made by the Division to or on behalf of a child."

[1]The district court failed to make this initial determination, likely due to the lack of argument by the parties.

NRS 425.280. If a debt for support is created for the parties' child pursuant to NRS 425.360(1), it must then be determined whether there is an exemption from reimbursement for that debt pursuant to NRS 425.360(4). NRS 425.360(4) excuses payments of debts for support owed by a parent to the Division if that parent is a recipient of public assistance for the benefit of any child. NRS 425.360(4), when interpreted in context with NRS 425.360(1), only acts to exempt a parent from a debt for support owed *to the Division*. NRS 425.360(4) does not act to independently exempt a parent from a child support obligation *to the custodial parent* of their child. Thus, it is clear from the plain language of the statute that NRS 425.360 does not apply in the instant case.

We note that this plain language interpretation is consistent with the spirit of the statute. *See Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). NRS 425.360 was part of a federal mandate to require states to enforce child support. Hearing on S.B. 454 Before the Assembly Judiciary Comm., 59th Leg. (Nev., April 18, 1977) (Summary Explanation). NRS 425.360 gave a right of assignment of child support debt to welfare departments to decrease the burden of caring for these children and require parents to pay support. *See* NRS 425.340 (providing that the purpose of NRS Chapter 425 is for "children [to] be promptly maintained insofar as possible from the resources of responsible parents"); *see also* Hearing on S.B. 454 Before the Assembly Judiciary Comm., 59th Leg. (Nev., April 18, 1977) (explaining that S.B. 454's purpose was to "provide cost-beneficial reductions in welfare rolls by causing parents to meet their primary obligation to support their dependent children"). Because the spirit of NRS 425.360 was to ensure that the Division received reimbursement from a responsible parent for the support it made to a child, NRS 425.360 is irrelevant to the enforcement of a child support obligation between parents where no debt to the Division has been created. Therefore, we conclude that NRS 425.360(4) does not relieve Aguilar from having to pay child support to Valdez for the support of their child.

Having concluded that NRS 425.360 does not apply here, we do not consider Valdez's arguments as to whether NRS 425.360(4) results in an impermissible retroactive modification of child support or is unconstitutional.

Accordingly, for the reasons set forth above, we reverse the district court's order denying Valdez's objection to the master's recommendations and remand this matter for further proceedings.

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

EDWIN GRIFFITH, APPELLANT, *v.*
GABRIELA GONZALES-ALPIZAR, RESPONDENT.

No. 67772

May 26, 2016 373 P.3d 86

Appeal from a post-divorce decree order granting attorney fees pendente lite for appeal costs. Second Judicial District Court, Family Court Division, Washoe County; Egan K. Walker, Judge.

Ex-wife moved for attorney fees pendente lite to enable her to defend appeal in child support arrears proceeding. The district court granted motion. Ex-husband appealed. The supreme court, PARRAGUIRRE C.J., held that: (1) the district court had subject matter jurisdiction to award pendente lite attorney fees, and (2) the district court did not abuse its discretion in awarding those fees.

Affirmed.

Jeffrey Friedman, Reno, for Appellant.

Richard F. Cornell, Reno, for Respondent.

Kunin & Carman and *Michael P. Carman* and *Israel L. Kunin*, Las Vegas, for Amicus Curiae.

1. APPEAL AND ERROR.
   Subject matter jurisdiction is a question of law subject to de novo review.
2. STATUTES.
   If a statute's language is clear and unambiguous, it must be given its plain meaning, unless doing so violates the spirit of the act.
3. STATUTES.
   A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.
4. STATUTES.
   When construing an ambiguous statute, legislative intent is controlling, and the supreme court looks to legislative history for guidance.
5. STATUTES.
   In interpreting a statute, the supreme court considers policy and spirit of law and will seek to avoid an interpretation that leads to an absurd result.
6. DIVORCE.
   Under statute giving court discretion to award either party attorney fees to enable the other party to carry on or defend a suit for divorce, "suit for divorce" includes appellate proceedings; therefore, the district court has jurisdiction to award attorney fees pendente lite for costs of an appeal. NRS 125.040.
7. CHILD SUPPORT.
   The district court did not abuse its discretion in awarding ex-wife attorney fees pendente lite to enable her to defend appeal of child support proceeding; ex-wife presented evidence that she earned $200 per month,

and her financial records and previous testimony revealed assets and/or earnings sufficient to warrant pendente lite fees. NRS 125.040.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, C.J.:

Under NRS 125.040(1)(c), a district court has discretion in a divorce suit to require one party to pay an amount of money necessary to assist the other party in carrying on or defending the suit. In this appeal, we are asked to determine whether this statute grants the district court subject matter jurisdiction to award a party attorney fees pendente lite to defend against an appeal. We hold that a district court does have jurisdiction to award attorney fees pendente lite for the costs of an appeal pursuant to NRS 125.040. Furthermore, we hold that the district court did not abuse its discretion in awarding such fees in this case. Accordingly, we affirm the district court's order.[1]

FACTS AND PROCEDURAL HISTORY

Appellant Edwin Griffith and respondent Gabriela Gonzales-Alpizar have been immersed in divorce litigation for almost ten years. In 2007, both parties obtained divorce decrees: Gonzales-Alpizar from a Costa Rica court, and Griffith from a Nevada court. Much litigation ensued, and in October 2014, Gonzales-Alpizar received a judgment for child support arrears and penalties against Griffith in Nevada, as well as an award of attorney fees. Griffith appealed the order, arguing that attorney fees should not have been awarded and that the underlying Costa Rica order was fraudulent. That appeal is currently before this court as Docket No. 66954.

In the meantime, Gonzales-Alpizar filed a motion for attorney fees pendente lite in the district court to enable her to defend the appeal in Docket No. 66954. The district court granted Gonzales-Alpizar's motion and awarded her $15,000 for attorney fees pendente lite, and Griffith filed this appeal. This court ordered that briefing in Docket No. 66954 remain suspended until the issue concerning the district court's award of attorney fees pendente lite was resolved.

DISCUSSION

In this appeal, Griffith argues that the district court did not have subject matter jurisdiction to award attorney fees pendente lite for

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

the costs of an appeal, and, even assuming it did, it abused its discretion in awarding such fees in this case. We disagree.

[Headnotes 1-5]

"Subject matter jurisdiction is a question of law subject to de novo review." *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Furthermore, if "a statute's language is clear and unambiguous, it must be given its plain meaning, unless doing so violates the spirit of the act." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007) (internal quotation marks omitted). "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.* "When construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006). "Finally, we consider the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result." *Id.* (internal quotation marks omitted).

[Headnote 6]

NRS 125.040 reads in relevant part as follows: "1. *In any suit for divorce* the court may, in its discretion . . . require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following: . . . (c) *To enable the other party to carry on or defend such suit*." (Emphases added.)

