(stating that a conditional privilege, the common interest privilege, should not be considered on an NRCP 12(b)(5) motion to dismiss, "but may or may not be applicable to the case when properly raised and fully presented to the district court").

For the foregoing reasons, we reverse the district court's dismissal order and remand this matter to the district court for further proceedings consistent with this opinion.

Pickering and Gibbons, JJ., concur.

MEI-GSR HOLDINGS, LLC, a Nevada Limited Liability Company, dba GRAND SIERRA RESORT, Appellant, *v.* PEPPERMILL CASINOS, INC., a Nevada Corporation, dba PEPPERMILL CASINO, Respondent.

No. 70319

May 3, 2018 416 P.3d 249

Appeal from a final judgment in a trade secrets action and post-judgment orders awarding attorney fees and costs and denying a post-judgment motion for a new trial. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Affirmed.

Cohen Johnson Parker Edwards and *H. Stan Johnson*, Las Vegas; *Law Offices of William E. Crockett* and *William E. Crockett*, Encino, California, for Appellant.

Robison, Sharp, Sullivan & Brust and *Kent R. Robison* and *Therese M. Shanks*, Reno, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Cherry, J.:

Under Nevada's Uniform Trade Secrets Act (NTSA), NRS 600A.030 defines a "[t]rade secret" as information that "[d]erives independent economic value, actual or potential, from . . . not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use." In this appeal, we are asked to determine whether

[1]The Honorable Ron D. Parraguirre, Justice, did not participate in the decision of this matter.

NRS 600A.030 precludes a defendant from demonstrating that certain information is readily ascertainable and not a trade secret even though the defendant acquired the information through improper means. We conclude that it does not, and thus, the district court did not err in instructing the jury concerning trade secrets under NRS 600A.030. We further conclude that appellant's other assignments of error lack merit. We therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

In July 2013, nonparty Ryan Tors, then employed by respondent Peppermill Casino, Inc. (Peppermill), went to the Grand Sierra Resort and Casino, owned by appellant MEI-GSR Holdings, LLC (GSR). There, GSR caught Tors using a slot machine key to access several GSR slot machines. GSR detained Tors and contacted the Nevada Gaming Control Board (NGCB), who thereafter investigated the matter and discovered that Tors accessed GSR's slot machines to obtain their "theoretical hold percentage information" (par values).[2] NGCB's investigation further revealed that, since 2011, Peppermill executives condoned Tors' conduct in obtaining par values from GSR and other casinos. However, NGCB found no evidence of Peppermill using par values from GSR or other casinos to adjust its own slot machines. Peppermill stipulated to a $1 million fine with the NGCB.

On August 2, 2013, GSR filed suit against Tors and Peppermill, asserting violation of the NTSA. The parties engaged in discovery and motion practice regarding Peppermill's production of emails sent and received by its executives that were obtained by the NGCB in its investigation of Peppermill. Thereafter, an 11-day jury trial was held, during which GSR proffered a jury instruction concerning the ascertainableness of information pursuant to NRS 600A.030's definition of a "trade secret." GSR's proposed jury instruction read as follows:

> To be readily ascertainable, the information asserted to be a trade secret must be ascertained quickly, or so self-revealing to be ascertainable at a glance.
>
> A trade secret is not readily ascertainable when the means of acquiring the information falls below the generally accepted standards of commercial morality and reasonable conduct, even if means of obtaining the information violated no government standard, did not breach any confidential relation, and did not involve any fraudulent or illegal conduct. Even if the information which is asserted to be a trade secret could have been duplicated by other proper means, the information is

[2]A par value is a gaming industry term for the theoretical percentage of money retained by the casino for each slot machine played.

> not readily ascertainable if in fact it was acquired by improper means.

The district court rejected GSR's proposed jury instruction and instructed the jury, over GSR's objection, that (1) "[i]f the information is in fact obtained through reverse engineering, however, the actor is not subject to liability, because the information has not been acquired improperly"; and (2) "[a] trade secret may not be readily ascertainable by proper means," and that "[p]roper means include . . . [d]iscovery by 'reverse engineering.' "

The jury returned a special verdict in favor of Peppermill and found that GSR's stolen par values did not constitute a "[t]rade secret" under NRS 600A.030 because GSR had failed to prove "by a preponderance of the evidence that its par information obtained by [Peppermill] was not readily ascertainable by proper means." Thereafter, Peppermill moved for costs and attorney fees due to GSR's rejection of Peppermill's offer of judgment and failure to obtain a more favorable judgment under NRCP 68. The district court awarded Peppermill its requested amount of $963,483 in attorney fees incurred since Peppermill's offer of judgment. The district court then entered an amended judgment on jury verdict in favor of Peppermill. GSR moved for a new trial, which the district court denied. This appeal followed.

DISCUSSION

On appeal, GSR argues that the district court erred in instructing the jury concerning trade secrets under NRS 600A.030. We first address this issue, and hold that the district court did not abuse its discretion in rejecting GSR's proposed instruction, before turning to GSR's remaining arguments that the district court erred in (1) denying GSR's motion to amend complaint, (2) denying GSR's motions to compel Peppermill to produce all emails obtained by the NGCB in its investigation of the underlying matter, (3) denying GSR's motion for case-concluding sanctions, (4) excluding evidence of Peppermill stealing par values from other casinos, and (5) awarding Peppermill attorney fees under NRCP 68.