Fees awarded pursuant to NRS 125.040(1)(c) are considered "pendente lite" because they cover the costs of the suit while the divorce action is pending. *Pendente Lite*, *Black's Law Dictionary* (10th ed. 2014) ("Pendente lite" is Latin for "while the action is pending."); *see Thompson v. First Judicial Dist. Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984) (stating "evidence of the legislature's intent may be gleaned from the title of the act by which the statute was enacted"); *see also* 1975 Nev. Stat., ch. 209, at 246 ("AN ACT relating to divorce; providing allowances during pendency of action for . . . costs of suit . . . .").

Although we conclude the phrase "suit for divorce" is ambiguous, as it is unclear from the text of the statute whether the "suit for divorce" includes appellate proceedings, we also conclude that this court's precedent resolves the ambiguity and a divorce action is still pending once an appeal has been filed. *See Braddock v. Braddock*, 91 Nev. 735, 743, 542 P.2d 1060, 1064 (1975) (stating a divorce action "is pending from the time of filing the complaint until its final determination on appeal"); *cf. Fleming v. Fleming*, 58 Nev. 179, 185, 72 P.2d 1110, 1112 (1937) (stating that, with regard to the 1929 equivalent of NRS 125.040, a divorce action remains pending after the entry of a divorce decree for some purposes, such as modifications to child custody). Furthermore, such an interpretation

of NRS 125.040 serves public policy in ensuring that underprivileged parties have access to justice in Nevada courts and may obtain appellate review in divorce proceedings. *See, e.g.*, *Sargeant v. Sargeant*, 88 Nev. 223, 227, 495 P.2d 618, 621 (1972) (stating that parties in a divorce action should "be afforded [their] day in court without destroying [their] financial position" and that they "should be able to meet [their] adversary in the courtroom on an equal basis"). Therefore, we hold NRS 125.040 grants district courts subject matter jurisdiction to award attorney fees pendente lite for the costs of an appeal.

Moreover, we conclude Griffith's reliance on *Lake v. Lake*, 17 Nev. 230, 30 P. 878 (1882), and *Korbel v. Korbel*, 101 Nev. 140, 696 P.2d 993 (1985), is misplaced. The issue before the court in *Lake* was whether this court, not the district court, had jurisdiction to award attorney fees pendente lite. *See Lake*, 17 Nev. at 233-34, 30 P. at 879. Furthermore, the *Lake* court did not discuss Section 220 of the Compiled Laws of the State of Nevada, the nineteenth century equivalent to NRS 125.040. *See* 1 Nev. Compiled Laws § 220 (Bonnifield and Healy, 1873) ("In any suit for divorce now pending, or which may hereafter be commenced, the Court or Judge may, in its discretion . . . require the husband to pay such sums as may be necessary to enable the wife to carry on or defend such suit . . . ."). To the extent *Lake* discussed a district court's authority to award attorney fees pendente lite, we conclude such dictum is unpersuasive.

As for *Korbel*, although this court stated that NRS 125.040 had "no application to an appeal," no analysis was provided and such a holding contravenes both this court's precedent and the policy underlying the statute. *Korbel*, 101 Nev. at 141, 696 P.2d at 994. Furthermore, *Korbel* is materially distinct from this case, as *Korbel* dealt with attorney fees for a previous appeal, not a prospective appeal. *Id.* at 142, 696 P.2d at 994; *see Levinson v. Levinson*, 74 Nev. 160, 161, 325 P.2d 771, 771 (1958) ("That an order for allowances under [NRS 125.040] must operate prospectively has been well established in this state. Expenses incurred and attorneys' services performed in the past are not proper considerations.").

[Headnote 7]

Finally, we conclude that the district court did not abuse its discretion in awarding attorney fees pendente lite in this case. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005) (stating "an award of attorney fees in divorce proceedings will not be overturned on appeal unless there is an abuse of discretion by the district court"). Although a party need not show "necessitous circumstances" in order to receive an award of attorney fees under NRS 125.040, *Sargeant*, 88 Nev. at 227, 495 P.2d at 621, Gonzales-Alpizar presented evidence that she earns $200 per month. And despite the fact that the financial statement contained in the record is several years

old, the district court concluded that "Mr. Griffith's financial records and previous testimony in this matter reveal assets and/or earnings sufficient to warrant pendent[e] lite fees . . . ." Griffith's financial records and hearing transcripts have not been brought up on appeal, and thus, we assume the evidence supports the district court's determinations. *See Leeming v. Leeming*, 87 Nev. 530, 532, 490 P.2d 342, 343 (1971) ("As appellant has not brought up the hearing transcript, we must assume the evidence supported the court's implicit determination[ ] . . . that the $2,500 awarded as suit money was needed so respondent might pay her counsel without diminishing the care the court contemplated for the children.").[2]

CONCLUSION

We hold that NRS 125.040 grants district courts subject matter jurisdiction to award attorney fees pendente lite for the costs of an appeal. Furthermore, we conclude that the district court did not abuse its discretion in awarding such fees in this case. Accordingly, we affirm the order of the district court.

Hardesty, Douglas, Cherry, Saitta, Gibbons, and Pickering, JJ., concur.

DARRIN D. BADGER, an Individual, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE, District Judge, Respondents, and OMNI FAMILY LIMITED PARTNERSHIP, a Nevada Domestic Limited Partnership, Real Party in Interest.

No. 67835

May 26, 2016 373 P.3d 89

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion for summary judgment and a motion to dismiss an action for breach of guaranty.

Lender filed action against guarantor of loan, alleging default on the guaranty. Meanwhile, lender foreclosed on the property and filed complaint for deficiency judgment against borrower. Parties filed stipulation and order to consolidate the two actions, and lender

[2]Although we conclude that the district court did not abuse its discretion in this instance, we caution that in the future, courts should make more explicit factual findings regarding the financial condition of the parties when awarding attorney fees pendente lite.

filed amended complaint adding application for deficiency judgment against guarantor. The district court denied guarantor's motion for summary judgment and guarantor's motion to dismiss. Guarantor filed petition for writ of mandamus or prohibition. The supreme court, GIBBONS, J., held that: (1) six-month statutory deadline for filing application for deficiency judgment was not subject to relation back, (2) timely complaint against borrower did not constitute a valid application for deficiency judgment against guarantor, (3) consolidation did not result in a timely application for deficiency judgment against guarantor, and (4) guarantor's alleged waiver of time requirements for filing application for deficiency judgment violated public policy.

Petition granted.

PICKERING, J., with whom HARDESTY, J., agreed, dissented.

Reid Rubinstein & Bogatz and *I. Scott Bogatz, Charles M. Vlasic, III*, and *Jaimie Stilz*, Las Vegas, for Petitioner.