Whether the district court erred in instructing the jury concerning trade secrets under NRS 600A.030

GSR argues that the district court erred in failing to instruct the jury that NRS 600A.030 precludes a defendant from demonstrating that information is readily ascertainable and therefore not a trade secret when the defendant acquired the information by improper means, including means that fall below accepted standards of commercial morality and reasonable conduct. We disagree.

This court "review[s] a decision to admit or refuse jury instructions for an abuse of discretion." *D & D Tire, Inc. v. Ouellette*, 131

Nev. 462, 470, 352 P.3d 32, 37 (2015). However, "whether a jury instruction accurately states Nevada law" is reviewed de novo. *Id.* "Although a party is entitled to jury instructions on every theory of its case that is supported by the evidence, the offering party must demonstrate that the proffered jury instruction is warranted by Nevada law." *Id.* at 470, 352 P.3d at 38 (internal quotation marks and citation omitted). This court further reviews questions of statutory interpretation de novo. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009). When interpreting a statute, if the statutory language is "facially clear," this court must give that language its plain meaning. *Id.*

NRS 600A.030(5) (2015) defines a "[t]rade secret" in relevant part as information that "[d]erives independent economic value, actual or potential, from not being generally known to, and *not being readily ascertainable by proper means by the public or any other persons* who can obtain commercial or economic value from its disclosure or use."[3] (Emphasis added.) We conclude that GSR's proposed jury instruction contravenes the plain language of NRS 600A.030. In particular, GSR fails to consider the phrase, "by the public or any other persons," which modifies the phrase "not being readily ascertainable by proper means." NRS 600A.030(5)(a). When read together, these phrases unambiguously provide that the determination of whether information is "being readily ascertainable by proper means" extends to the conduct of "the public or any other persons" and is not limited to the defendant's conduct. Thus, although a defendant's acquisition of information by *proper means* is a relevant consideration in determining whether the information is a trade secret (i.e., demonstrates that the information is readily ascertainable), we hold that a defendant's acquisition of information by *improper means* does not preclude the defendant from demonstrating that the information is readily ascertainable by other persons. Accordingly, we conclude that GSR's proposed jury instruction is not supported by Nevada law, *see D & D Tire*, 131 Nev. at 470, 352 P.3d at 38, and thus, the district court did not abuse its discretion in rejecting the instructions.[4]

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[3]The Legislature amended NRS 600A.030, effective October 1, 2017. 2017 Nev. Stat., ch. 592, § 9, at 4306-07. While the amendments do not affect our analysis in this matter, this opinion addresses the pre-amendment version of NRS 600A.030 that was in effect at the time of the events underlying this appeal. 1999 Nev. Stat., ch. 449, § 2, at 2101.

[4]GSR also argues that the district court (1) erred in instructing the jury that reverse engineering is a proper means of ascertaining information, and (2) erred in failing to instruct the jury that information is readily ascertainable only if it is so self-revealing that it is ascertainable at a glance. We reject the first argument because, although NTSA does not define "proper means," the comments to the Uniform Trade Secrets Act (UTSA), which the NTSA was modeled after, define the term to include discovery by reverse engineering. Unif. Trade Secrets Act § 1

Whether the district court erred in denying GSR's motion to amend complaint

Approximately a year and a half after bringing suit against Peppermill, GSR moved to amend its complaint. The then-discovery deadline and then-trial date were scheduled for April 16, 2015, and July 6, 2015, respectively. GSR sought to assert seven new claims and add Peppermill's general manager as a new defendant. GSR argued that the amendment was proper in light of newly discovered information following depositions with Tors. The district court denied GSR's motion to amend, finding that the motion was brought with undue delay because GSR's alleged newly discovered information was generally conceded in the parties' pleadings and was available from NGCB's investigation of Peppermill.

"After a responsive pleading is filed, a party may amend his or her pleading 'only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'" *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (quoting NRCP 15(a)). Nonetheless, "a motion for leave to amend pursuant to NRCP 15(a) is addressed to the sound discretion of the trial court, and its action in denying such a motion will not be held to be error in the absence of a showing of abuse of discretion." *Id.* (internal quotation marks omitted).

On appeal, GSR does not dispute the district court's finding of undue delay. Instead, GSR argues that delay alone is insufficient grounds to deny a motion to amend. However, this court has explicitly held that "[s]ufficient reasons to deny a motion to amend a pleading include undue delay, bad faith or dilatory motives on the part of the movant." *Kantor*, 116 Nev. at 891-93, 8 P.3d at 828-29 (affirming a district court's denial of appellant's motion to amend her complaint because granting the motion would require respondent to obtain new counsel, the motion to amend was filed 11 months after the initial complaint and 7 weeks before the trial date, and the information supporting appellant's amended complaint was available to appellant when she filed her original complaint); *Burnett v. C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) (affirming the district court's denial of appellant's motion to amend her complaint based on the untimeliness of the motion, which was filed 3 years after the original complaint and 6 years after the underlying accident occurred). Moreover, any prejudice alleged by GSR is se-

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cmt. 2, 14 U.L.A. 538 (1985). Moreover, numerous witnesses at trial testified to being able to calculate the stolen par values through methods that may constitute reverse engineering. *See Allan v. Levy*, 109 Nev. 46, 49, 846 P.2d 274, 275-76 (1993) ("A litigant is entitled to have the jury instructed on all theories of his or her case which are supported by the evidence."). We further reject the second argument because the UTSA explicitly contemplated reverse engineering as a proper means of ascertaining information, and reverse engineering necessarily entails a process of ascertaining information beyond a glance.

verely undermined by its failure to renew its motion to amend when the district court ultimately extended the discovery deadline and continued the trial date by approximately 6 months. *See Stephens v. S. Nev. Music Co., Inc.*, 89 Nev. 104, 106, 507 P.2d 138, 139 (1973) (affirming the district court's denial of appellant's motion to amend complaint based, in part, on appellant's failure to renew her motion to amend even though trial was delayed by a year). Accordingly, we conclude that the district court did not abuse its discretion in denying GSR's motion to amend its complaint.