Roger P. Croteau & Associates, Ltd., and *Roger P. Croteau* and *Timothy E. Rhoda*, Las Vegas; *Lewis Roca Rothgerber, LLP*, and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas, for Real Party in Interest.

1. COURTS.
   The supreme court has original jurisdiction to issue writs of mandamus and prohibition. Const. art. 6, § 4.
2. MANDAMUS; PROHIBITION.
   While the supreme court will not normally entertain a petition for writ of mandamus or prohibition that challenges the denial of a motion to dismiss, the supreme court may do so when the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law.
3. MANDAMUS; PROHIBITION.
   The supreme court may address petitions for writ of mandamus or prohibition when summary judgment is clearly required by a statute or rule.
4. MANDAMUS; PROHIBITION.
   The supreme court would exercise its discretion to consider petition for writ of mandamus or prohibition challenging a district court order denying guarantor's motion for summary judgment and motion to dismiss lender's action for breach of guaranty and for deficiency judgment; petition involved a significant and potentially recurring question of law regarding whether relation back doctrine applied to applications for deficiency judgment, petition was not fact-based, and district court failed to grant summary judgment where a statute required it. NRS 40.455(1); NRCP 15(c).
5. MANDAMUS; PROHIBITION.
   In the context of a petition for writ of mandamus or prohibition, statutory interpretation is a question of law that the supreme court reviews de novo.
6. STATUTES.
   Statutory language must be given its plain meaning if it is clear and unambiguous.

7. Courts.
   The supreme court is loath to depart from the doctrine of stare decisis.
8. Mandamus.
   A writ of mandamus is available to control an arbitrary or capricious exercise of discretion.
9. Mandamus.
   An exercise of discretion is considered arbitrary, supporting issuance of writ of mandamus, if it is founded on prejudice or preference rather than on reason, and is considered capricious if it is contrary to the evidence or established rules of law.
10. Guaranty.
    Lender's amended complaint, adding a request for deficiency judgment against guarantor of loan after six-month deadline for applications for deficiency judgment had expired, did not relate back to original complaint that timely sought deficiency judgment against borrower; six-month statutory deadline for filing application for deficiency judgment was a strict one and was not subject to relation back. NRS 40.455(1); NRCP 15(c).
11. Mortgages.
    Every obligation secured by property through a mortgage or a deed of trust is subject to Nevada's antideficiency statutes. NRS 40.455.
12. Guaranty; Mortgages.
    Nevada's deficiency judgment statutes are intended not only to protect borrowers, but to protect guarantors as well. NRS 40.455.
13. Guaranty.
    Amendment to deficiency judgment statute, providing that a pre-foreclosure complaint against a guarantor constitutes an application for deficiency judgment within six months after date of foreclosure sale, did not apply retroactively to case in which lender sought deficiency judgment against borrower and guarantor following foreclosure sale; right to deficiency judgment was a vested right, and legislative history contemplated neither retroactive application of amendment nor reversing the supreme court's holdings on the subject. NRS 40.455.
14. Statutes.
    The supreme court applies a strong presumption against retroactivity to statutes that affect vested rights when the Legislature has not explicitly provided for retroactivity.
15. Mortgages.
    A complaint filed prior to a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim. NRS 40.455.
16. Statutes.
    As a general principle, the supreme court will not interpret statutes so as to render the statutory language meaningless.
17. Limitation of Actions.
    The relation-back doctrine for amended pleadings applies to both the addition and substitution of parties, and will be liberally construed unless the opposing party is disadvantaged by relation back. NRCP 15(c).
18. Limitation of Actions.
    An amended pleading adding a defendant that is filed after the statute of limitations has run will generally relate back to the date of the original pleading if the proper defendant (1) receives actual notice of the action, (2) knows that it is the proper party, and (3) has not been misled to its prejudice by the amendment. NRCP 15(c).

19. MORTGAGES.
Relation back pursuant to rule of civil procedure governing amended pleadings may not be utilized to save an untimely application for a deficiency judgment under statute requiring application for a deficiency judgment to be made within six months of foreclosure sale. NRS 40.455(1); NRCP 15(c).

20. MORTGAGES.
Following foreclosure sale, creditor's failure to timely file an application for a deficiency judgment per statute is fatal. NRS 40.455(1).

21. GUARANTY.
Lender's timely complaint against borrower to recover a deficiency judgment following foreclosure sale did not constitute a valid application for deficiency judgment against guarantor who was not named as a party, although guarantor was mentioned in the "General Allegations" section of the complaint; while complaint stated with particularity the causes of action alleged against borrower, it did not do the same as against the guarantor. NRS 40.455; NRCP 7(b)(1).

22. GUARANTY.
Even if consolidation of lender's action against guarantor for breach of guaranty with lender's action against borrower for deficiency judgment resulted in merger of the two complaints, the consolidation did not result in a timely application for deficiency judgment against guarantor, in addition to the borrower, where six-month deadline for filing deficiency judgment had lapsed nearly two months before the parties' stipulation and order to consolidate the cases. NRS 40.455(1); NRCP 42(a).

23. GUARANTY.
Provision of guaranty agreement, under which guarantor allegedly waived the time requirements for filing application for deficiency judgment following foreclosure sale, violated public policy and, thus, was not enforceable. NRS 40.453, 40.455(1).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we consider whether a creditor's amended complaint seeking a deficiency judgment against petitioner may relate back to a timely complaint against a different party pursuant to NRCP 15(c), so as to satisfy NRS 40.455(1)'s six-month deadline for an application for a deficiency judgment against petitioner. We conclude that the district court erred in permitting real party in interest's amended complaint to relate back to the timely original complaint pursuant to NRCP 15(c), so as to satisfy the six-month deadline for an application for a deficiency judgment against petitioner, as required by NRS 40.455(1). Additionally, we conclude that the timely complaint against the borrowers does not constitute a valid application for deficiency judgment against the unnamed petitioner. Finally, we conclude that petitioner did not waive his right to object

under NRS 40.455(1). Accordingly, we conclude that the district court erred in denying petitioner's motion for summary judgment in the guaranty action and motion to dismiss in the borrower action, and we grant the petition for writ of mandamus.

FACTS AND PROCEDURAL HISTORY

Southwest Desert Equities, LLC (the Borrower) borrowed from OneCap Mortgage Corporation (OneCap), where OneCap was the predecessor-in-interest to real party in interest Omni Family Limited Partnership (Omni). On the same day that the Borrower took out the loan, petitioner Darrin Badger (the Guarantor) personally guaranteed the Borrower's loan by executing a continuing guaranty.

After the Borrower defaulted on the loan, the Guarantor allegedly breached the guaranty. Omni filed a complaint against the Guarantor for the alleged default on the guaranty (referred to as the Guaranty Action or Guaranty Complaint).