Whether the district court erred in denying GSR's motions to compel Peppermill to produce all emails obtained by the NGCB in its investigation of the underlying matter

During discovery, GSR sought all emails obtained by NGCB in its investigation of Peppermill. Peppermill untimely objected to production of the requested emails. GSR then moved to compel disclosure of the requested emails from Peppermill, arguing that Peppermill's untimely response effectively waived all objections to GSR's discovery request. The district court impliedly denied GSR's motion to compel by directing the parties to meet and confer to narrow GSR's production request. In an attempt to resolve the matter, the parties engaged in three discovery conferences, extensively negotiated the production of the requested emails, and ultimately agreed to develop a word-search protocol to locate relevant emails for production. However, the parties failed to agree on common search terms.

Subsequently, Peppermill notified GSR that it had compiled the requested emails and transferred them onto a computer located at Peppermill's counsels' office for GSR's inspection. Peppermill further notified GSR that it would be able to use its proposed search terms to inspect the emails, but on the condition that Peppermill would review any emails selected by GSR for approval before producing them. GSR opposed Peppermill's proposed method of production, but nonetheless inspected the emails accordingly. Thereafter, GSR again moved to compel Peppermill to produce the requested emails, arguing that Peppermill's proposed method of inspection was improper. The district court again denied GSR's motion to compel, finding that Peppermill satisfied its burden of production in response to GSR's production request.

On appeal, GSR argues that the district court erred in denying its motions to compel because Peppermill's production of the requested emails for inspection did not comport with NRCP 34(b)(2)(E)(i), which provides that documents or electronically stored information must be produced "as they are kept in the usual course of business." In particular, GSR argues that it was entitled to a copy of the emails in their electronic format as a whole. We disagree.

"Generally, discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding

discovery unless the court has clearly abused its discretion." *Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 839, 359 P.3d 1106, 1110 (2015) (internal quotation marks omitted).

In support of its argument, GSR relies on a United States District Court case, *McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Insurance Co.* (*McKinney*), which provides that "[p]roduction 'as kept in the [usual] course of business' generally requires turning over electronic documents in the format in which they are kept on the user's hard drive or other storage device." 322 F.R.D. 235, 250 (N.D. Tex. 2016). Under *McKinney*, GSR argues that Peppermill should have provided electronic copies of the requested emails to satisfy the requirement that the documents are produced as they are kept in the usual course of business. However, GSR's reliance is misplaced as the aforementioned language, when considered in context, provides that when a party decides to produce documents in their electronic format, the files should not be converted or altered to maintain that they are produced as kept in the usual course of business. *Id*. In fact, contrary to GSR's assertion, the *McKinney* court states: "[t]he most obvious means of complying with the [usual course of business requirement] is to permit the requesting party to inspect the documents where they are maintained, and the manner in which they are organized by the producing party." *Id.* at 249 (second alteration in original).

GSR nonetheless argues that Peppermill could have easily produced electronic copies of the emails and that inspecting the emails under Peppermill's method of production would have been unduly burdensome. We reject GSR's first argument because its request for production failed to specify a form for Peppermill to produce the emails. "If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." NRCP 34(b)(2)(E)(ii). In light of GSR's failure to specify a form, we conclude that Peppermill produced the electronically stored information in a reasonably usable form. In particular, Peppermill retrieved the email files through an external hard drive, formatted the files to preserve the email directories and Outlook structure, and then transferred the files onto a computer to be made available for GSR's inspection for a 4-month period. We further reject GSR's second argument because its asserted difficulty in reviewing the emails was due, in part, to its broad discovery request. Thus, we conclude that the district court did not abuse its discretion in denying GSR's motions to compel Peppermill to produce electronic copies of the requested emails.[5]

[5]The remainder of GSR's arguments on appeal concerning the district court's denial of its motions to compel are premised on Peppermill's failure to produce the requested emails. Having concluded that Peppermill complied with GSR's

Whether the district court erred in denying GSR's motion for case-concluding sanctions under NRCP 37

Below, GSR moved for case-concluding sanctions against Peppermill pursuant to NRCP 37 following Peppermill's failure to produce electronic copies of the requested emails. The district court issued an order denying GSR's motion, but did not provide any findings of fact or conclusions of law. On appeal, GSR argues that the district court abused its discretion in denying GSR's motion for case-concluding sanctions because (1) the district court's order failed to include findings of fact and conclusions of law, and (2) Peppermill willfully engaged in abusive discovery practices. We disagree.

A district court's decision to implement sanctions is reviewed for an abuse of discretion. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). However, this court employs "a somewhat heightened standard of review" for case-concluding sanctions. *Id.* Case-concluding sanctions "should be used only in extreme situations." *Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992).

Here, the district court's order denying GSR's motion for case-concluding sanctions failed to proffer any findings of fact or legal analysis. Generally, these "sanction[s] must be supported by an express, careful and preferably written explanation of the court's analysis of certain pertinent factors that guide the district court in determining appropriate sanctions." *Blanco v. Blanco*, 129 Nev. 723, 729, 311 P.3d 1170, 1174 (2013) (internal quotation marks omitted). Specifically, this court in *Young* listed several nonexclusive factors for consideration in imposing case-concluding sanctions. 106 Nev. at 93, 787 P.2d at 780. However, a district court's failure to provide any findings of fact or legal analysis when denying a motion for case-concluding sanctions may nonetheless be reviewed for an abuse of discretion by examining the record. *See Schouweiler v. Yancey Co.*, 101 Nev. 827, 831, 712 P.2d 786, 789 (1985) (providing that, "[i]n the absence of express findings of fact and conclusions of law by the trial court, this court must rely on an examination of the record to see if the trial court's [denial of excess expert witness fees pursuant to NRS 18.005] constitutes an abuse of discretion").

Below, GSR relied solely upon NRCP 37 in seeking case-concluding sanctions. Thus, on appeal, we will only consider GSR's asserted abusive discovery practices by Peppermill as it relates to NRCP 37. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (providing that a point not urged below "is deemed to have been waived and will not be considered on appeal"). NRCP 37(b)-(c) permit the district court to impose case-concluding

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discovery request and properly produced the emails, we need not reach these arguments.

sanctions when a party fails to comply with a discovery order or disclose certain information during discovery. Upon review of the record and consideration of the relevant *Young* factors, we are not persuaded that Peppermill's discovery practices constitute one of the "extreme situations" warranting case-concluding sanctions under NRCP 37. *Nev. Power Co.*, 108 Nev. at 645, 837 P.2d at 1359. Accordingly, we conclude that the district court did not abuse its discretion in denying GSR's motion for case-concluding sanctions.

Whether the district court erred in excluding evidence of Peppermill obtaining par values from other casinos

Below, Peppermill filed two motions in limine seeking to exclude evidence that it stole par values from other casinos. The district court granted the motions, and GSR moved to clarify the district court's order. Thereafter, the district court held a hearing on the matter and issued an oral ruling excluding the evidence, finding that the excluded evidence was largely irrelevant under NRS 48.025 (providing that "[e]vidence which is not relevant is not admissible"), and that any probative value would be substantially outweighed by considerations of waste of time under NRS 48.035 (providing that relevant "evidence may be excluded if its probative value is substantially outweighed by considerations of . . . waste of time"). On appeal, GSR argues that the district court erroneously excluded evidence of Peppermill obtaining par values from other casinos because this circumstantial evidence was highly probative of Peppermill's theft and use of GSR's par values. We disagree.

"The decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value, is within the sound discretion of the trial judge, and the trial court's determination will not be overturned absent manifest error or abuse of discretion." *Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 985, 103 P.3d 8, 16-17 (2004) (internal quotation marks omitted).

We conclude that the district court correctly excluded the evidence under NRS 48.025 and NRS 48.035. First, Peppermill has admitted to improperly obtaining GSR's par values since the inception of the underlying suit; thus, any probative value in admitting such evidence to demonstrate Peppermill's theft of GSR's par values is "substantially outweighed by considerations of . . . waste of time." *See* NRS 48.035(2). Second, GSR fails to articulate how Peppermill's acts of accessing the slot machine information of other casinos is probative of Peppermill's use of GSR's par values to gain an economic advantage, even as circumstantial evidence. *See* NRS 48.015 (defining "relevant evidence"); NRS 48.025(2); *see also Frantz v. Johnson*, 116 Nev. 455, 467-69, 999 P.2d 351, 359-60 (2000) (providing that causation of damages may be inferred by certain circumstantial evidence in a claim for misappropriation of trade

secrets). Thus, we conclude that the district court did not abuse its discretion in excluding evidence of Peppermill obtaining par values from other casinos.

Whether the district court erred in awarding Peppermill attorney fees under NRCP 68

GSR argues that the district court erroneously awarded Peppermill attorney fees under NRCP 68 because (1) NRS 600A.060 is the sole means of recovering attorney fees in a case concerning misappropriation of trade secrets; and (2) even if NRCP 68 is applicable, the district court failed to properly consider the enumerated factors in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). We disagree.

Whether NRS 600A.060 supersedes NRCP 68

"Although a district court's decision regarding an award of attorney fees is generally reviewed for an abuse of discretion, where, as here, the decision implicates a question of law, the appropriate standard of review is de novo." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014). NRS 600A.060 provides that a "court may award reasonable attorney's fees to the prevailing party" when: (1) "[a] claim of misappropriation is made in bad faith," (2) "[a] motion to terminate an injunction is made or resisted in bad faith," or (3) "[w]illful and malicious misappropriation exists." NRCP 68(f)(2) provides, in relevant part, that "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment, . . . the offeree shall pay the offeror's . . . reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer."