While the Guaranty Action was pending, Omni foreclosed on the property securing the underlying loan. The August 13, 2013, foreclosure triggered the six-month deadline for Omni to file an application for a deficiency judgment against either or both the Borrower and the Guarantor pursuant to NRS 40.455(1). Omni applied for a deficiency judgment against the Borrower within the six-month deadline by virtue of filing a complaint against the Borrower (referred to as the Borrower Action or Borrower Complaint) but failed to file a timely application for a deficiency judgment against the Guarantor before the lapse of the six-month deadline on February 13, 2014. On April 15, 2014, the parties filed a stipulation and order to consolidate the Guaranty Action with the Borrower Action. On September 18, 2014, the Guarantor filed a motion for summary judgment in the Guaranty Action, seeking dismissal of Omni's claims against him due to Omni's failure to apply for a deficiency judgment against the Guarantor within the six months following the foreclosure sale pursuant to NRS 40.455(1).

On December 1, 2014—approximately 16 months after the foreclosure sale—Omni filed an amended complaint in the Borrower Action (referred to as the Amended Borrower Complaint) naming the Guarantor as an additional defendant and seeking to relate the Amended Borrower Complaint back to the Borrower Complaint pursuant to NRCP 15(c), where the Borrower Complaint constituted a timely application for a deficiency judgment against the Borrower.

In addition to the earlier motion for summary judgment in the Guaranty Action, the Guarantor filed a motion to dismiss the Amended Borrower Complaint. The district court denied both motions and concluded that the Amended Borrower Complaint related back to the timely Borrower Complaint pursuant to NRCP 15(c),

thereby curing Omni's failure to apply for a deficiency judgment against the Guarantor within the six-month time frame required by NRS 40.455(1). The Guarantor then filed this petition for writ of mandamus or prohibition.

DISCUSSION

Consideration of the writ petition

[Headnotes 1-3]

"This court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); *see also* Nev. Const. art. 6, § 4. Where there is no plain, speedy, and adequate remedy available at law, extraordinary relief may be available. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). While this court will not normally entertain a writ petition that challenges the denial of a motion to dismiss, "we may do so where, as here, the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law." *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010). Additionally, this court may address writ petitions when "summary judgment is clearly required by a statute or rule." *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008).

[Headnote 4]

We exercise our discretion to consider this writ petition because the petition involves a significant and potentially recurring question of law, the petition is not fact-based, and the district court failed to grant summary judgment where a Nevada statute required it. Specifically, the district court's application of NRCP 15(c) to supplement the deadline contained in NRS 40.455(1) reveals confusion with our previously strict application of the deadline. We believe that consideration of this petition will clarify our position and prevent further misapplication of NRCP 15(c) in cases that are subject to NRS 40.455(1). Accordingly, we conclude that this writ petition warrants our consideration.

Merits of the writ petition

[Headnotes 5-7]

In the context of a writ petition, statutory interpretation is a question of law that this court reviews de novo. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 808, 312 P.3d 491, 498 (2013). Statutory language must be given its plain meaning if it is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). Further, this court is

"loath to depart from the doctrine of stare decisis." *City of Reno v. Howard*, 130 Nev. 110, 113-14, 318 P.3d 1063, 1065 (2014) (quoting *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013)).

[Headnotes 8, 9]

A writ of mandamus is available "to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). "An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law." *State, Dep't of Public Safety v. Coley*, 132 Nev. 149, 153, 368 P.3d 758, 760 (2016) (internal quotations omitted).

The district court erred in permitting the Amended Borrower Complaint to relate back to the timely Borrower Complaint under NRCP 15(c) to satisfy the six-month deadline required by NRS 40.455(1)

[Headnote 10]

Omni argues that the district court properly denied summary judgment and the Guarantor's motion to dismiss because Omni's Amended Borrower Complaint related back to the timely Borrower Complaint pursuant to NRCP 15(c), thereby satisfying NRS 40.455(1)'s six-month deadline for an application for a deficiency judgment against the Guarantor. We disagree.

[Headnotes 11, 12]

It is well-settled that every obligation secured by property through a mortgage or a deed of trust is subject to Nevada's antideficiency statutes. *First Interstate Bank of Nev. v. Shields*, 102 Nev. 616, 620-21, 730 P.2d 429, 432 (1986). Indeed, "the Legislature has shown a strong inclination towards protecting an obligor's rights under the antideficiency statutes." *Lavi v. Eighth Judicial Dist. Court*, 130 Nev. 344, 348, 325 P.3d 1265, 1268 (2014). Accordingly, Nevada's deficiency judgment statutes are intended not only to protect borrowers, but to protect guarantors as well. *Shields*, 102 Nev. at 621, 730 P.2d at 432. Such protection furthers Nevada public policy goals because "[a] guarantor is the favorite of the law." *Tri-Pac. Commercial Brokerage, Inc. v. Boreta*, 113 Nev. 203, 206, 931 P.2d 726, 729 (1997) (citation omitted).

[Headnotes 13-16]

Consistent with these policy rationales, NRS 40.455(1) requires that an application for a deficiency judgment be made within six

months after the date of a foreclosure sale. NRS 40.455(1);[1] *see also Lavi*, 130 Nev. at 348, 325 P.3d at 1268 (holding that a "timely application for a deficiency judgment must be made under NRS 40.455" in order to seek a deficiency judgment);[2] *see also Walters*, 127 Nev. at 728, 263 P.3d at 234 ("Under the clear and unambiguous language of NRS 40.455(1), an application must be made within six months."). It follows that a complaint filed prior to a foreclosure sale cannot sufficiently put an obligor on notice of a deficiency claim. *Lavi*, 130 Nev. at 349, 325 P.3d at 1269. As a general principle, this court will not interpret statutes so as to render the statutory language meaningless. *In re Parental Rights as to S.M.M.D.*, 128 Nev. 14, 24, 272 P.3d 126, 132 (2012).

[Headnotes 17, 18]

Under NRCP 15(c), "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." The relation-back doctrine applies to both the addition and substitution of parties, and will be liberally construed unless the opposing party is disadvantaged by relation back. *Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d 631, 634 (2011). However, in *Garvey*

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[1]NRS 40.455 was amended in 2015. *See* 2015 Nev. Stat., ch. 518, § 8, at 3340. The dissent contends that the 2015 amendment should apply retroactively to the facts of this case. However, neither party raised this argument to this court. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider claims that are not cogently argued or supported by relevant authority). Moreover, this court applies a strong presumption against retroactivity to statutes that affect vested rights where the Legislature has not explicitly provided for retroactivity, and this court has determined that the right to a deficiency judgment is a vested right. *See Sandpointe Apts. v. Eighth Judicial Dist. Court*, 129 Nev. 813, 819, 313 P.3d 849, 853-56 (2013). This conclusion is consistent with the legislative history of NRS 40.455, which contemplated neither retroactive application of the 2015 amendment nor reversing this court's holdings in *Lavi* and *Walters*. *See, e.g.*, Hearing on S.B. 453 Before the Senate Judiciary Comm., 78th Leg. (Nev., May 15, 2015); Hearing on S.B. 453 Before the Senate Judiciary Comm., 78th Leg. (Nev., May 1, 2015); Hearing on S.B. 453 Before the Senate Judiciary Comm., 78th Leg. (Nev., April 3, 2015); Hearing on S.B. 453 Before the Senate Judiciary Comm., 78th Leg. (Nev., March 31, 2015); 2015 Nev. Stat., ch. 518, § 8, at 3340.