In *Frantz v. Johnson*, this court considered whether a district court abused its discretion in awarding attorney fees pursuant to NRS 600A.060, or alternatively, NRS 18.010.[6] 116 Nev. at 471, 999 P.2d at 361. Although this court did not expressly decide whether NRS 600A.060 supersedes other statutes permitting awards of attorney fees, this court implicitly recognized that NRS 600A.060 and NRS 18.010(2) were independently applicable by examining the record to determine the appropriate statutory basis for the district court's award. *Id.* at 471-72, 999 P.2d at 361-62. This court ultimate-

[6]NRS 18.010(2) provides that "[i]n addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party . . . [w]hen the prevailing party has not recovered more than $20,000; or . . . when the court finds that [a] claim . . . was brought or maintained without reasonable ground or to harass the prevailing party."

ly concluded that the record supported the district court's award of attorney fees under NRS 600A.060, but not NRS 18.010(2). *Id.* at 472, 999 P.2d at 362.

Consistent with *Frantz*, we conclude that NRS Chapter 600A does not preclude recovery of attorney fees under NRCP 68 in an action for misappropriation of trade secrets. Specifically, nowhere in NRS 600A.060 or NRS Chapter 600A does the Legislature expressly provide that NRS 600A.060 is the exclusive means of recovering attorney fees. *See State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988) (providing that this court has "repeatedly refused to imply provisions not expressly included in the legislative scheme"). Moreover, to the extent that the two can also be construed to conflict with each other, a harmonious interpretation is preferred. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes."). Additionally, our interpretation furthers NRCP 68's purpose of "sav[ing] time and money for the court system, the parties, and the taxpayer by rewarding the party who makes a reasonable offer and punishing the party who refuses to accept such an offer." *Albios v. Horizon Cmtys. Inc.*, 122 Nev. 409, 419, 132 P.3d 1022, 1029 (2006). We can discern no logical reason to exclude NRCP 68's policy in actions arising under the NTSA. Accordingly, we conclude that NRS 600A.060 does not preclude a party from seeking other alternative grounds for recovering attorney fees.

Whether the district court properly considered the Beattie and Brunzell factors

Under NRCP 68, the district court must first consider the *Beattie* factors in determining whether to award attorney fees. *See Gunderson*, 130 Nev. at 81, 319 P.3d at 615. If the district court determines that attorney fees are warranted, it must then consider the *Brunzell* factors in determining whether the requested fee amount is reasonable and justified. *Id.* at 81, 319 P.3d at 615-16. "Although explicit findings with respect to these factors are preferred, the district court's failure to make explicit findings is not a per se abuse of discretion." *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). "Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

Here, the district court's order awarding attorney fees to Peppermill commented favorably on the quality of the work by the attorneys for both parties, recognized that the case involved complex

issues regarding the NTSA, and provided that it has considered the necessary documents and enumerated factors under *Beattie* and *Brunzell*. The parties also extensively argued the factors below. Finally, Peppermill submitted documentation of its attorneys' invoices.[7] Accordingly, we conclude that the district court demonstrated that it considered the required factors. *See Logan*, 131 Nev. at 266-67, 350 P.3d at 1143; *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995)*, superseded by statute on other grounds as stated in RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 110 P.3d 24 (2005). Upon review of the record, we further conclude that the district court's award of attorney fees is supported by substantial evidence. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 252 n.16, 995 P.2d 661, 673 n.16 (1998) (providing that "no one factor under *Beattie* is determinative"); *see also Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994) (providing that the district court "need not . . . make explicit findings as to all of the factors where support for an implicit ruling regarding one or more of the factors is clear on the record"). Thus, we conclude that the district court did not abuse its discretion in awarding attorney fees to Peppermill under NRCP 68.

CONCLUSION

For the reasons set forth above, we affirm the district court's amended judgment on the jury verdict and the post-judgment orders awarding attorney fees and costs and denying a motion for a new trial.

Douglas, C.J., and Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

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[7]GSR nonetheless argues that the district court erred in refusing to discount Peppermill's requested amount of attorney fees based on inadequate documentation under the *Brunzell* factors. We reject this argument as the district court's familiarity with the work quality of the parties' attorneys and the submitted invoices permitted the district court to properly consider the *Brunzell* factors. *See Logan*, 131 Nev. at 266-67, 350 P.3d at 1143.

JAMES J. COTTER, JR., Individually and Derivatively on Behalf of READING INTERNATIONAL, INC., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GOFF GONZALEZ, District Judge, Respondents, and MARGARET COTTER; ELLEN COTTER; GUY ADAMS; EDWARD KANE; DOUGLAS McEACHERN; WILLIAM GOULD; JUDY CODDING; MICHAEL WROTNIAK; and READING INTERNATIONAL, INC., Real Parties in Interest.

No. 71267

May 3, 2018 416 P.3d 228

Original petition for a writ of mandamus or prohibition challenging a district court order requiring disclosure of certain documents.

Petition granted.

Morris Law Group and *Steve L. Morris* and *Akke Levin*, Las Vegas; *Yurko, Salvesen & Remz, P.C.*, and *Mark G. Krum*, Boston, Massachusetts, for Petitioner.

Cohen Johnson Parker Edwards and *H. Stan Johnson*, Las Vegas; *Quinn Emanuel Urquhart & Sullivan, LLP*, and *Marshall M. Searcy* and *Christopher Tayback*, Los Angeles, California, for Real Parties in Interest Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Codding, and Michael Wrotniak.

Greenberg Traurig, LLP, and *Mark E. Ferrario, Kara B. Hendricks*, and *Tami D. Cowden*, Las Vegas, for Real Party in Interest Reading International, Inc.