[2]Omni contends that our decision in *Lavi* changed existing law, and that prior to *Lavi*, its Guaranty Complaint, wherein Omni sued the Guarantor for breach of guaranty prior to the foreclosure sale, would have been sufficient to satisfy NRS 40.455(1). We reject this argument because, as this opinion demonstrates, *Lavi* merely reiterated the bright-line rule established in existing Nevada caselaw and the plain language of NRS 40.455(1). *See, e.g.*, *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 728, 263 P.3d 231, 234 (2011) (stating that NRS 40.455(1) requires an application within six months after a foreclosure sale).

v. Clark County, this court expressly refused to allow an amended complaint to relate back after a limitations period had run where the plaintiff elected not to name the proposed defendant as a party in the original action. 91 Nev. 127, 128, 532 P.2d 269, 270-71 (1975).

> [Generally], an amended pleading adding a defendant that is filed after the statute of limitations has run will relate back to the date of the original pleading under NRCP 15(c) if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment."

Costello, 127 Nev. at 440-41, 254 P.3d at 634 (quoting *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979)). Similarly, we have previously refused to allow a new claim based upon a new theory of liability asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations had run. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556-57, 665 P.2d 1141, 1146 (1983).

[Headnotes 19, 20]

We conclude that relation back pursuant to NRCP 15(c) may not be utilized to save an untimely application for a deficiency judgment under NRS 40.455(1). We emphasized in both *Lavi* and *Walters* that the six-month statutory deadline is a rigid one, and we reiterate here that a creditor's failure to timely file an application for a deficiency judgment per NRS 40.455 is fatal. To permit relation back pursuant to NRCP 15(c) in this case would allow creditors to bypass the deadline entirely with intentions to amend a pending complaint later. Such an outcome would be inconsistent with Nevada's aim to protect borrowers and guarantors as articulated in *Shields* and would fail to provide guarantors with adequate notice of a deficiency claim as we required in *Lavi*. Therefore, the district court erred in permitting the Amended Borrower Complaint to relate back to the timely Borrower Complaint under NRCP 15(c), so as to satisfy NRS 40.455(1)'s six-month deadline for application for a deficiency judgment against the Guarantor.

Because we strictly construe NRS 40.455(1) to conclude that the six-month deadline is not subject to relation back, we need not entertain Omni's contention, pursuant to the first two requirements of *Costello*, that the Guarantor had actual notice of the action and knowledge that they were the proper party.

> *The timely Borrower Complaint does not constitute a valid application for a deficiency judgment against the unnamed Guarantor*

[Headnote 21]

Omni argues that its timely Borrower Complaint constitutes a valid application for a deficiency judgment against the unnamed

Guarantor because it mentions the Guarantor in the "General Allegations" section of the complaint and it meets the definition of "application" that this court applied in *Walters*. We disagree.

NRS 40.455(1) bars a judgment creditor from proving a deficiency unless the creditor files an application for a deficiency judgment within the six months following a foreclosure sale, but "application" remains undefined in the statute. *See generally* NRS 40.455. As a result, we have applied the following definition as stated in NRCP 7(b)(1): "[a]n application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." *See Walters*, 127 Nev. at 728, 263 P.3d at 234. In applying this definition, we have found that a creditor's motion for summary judgment constituted a valid application for a deficiency judgment where it named the guarantor as a defendant, was filed within the six months following the trustee's sale of the underlying property, and otherwise met the three requirements of NRCP 7(b)(1). *Id.*

We reject Omni's argument that its timely Borrower Complaint constitutes an application for a deficiency judgment against the Guarantor because, while the Borrower Complaint states with particularity the causes of action alleged against the Borrower to satisfy the second prong of the *Walters* test, the Borrower Complaint does not do the same as against the Guarantor where the language referring to "defendants" can only be logically construed to refer to the defendant(s) named in the complaint. To bind unnamed parties by the allegations in a complaint based on a loose compliance with NRCP 7(b)(1) would lead to an absurd result and contravene the Nevada Rules of Civil Procedure. *See* NRCP 10(a) (naming a party to a suit requires that a complaint contain in the title of the action the names of all the parties, save for a limited exception when a party's name is initially unknown). Therefore, we conclude that the timely Borrower Complaint did not constitute a valid application for a deficiency judgment against the Guarantor.

The subsequent consolidation of the Guaranty Action and the Borrower Action pursuant to NRCP 42(a) did not merge the two actions to satisfy NRS 40.455(1)

[Headnote 22]

Omni argues that the consolidation of the Guaranty Action and the timely Borrower Action pursuant to NRCP 42(a) serves to merge the parties and claims of the two separate actions to satisfy the time requirements of NRS 40.455(1). Further, by virtue of the consolidation, Omni claims that each of the defendants consented to the complaints being combined into one single action, meaning that the Guarantor is also subject to Omni's claim for deficiency. We disagree.

We decline to delve into the merits of Omni's consolidation argument because the April 15, 2014, stipulation and order to consoli-

date cases occurred nearly two months after the six-month deadline for filing a deficiency judgment had lapsed. Thus, even if the consolidation served to merge the two complaints as Omni contends, the consolidation would still fail to qualify as a timely application for a deficiency judgment against the Guarantor under NRS 40.455(1).

The Guarantor did not waive his right to object under NRS 40.455(1)

[Headnote 23]

Finally, Omni argues that the Guarantor contractually waived his right to object under NRS 40.455(1). While the terms of the Guaranty suggest that the Guarantor waived the time requirements of NRS 40.455(1), we decline to uphold the waiver as a matter of public policy. *See Lavi*, 130 Nev. at 348, 325 P.3d at 1268 (stating that "the Legislature has shown a strong inclination towards protecting an obligor's rights under the antideficiency statutes"); *see also Shields*, 102 Nev. at 620-21, 730 P.2d at 432 (stating that *every* obligation secured by property through a mortgage or a deed of trust is subject to Nevada's antideficiency statutes); NRS 40.453 (providing that courts will not enforce a provision related to the sale of real property whereby a guarantor waives any right secured to him by the laws of this state); *Lowe Enters. Residential Partners, LP v. Eighth Judicial Dist. Court*, 118 Nev. 92, 1034, 40 P.3d 405, 412 (2002) (reasoning that the Legislature passed NRS 40.453 with the intent to preclude lenders from forcing borrowers to waive their rights pursuant to the antideficiency statutes).

CONCLUSION

Having considered the parties' filings and the attached documents, we choose to entertain the Guarantor's petition for a writ of mandamus. In doing so, we conclude that the district court erred in permitting Omni's Amended Borrower Complaint to relate back to the timely Borrower Complaint pursuant to NRCP 15(c), so as to satisfy the six-month deadline for an application for a deficiency judgment required by NRS 40.455(1). Additionally, we conclude that the timely Borrower Complaint does not constitute a valid application for deficiency judgment against the unnamed Guarantor. Finally, we conclude that the Guarantor did not waive his right to object under NRS 40.455(1). Therefore, we conclude that the district court erred in denying the Guarantor's motion for summary judgment in the Guaranty Action and motion to dismiss in the Borrower Action. Accordingly, we grant the Guarantor's petition for writ of mandamus and direct the clerk of this court to issue a writ of mandamus in-

structing the district court to enter an order granting the Guarantor's motion to dismiss and motion for summary judgment.

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

PICKERING, J., with whom HARDESTY, J., agrees, dissenting:

In *Lavi v. Eighth Judicial District Court*, 130 Nev. 344, 325 P.3d 1265 (2014), a divided court held that a pre-foreclosure complaint against a guarantor who had waived the one-action rule did not qualify as the "application . . . within 6 months after the date of the foreclosure sale" that NRS 40.455 requires to recover the post-sale deficiency. This holding was not required by the plain text of the statute and, in fact, conflicted with prior decisions of this court and the United States District Court for the District of Nevada, applying Nevada law. *See Lavi*, 130 Nev. at 354, 325 P.3d at 1272-73 (PICKERING and HARDESTY, JJ., dissenting) (noting that *First Interstate Bank of Nevada v. Shields*, 102 Nev. 616, 618 n.2, 730 P.2d 429, 430 n.2 (1986), had held that, "to make *application* for a 'deficiency judgment' the lender must file a *complaint* against the guarantor within the time set by NRS 40.455," and that *Interim Capital, LLC v. Herr Law Group, Ltd.*, 2:09-CV-1606-KJD-LRL, 2011 WL 7053806 (D. Nev. Aug. 23, 2011), rejected the argument that the pre-foreclosure complaint against the guarantors did not suffice as the predicate "application" required to obtain a deficiency judgment against the guarantors).

The split decision in *Lavi* would be so much water under the bridge except that, before *Lavi* had been on the books for a year, the Nevada Legislature amended NRS 40.455 to add new paragraph 4, which defines "application" as the *Lavi* dissent and *Herr* did. New NRS 40.455(4) reads in full as follows:

> *For purposes of an action against a guarantor*, surety or other obligor of an indebtedness or obligation secured by a mortgage or lien upon real property pursuant to NRS 40.495, *the term "application" includes, without limitation, a complaint or other pleading to collect the indebtedness or obligation which is filed before the date and time of the foreclosure sale* unless a judgment has been entered in such action as provided in paragraph (b) of subsection 4 of NRS 40.495.

2015 Nev. Stat., ch. 518, § 8(4), at 3340 (emphases added). The 2015 amendments to NRS 40.455 make clear that, contrary to *Lavi* and contrary to today's opinion, a pre-foreclosure complaint against a guarantor *does* constitute an "application . . . within 6 months after

the date of the foreclosure sale" for purposes of NRS 40.455(1). And, if the language of the 2015 amendment to NRS 40.455 left room for doubt, the Legislative Counsel's Digest introducing Senate Bill 453 settles the point:

> Under existing law, to obtain a deficiency judgment after a foreclosure sale, a creditor must file an application with the court within 6 months after the date of the foreclosure sale. (NRS 40.455). Existing law further provides that in certain circumstances a creditor may bring an action against a guarantor, surety or other obligor who is not the borrower to enforce the obligation to pay, satisfy or purchase all or part of the obligation secured by a mortgage or lien on real property. (NRS 40.495). *Section 8 provides that the complaint or other pleading in this action constitutes the application for a deficiency judgment and,* ***thus, the creditor is not required to file an application for a deficiency judgment after the foreclosure sale.***

2015 Nev. Stat., ch. 518, Legislative Counsel's Digest, at 3335 (emphasis added).

Without even acknowledging the text, much less the context, of the 2015 amendments to NRS 40.455, the majority dismisses them as irrelevant, citing the general rule against applying new statutes retroactively. *See supra* note 1, at 403. But as with most general rules, the rule against retroactivity has exceptions, particularly where, as here, the new statute adds to or amends an existing statute. In the context of statutory amendments, the new enactment's applicability depends on whether it clarifies or changes the existing statutory scheme. If the amendment clarifies the law, the rule against retroactivity does not apply. *See Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157 n.52, 179 P.3d 542, 555 n.52 (2008) ("[A]n amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act." (quoting *Police Pension Bd. v. Warren*, 398 P.2d 892, 896 (Ariz. 1965)); 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 22:31, at 374-75 (7th ed. 2012) ("An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, [especially] where the amendment was adopted soon after . . . controversy arose concerning the proper interpretation of the statute." (footnote omitted)). This is so because, when an amendment clarifies a pre-existing law, "courts . . . logically conclude that [the] amendment was adopted to make plain what the legislation had been all along from the time of the statute's original enactment." 1A Singer & Singer, *Statutes and Statutory Construction* § 22:31, at 375.

The question becomes, then, whether the 2015 amendments clarify or change NRS 40.455. "Whether a subsequent statute or amendment sheds light upon the meaning of a former statute depends upon a number of circumstances." 2B Singer & Singer, *Statutes and Statutory Construction* § 49:10, at 135.

> The force which should be given to subsequent legislation, as affecting prior legislation, depends largely upon the circumstances under which it takes place. *If it follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight*.

Id. (emphasis added) (quoting *People ex rel. Westchester Fire Ins. Co. v. Davenport*, 91 N.Y. 574, 591-92 (1883)).

The 2015 amendment to NRS 40.455 defines what the statute means by "application." It does not delete old language and replace it with new. Textually, therefore, it appears to clarify the existing statute, not to change it. Context supports this conclusion. As noted above, in 2014, controversy arose over whether and how to apply NRS 40.455's "application" requirement to pre-foreclosure suits against guarantors, a controversy that divided this court internally and produced a split between this court and Nevada's federal district court. In 2015, the Legislature amended NRS 40.455 to resolve that controversy, adding subparagraph 4 to define "application" as the *Lavi* dissent and *Herr* decision had. As this amendment immediately followed the *Lavi*/*Herr* split, it is "entitled to great weight" in determining whether new NRS 40.455(4) clarifies, or changes, the "application" requirement stated in NRS 40.455(1).