Maupin, Cox & LeGoy and *Donald A. Lattin* and *Carolyn K. Renner*, Reno; *Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhows, P.C.*, and *Ekwan E. Rhow, Hernán D. Vera*, and *Shoshana E. Bannett*, Los Angeles, California, for Real Party in Interest William Gould.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Douglas, C.J.:

In this original petition for extraordinary relief, we consider whether documents disclosed to third parties constitute waiver of

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

the work-product privilege. In considering this petition, we adopt the common interest rule that allows attorneys to share work product with third parties that have common interest in litigation without waiving the work-product privilege. Petitioner shared assertedly work-product material through emails with third parties who were intervening plaintiffs in the litigation, suing the same defendants on similar issues. Without reviewing the emails, the district court ruled that petitioner must disclose them based on his insufficient showing of common interest between him and the intervening plaintiffs. Because we conclude that petitioner and the intervening plaintiffs share common interest in litigation, the district court erred in concluding otherwise. We therefore grant petitioner's petition for extraordinary relief and direct the district court to refrain from compelling disclosure of the emails before it conducts an *in camera* review of the emails to establish clear findings concerning the work-product privilege.

FACTS AND PROCEDURAL HISTORY

From approximately 2000 to 2014, petitioner James Cotter served as the CEO and Chairman of the Board of Directors of Reading International, Inc. (Reading). After Reading terminated petitioner, he filed a complaint in the district court alleging breach of fiduciary duty against the following members of the Board of Directors of Reading: Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Codding, and Michael Wrotniak (collectively, real parties in interest). Numerous Reading shareholders (the intervening plaintiffs) filed a derivative action in the district court against real parties in interest, asserting breach of fiduciary duty. Similar to petitioner, the intervening plaintiffs included allegations concerning petitioner's termination and other related events. The district court consolidated the two actions.

During discovery, real parties in interest filed a motion to compel petitioner to produce a supplemental privilege log. The district court granted the motion and ordered petitioner to revise his privilege log and reserved a ruling on the production of any of the communications between the attorneys for petitioner and the intervening plaintiffs. Petitioner subsequently produced 350 communications, as well as a supplemental privilege log. The log labeled approximately 150 emails between Lewis Roca Rothgerber LLP, counsel for petitioner, and Robertson & Associates, counsel for the intervening plaintiffs, as work product. According to petitioner, these emails, dated from August 2015 to June 2016, constituted work product because they contained mental impressions of matters related to the case.

Real parties in interest filed a motion to compel production of these emails, arguing that petitioner waived his claim of work-

product protection by sharing these communications with the intervening plaintiffs. Real parties in interest also noted that there was no joint prosecution agreement or confidentiality agreement between the parties. The district court held oral arguments on the motion, though it did not conduct an *in camera* review of the emails. Ultimately, the district court determined that petitioner failed to show common interest between him and the intervening plaintiffs and, thus, ordered petitioner to produce the emails.[2] This petition for writ relief followed.

DISCUSSION

Writ relief is an extraordinary remedy, available when the petitioner has "no plain, speedy and adequate remedy at law other than to petition this court." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995). This court may exercise its discretion to consider writ relief when presented with a situation where "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by later appeal." *Id.* at 350-51, 891 P.2d at 1183-84. Furthermore, a writ of prohibition is a more appropriate remedy than mandamus to correct an order that compels the disclosure of privileged information. *See id.* at 350, 891 P.2d at 1183. Although this court rarely entertains writ petitions challenging pretrial discovery, "there are occasions where, in the absence of writ relief, the resulting prejudice would not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions." *Id.* at 351, 891 P.2d at 1184.

In this case, without writ relief, compelled disclosure of petitioner's assertedly privileged communication will occur and petitioner would have no effective remedy, even by subsequent appeal. Accordingly, we exercise our jurisdiction to entertain this writ petition.

In considering this petition, discovery rulings are reviewed for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). "A manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark.

[2]Approximately one week after the hearing on the motion to compel, petitioner filed an emergency motion for stay pending resolution of his writ petition, pursuant to NRAP 8 and 27(e). Later that same day, this court granted the emergency motion. *See Cotter v. Eighth Judicial Dist. Court*, Docket No. 71267 (Order Directing Answer and Granting Motion for Stay, Sept. 15, 2016). In light of this opinion, we lift this court's prior stay.

1997)). In addition, when considering a writ petition, this court reviews legal questions de novo and "gives deference to the district court's findings of fact." *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011).

Petitioner asserts that the work-product privilege is applicable and that he did not waive the privilege because he shares common interest in litigation with the intervening plaintiffs. In response, real parties in interest claim that the district court correctly concluded that no common interest exists between petitioner and the intervening plaintiffs. We conclude the district court erred and that common interest exists between petitioner and the intervening plaintiffs.

The work-product privilege "protects an attorney's mental impressions, conclusions, or legal theories concerning the litigation, as reflected in memoranda, correspondence, interviews, briefs, or in other tangible and intangible ways." *Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188; *see also* NRCP 26(b)(3). Rather than protecting the confidential relationship between attorney and client, the work-product privilege exists "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (emphasis omitted). Thus, "[u]nlike the attorney-client privilege, selective disclosure of work product to some, but not to others, is permitted," and disclosure to third parties does not automatically waive the privilege. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 385, 399 P.3d 334, 349 (2017).

In particular, numerous jurisdictions have recognized a broad common interest rule, allowing attorneys to share work product with other counsel for clients with the same interest without waiving the privilege. *See, e.g.*, *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984); *Am. Tel. & Tel. Co.*, 642 F.2d at 1299. We take this opportunity to adopt the common interest rule as an exception to waiver of the work-product privilege.

For the common interest rule to apply, the "transferor and transferee [must] anticipate litigation against a common adversary on the same issue or issues" and "have strong common interests in sharing the fruit of the trial preparation efforts." *Am. Tel. & Tel. Co.*, 642 F.2d at 1299. The rule is not narrowly limited to co-parties. *Id.* In addition, a written agreement is not required, and common interest "may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation." *Gonzalez*, 669 F.3d at 979. However, waiver of the

privilege is "usually found when the material is disclosed to an adversary." *Wynn Resorts*, 133 Nev. at 386, 399 P.3d at 349. As a result, disclosure to third parties will waive the privilege "when 'it has substantially increased the opportunities for potential adversaries to obtain the information.'" *Id.* (quoting 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 532 (3d ed. 2010)).

Here, the record demonstrates that petitioner and the intervening plaintiffs, whose actions were consolidated, were all shareholders of Reading and asserted derivative claims against real parties in interest. The intervening plaintiffs have never filed claims against petitioner in this case. It is also unlikely that the intervening plaintiffs would disclose the work-product material to the real parties in interest given that petitioner and the intervening plaintiffs filed similar claims against the real parties in interest. Thus, we conclude that petitioner and the intervening plaintiffs anticipated litigation against a common adversary—real parties in interest—on similar issues concerning breaches of fiduciary duty, and they shared a sufficiently strong common interest in litigation as a matter of law.

As a result, we conclude that the district court erred in ruling that petitioner must disclose the emails based on finding an insufficient showing of common interest between him and the intervening plaintiffs. Accordingly, we grant petitioner's writ of prohibition and direct the clerk of this court to issue a writ instructing the district court to refrain from compelling disclosure of the emails until it reviews the emails *in camera* to evaluate whether they contain impressions, conclusions, opinions, and legal theories of counsel, as required pursuant to the work-product privilege.

Cherry, Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada Limited Liability Company, Appellant, *v.* JAMES R. BLAHA, an Individual; BANK OF AMERICA, N.A., a National Banking Association, as Successor by Merger to BAC HOME LOANS SERVICING, LP; RECONTRUST COMPANY, N.A., a Texas Corporation; EZ PROPERTIES, LLC, a Nevada Limited Liability Company; K&L BAXTER FAMILY LIMITED PARTNERSHIP, a Nevada Limited Partnership; and NOBLE HOME LOANS, INC., fka FCH FUNDING, INC., an Unknown Corporate Entity, Respondents.

No. 71875

May 3, 2018 416 P.3d 233

Appeal from a district court order granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Affirmed in part, reversed in part, and remanded.

Roger P. Croteau & Associates, Ltd., and *Roger P. Croteau* and *Timothy E. Rhoda*, Las Vegas, for Appellant.

Kolesar & Leatham and *Aaron R. Maurice* and *Brittany Wood*, Las Vegas, for Respondents James R. Blaha and Noble Home Loans, Inc.

Akerman, LLP, and *Darren T. Brenner* and *William S. Habdas*, Las Vegas, for Respondents Bank of America, N.A., and Recontrust Company, N.A.

Law Offices of Kevin R. Hansen and *Kevin R. Hansen*, Las Vegas, for Respondents EZ Properties, LLC, and K&L Baxter Family Limited Partnership.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In this opinion, we consider whether the time limitations in NRS 107.080(5)-(6) (2010)[1] bar an action challenging an NRS Chapter 107 nonjudicial foreclosure where it is alleged that the deed of

[1]NRS 107.080 was amended after 2010. *See, e.g.*, 2011 Nev. Stat., ch. 81, § 9, at 332. However, because a notice of default and election to sell was recorded in April 2011 in this case, prior to the effective date of the amendments, all references in this opinion are to the 2010 statute in effect at the time of the notice. *See* 2010 Nev. Stat. 26th Spec. Sess., ch. 10, § 31, at 77-79.

trust had been extinguished before the sale. Because such an action challenges the authority to conduct the sale, rather than the manner in which the foreclosure was conducted, we conclude that the time limitations set forth in NRS 107.080(5)-(6) do not apply to such an action.

FACTS AND PROCEDURAL HISTORY

This case involves a residential property located in a common-interest community governed by the Nevada Trails II Community Association (HOA). The former homeowner, who is not a party to this case, purchased the property for $456,000 with a loan secured by a first deed of trust that was assigned to respondent Bank of America, N.A. (BANA).[2] By 2010, the homeowner had fallen delinquent on both his loan obligations and his HOA assessments. The HOA and BANA each initiated separate nonjudicial foreclosure sales.

On April 12, 2011, the HOA held a nonjudicial foreclosure sale pursuant to NRS Chapter 116. Appellant Las Vegas Development Group, LLC (LVDG) purchased the property at the HOA foreclosure sale for $5,200, and recorded the deed on April 13, 2011. Approximately five months later, on August 29, 2011, BANA conducted a foreclosure sale pursuant to NRS Chapter 107, at which respondent EZ Properties, LLC, purchased the property for $151,300. EZ then sold the property to respondent James R. Blaha for $208,000, and Blaha recorded his deed on September 30, 2011.[3] Both LVDG and Blaha have recorded title to the property.