Applying a clarifying amendment to an existing suit does not, as the majority suggests, disturb vested rights. This suit was filed, and the foreclosure sale in this case held, before the *Lavi* opinion was published. If, as the 2015 clarifying amendments to NRS 40.455 confirm, the pre-foreclosure complaint qualified as the "application" that NRS 40.455(1) requires, the guarantor in this case did not have a vested right to more.

No doubt stare decisis counsels adherence to prior decisions by this court. *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). Nonetheless, "when governing decisions prove to be unworkable or are badly reasoned, they should be overruled," *Harris v. State*, 130 Nev. 435, 441, 329 P.3d 619, 623 (2014) (internal quotations omitted), especially where, as here, the unworkable decision is so recent that reliance interests have not accrued. *See Helvering v. Hallock*, 309 U.S. 106, 119 (1940). The Legislature sets policy, not the court, and here the Legislature has disavowed the rigid public policy cited by the majority as support for the creditor's loss of rights against the guarantor in this case, whom the creditor sued and thus gave notice of its intent to sue, before the foreclo-

sure sale occurred. For these reasons, I would deny writ relief in an opinion that overrules *Lavi* as resting on a misinterpretation of the application requirement in NRS 40.455(1).

I dissent.

SHAWN RUSSELL HARTE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 67519

June 2, 2016 373 P.3d 98

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Following affirmance of his conviction of first-degree felony murder and sentence of death on direct appeal and affirmance of grant of his postconviction petition for writ of habeas corpus challenging his sentence, 124 Nev. 969, 194 P.3d 1263 (2008), the district court sentenced petitioner to life in prison without possibility of parole. Petitioner appealed. The supreme court, CHERRY, J., held that: (1) the district court has discretion to admit or deny evidence of codefendants' sentences in a penalty hearing, (2) decision to set order for closing arguments in a noncapital penalty hearing is within the district court's discretion, and (3) sentence was not excessive.

Affirmed.

GIBBONS, J., dissented in part.

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

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

1. SENTENCING AND PUNISHMENT.
   The decision to admit evidence at a penalty hearing is left to the discretion of the trial judge; that discretion is not limited to death penalty hearings.
2. SENTENCING AND PUNISHMENT.
   The district court's discretion in a first-degree murder penalty hearing is broad.
3. SENTENCING AND PUNISHMENT.
   An abuse of a district court's broad discretion in a first-degree murder penalty hearing occurs if the court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.

4. Sentencing and Punishment.
   A district court must exclude otherwise relevant evidence at a penalty hearing if it is impalpable, highly suspect, dubious, or tenuous.
5. Sentencing and Punishment.
   A district court has discretion to admit or deny evidence of codefendants' sentences in a penalty hearing. NRS 175.552(3).
6. Criminal Law.
   A district court has wide discretion in many facets of trial procedure in the absence of a rigid rule.
7. Criminal Law.
   Decision to set the order for closing statements in a noncapital penalty hearing is within the district court's discretion. NRS 175.141(5).
8. Homicide; Pardon and Parole.
   Sentence of life in prison without possibility of parole was not excessive following conviction for first-degree felony murder; sentence was within parameters provided by relevant statute, and, although evidence of defendant's rehabilitation in prison was presented to sentencing jury, it ultimately decided that life without possibility of parole was appropriate sentence. NRS 177.055(2)(e), 200.030(4).
9. Sentencing and Punishment.
   Regardless of its severity, a sentence that is within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. U.S. Const. amend. 8.
10. Homicide; Pardon and Parole.
    A sentence of life without the possibility of parole for first-degree murder does not require aggravating circumstances. NRS 200.030(4)(b).

Before Douglas, Cherry and Gibbons, JJ.

OPINION

By the Court, Cherry, J.:

NRS 175.552(3) allows a district court judge broad discretion to admit or deny evidence during a first-degree murder penalty hearing so long as the evidence is relevant to the sentence, even if it would not be admissible during the guilt phase of trial. We have previously held that a district court does not abuse its discretion when it allows evidence of the codefendants' sentences. *Flanagan v. State*, 107 Nev. 243, 247-48, 810 P.2d 759, 762 (1991), *vacated on other grounds by Moore v. Nevada*, 503 U.S. 930 (1992). We reaffirm our holding in *Flanagan*, concluding, specifically, that the district court has discretion to admit evidence of a codefendant's sentence in a first-degree murder sentencing hearing. Furthermore, we conclude that Harte's challenge to the district court's ruling allowing the State to argue twice during closing arguments at the penalty hearing lacks merit. His contention that his sentence is excessive also lacks merit. We therefore affirm the district court's sentence in this matter.

FACTS AND PROCEDURAL HISTORY

Appellant Shawn Russell Harte, along with two codefendants, was convicted of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. During the course of the robbery, Harte shot and killed the victim. Harte was convicted of felony murder and received the death penalty. The fact that the murder was committed during the course of a robbery was the only aggravating factor to support the death sentence. Harte's codefendants were also convicted on the same charges but received life sentences without the possibility of parole. Harte previously appealed, but we affirmed his conviction and death sentence.

Subsequently, this court decided *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004) (holding that the same felony may not be used both to establish felony murder and as a capital aggravator), and *Bejarano v. State*, 122 Nev. 1066, 146 P.3d 265 (2006) (applying *McConnell* retroactively). Harte then filed a postconviction petition for a writ of habeas corpus challenging his death sentence under *McConnell*. *See State v. Harte*, 124 Nev. 969, 971, 194 P.3d 1263, 1264 (2008). The district court granted Harte's postconviction petition and vacated the death sentence. We affirmed the district court's decision. *Id*. After a second penalty hearing, a jury sentenced Harte to life in prison without the possibility of parole. This appeal followed.

DISCUSSION

The district court was within its discretion when it admitted evidence of the codefendants' sentences

Harte argues that the district court erred by admitting evidence of his codefendants' sentences because it deprived him of his right to be sentenced individually. In this, he argues that the life-without-parole sentences his codefendants received were influenced by his invalid death sentence. Harte asks this court to issue an overarching rule that evidence of codefendants' sentences is never admissible in a penalty hearing.[1] The State argues that the decision to admit or deny such evidence should be left to the discretion of the district court on a case-by-case basis. We agree with the State.

Prior to the new penalty hearing, the parties filed competing motions in limine. The State sought permission to introduce the codefendants' sentences of life without the possibility of parole at Harte's new penalty hearing. Harte sought to suppress that information. After considering both parties' arguments, the district court granted the State's motion and denied Harte's. The district court also ruled that

[1]Harte does not argue that the district court abused its discretion, but that the district court should not be allowed discretion in this matter.

the jury would be instructed that it was not bound to sentence Harte based on the sentences his codefendants received.

[Headnotes 1-3]

"The decision to admit evidence at a penalty hearing is left to the discretion of the trial judge." *Nunnery v. State*, 127 Nev. 749, 769, 263 P.3d 235, 249 (2011). That discretion is not limited to death penalty hearings. *Id.* at 769 n.7, 263 P.3d at 249 n.7. The district court's discretion in a first-degree murder penalty hearing is broad. *Lisle v. State*, 113 Nev. 540, 557, 937 P.2d 473, 484 (1997). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005) (internal quotations omitted).

[Headnote 4]

At a penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim *and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible*." NRS 175.552(3) (emphasis added). The district court must, however, exclude otherwise relevant evidence if it is impalpable, highly suspect, dubious, or tenuous. *Parker v. State*, 109 Nev. 383, 390, 849 P.2d 1062, 1067 (1993).

[Headnote 5]

A district court has discretion to admit or deny evidence of codefendants' sentences. *See Flanagan*, 107 Nev. at 247-48, 810 P.2d at 762. In *Flanagan*, the defendant and his codefendants were convicted of murdering the defendant's grandfather. *Id.* at 245, 810 P.2d at 760. During Flanagan's penalty hearing, the State, with the district court's permission, presented evidence of the sentences that two of Flanagan's codefendants received. *Id.* at 247, 810 P.2d at 762. This court held that NRS 175.552 allows the district court to admit this type of evidence, particularly because the jury was instructed that it was not bound by the previous sentences. *Id.* at 247-48, 810 P.2d 762.

Here, Harte asks this court to overrule *Flanagan* and adopt a rule that a district court should never allow evidence of codefendant's sentences. We decline to issue such a rule because each case has unique facts and circumstances. The district court must be given the discretion to determine if such evidence should be admitted.

The district court did not abuse its discretion when it allowed the State to open and conclude the closing arguments

Harte also argues that the district court erred because the mandate in NRS 175.141(5) that the State argue both first and last does not

apply in a penalty hearing. He also argues the mandate that the State argue last as found in *Schoels v. State*, 114 Nev. 981, 966 P.2d 735 (1998), does not apply here because *Schoels* was a death penalty case where the State carried a burden of proof. He claims that because the instant case is no longer a death penalty case, the burden no longer exists. We agree to the extent that neither authority required the district court to let the State argue twice in this case but conclude, nonetheless, that it is within the district court's discretion to so rule.

[Headnote 6]

A district court has wide discretion in many facets of trial procedure in the absence of a rigid rule. *See, e.g.*, *Manley v. State*, 115 Nev. 114, 125, 979 P.2d 703, 710 (1999) (stating that the district court has discretion to impose a two-hour time limit on closing arguments); *Williams v. State*, 91 Nev. 533, 535, 539 P.2d 461, 462-63 (1975) (providing that the district court has discretion to reopen evidence after each side rests); *State v. Harrington*, 9 Nev. 91, 94 (1873) (stating that in the interests of justice, a district court may deviate from traditional order of evidence presentation).

[Headnote 7]

NRS 175.141(5) provides that, during a criminal trial, "[w]hen the evidence is concluded, . . . the district attorney, or other counsel for the State, must open and must conclude the argument." We have held that this rule extends to the penalty phase of a capital trial. *Schoels*, 114 Nev. at 989, 966 P.2d at 741. There is no caselaw or statute forbidding a district court from conducting a penalty hearing in a noncapital case in the same manner. Absent such a proscription, we cannot conclude that the district court exceeded the bounds of law or reason. *Crawford*, 121 Nev. at 748, 121 P.3d at 585. Therefore, we conclude that the district court did not abuse its discretion when it allowed the State to start and conclude during closing arguments. The decision to set the order for closing statements in a noncapital penalty hearing is within the district court's discretion.

Harte's sentence was not cruel and unusual

[Headnote 8]

Harte argues that life without parole is an excessive sentence because he has spent his time in prison bettering himself and he is no longer the type of unsalvageable prisoner who should never have an opportunity for release. This court reviews death sentences for being excessive, *see* NRS 177.055(2)(e), but there is no statute authorizing such review for life sentences. Harte cites only to *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944, 944 (1989), for the premise that a life without parole sentence should be reserved only for the

"deadliest and most unsalvageable of prisoners." Although we do not review nondeath sentences for excessiveness, Harte's argument appears to be a cruel and unusual punishment challenge. We will respond accordingly.

[Headnote 9]

Regardless of its severity, a sentence that is "within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (plurality opinion) (explaining that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence[;] . . . it forbids only extreme sentences that are 'grossly disproportionate' to the crime" (citation omitted)). The sentence imposed is within the parameters provided by the relevant statute, *see* NRS 200.030(4), and Harte does not allege that those statutes are unconstitutional. We are not convinced that the sentence imposed is so grossly disproportionate to the crime as to constitute cruel and unusual punishment.

[Headnote 10]

Harte was previously sentenced to death in this matter. His death sentence originally survived our appellate review. Only after this court decided *McConnell* and *Bejarano*, which struck the only aggravating factor supporting Harte's death sentence, did his death sentence become illegal. A sentence of life without the possibility of parole, however, does not require aggravating circumstances. *See* NRS 200.030(4)(b). Life without the possibility of parole is readily available as a sentence for a conviction of first-degree murder. *Id.*

Harte's case is distinguishable from *Naovarath.* Naovarath was a "mentally and emotionally disordered thirteen-year-old child." *Id.* at 532, 779 P.2d at 949. Harte was an adult when he committed his crimes. Additionally, Naovarath was the victim of sexual abuse perpetrated by the decedent in his case. *Id.* at 526, 779 P.2d at 945. Harte killed a complete stranger without provocation. Because of these distinguishing factors, the holding from *Naovarath* is inapplicable here.

Finally, Harte's argument that he is a changed man is out of place in this proceeding. He was appropriately sentenced based on the crime he committed. Although evidence of Harte's rehabilitation in prison was presented to the sentencing jury, it ultimately decided that life without the possibility of parole was the appropriate sentence. We see no reason to substitute our judgment here. Because the jury imposed a sentence within the statutory limit, and that limit is constitutional, we conclude that Harte's sentence is valid.

CONCLUSION

Accordingly, we order the judgment of conviction affirmed.

DOUGLAS, J., concurs.

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

I concur with the majority in part. The district court properly allowed the State to argue twice during closing arguments at the penalty hearing. I further concur that the sentence is not excessive.

However, I would revisit this court's holding in *Flanagan v. State*, 107 Nev. 243, 247-48, 810 P.2d 759, 762 (1991), regarding the admission of sentences of codefendants in the penalty phase of a first-degree murder hearing. I agree with appellant that there should be a uniform rule for the district courts on this issue for all penalty hearings. Therefore, I would preclude allowing evidence of the codefendants' sentences.