On March 19, 2015, LVDG filed a complaint in the district court, asserting five causes of action against all of the respondents: (1) quiet title, (2) equitable mortgage, (3) slander of title, (4) wrongful foreclosure, and (5) rescission. LVDG also asserted a cause of action for unjust enrichment against BANA, Recontrust Company, N.A., and EZ, and a cause of action for conversion against BANA and Recontrust. LVDG relied on *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), to argue that the HOA foreclosure sale extinguished the first deed of trust and therefore BANA lacked authority to conduct a nonjudicial foreclosure sale on the property. Thus, according to LVDG, BANA's fore-

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[2]The loan was initially secured through Countrywide Bank, FSB, and was then assigned to BAC Home Loans Serving, LP, which eventually merged with BANA.

[3]Respondents Blaha and his lender, Noble Home Loans, Inc., filed a joint answering brief. Respondents BANA and Recontrust Company, N.A., the trustee of the first deed of trust, filed a joinder to the answering brief. We refer to these respondents collectively as Blaha. We note that respondents EZ and K&L Baxter Family Limited Partnership failed to file an answering brief, and we treat this failure as a confession of error as to these respondents. *See* NRAP 31(d)(2).

closure sale and all subsequent transfers of the property were void and LVDG is the rightful owner of the property.

Blaha moved for summary judgment, arguing primarily that LVDG's claims were barred by the statute of limitations in NRS 107.080(5)-(6) because LVDG failed to file the complaint within 90 or 120 days of the deed-of-trust foreclosure sale. Blaha also argued that the slander of title claim should be dismissed as untimely under NRS 11.190(4)(c) (2010). In response, LVDG contended that the time limitations in NRS 107.080(5)-(6) did not apply to its claims because the deed-of-trust foreclosure sale was void ab initio. LVDG did not oppose summary judgment for the slander of title claim. The district court granted Blaha's motion for summary judgment on the slander of title claim and concluded that the 90- or 120-day statute of limitations in NRS 107.080(5)-(6) barred all of LVDG's remaining causes of action.

LVDG appeals from the grant of summary judgment. Accordingly, the narrow issue we consider is whether NRS 107.080(5)-(6) applies to challenges to the authority behind an NRS Chapter 107 nonjudicial foreclosure sale.[4]

DISCUSSION

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). "This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Here, the parties do not dispute the operative facts, and we are presented only with a question of statutory interpretation and application, which "is a question of law subject to our de novo review." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 118, 123, 319 P.3d 618, 621 (2014).

"When a statute's language is plain and unambiguous, we will give that language its ordinary meaning." *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). "We only look beyond the plain language if it is ambiguous or silent on the issue in question." *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138,

[4]LVDG also argues that the district court erred by entering a written order that contained factual issues not discussed at the hearing on the motion for summary judgment. LVDG does not provide authority for its argument; thus, LVDG fails to cogently argue the issue and we decline to decide it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (concluding that this court need not address issues not cogently argued and supported by relevant authority).

206 P.3d 572, 576 (2009). Thus, we begin with the plain language of NRS 107.080.

LVDG argues that NRS 107.080(5)-(6) governs only procedural defects in the manner in which an NRS Chapter 107 nonjudicial foreclosure sale is conducted, and thus does not apply to LVDG's action, which challenges the authority behind the foreclosure sale. LVDG contends that because the HOA foreclosure sale extinguished the first deed of trust, BANA had no security interest in the property and thus no authority to foreclose on the property. LVDG argues that the plain language of NRS 107.080(5) presumes that the individual conducting the sale has authority to do so, which further demonstrates that NRS 107.080(5)-(6) does not apply to situations where the foreclosing entity lacks the proper authority to foreclose. Blaha contends that the time limitations in NRS 107.080(5)-(6) apply to all challenges to NRS Chapter 107 nonjudicial foreclosure sales. Blaha argues that the legislative history, which demonstrates that the Legislature's intent in enacting NRS 107.080(5)-(6) was to ensure that individuals could not overturn foreclosure sales indefinitely, supports this position.

NRS 107.080 governs nonjudicial deed-of-trust foreclosure sales and sets forth the substantive requirements and procedures for such sales. Subsection 5(a) states that a sale under "this section may be declared void" if the individual "authorized to make the sale does not substantially comply with the provisions of this section or any applicable provision of NRS 107.086 and 107.087."[5] 2010 Nev. Stat. 26th Spec. Sess., ch. 10, § 31, at 78. Subsection 5(b) requires that such an action be commenced "within 90 days after the date of the sale." *Id.* Subsection 6 allows 120 days to commence an action if proper notice is not given. *Id.* Thus, if the person authorized to conduct the sale fails to substantially comply with NRS 107.086, NRS 107.087, or one of NRS 107.080(5)'s provisions, it can render the sale void. By the statute's plain language, challenges to those violations are subject to the time limitations in subsections 5 and 6. However, the language of NRS 107.080 presumes that the person making this sale is authorized to do so as trustee or as the person designated under the terms of the deed of trust or transfer in trust. In this case, it is alleged that the security interest of the deed of trust was extinguished by the prior HOA foreclosure sale leaving the person to conduct the sale without authority to do so.

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[5]NRS 107.086 (2010) included "[a]dditional requirements for sale of owner-occupied housing: Notice; form; election of mediation; adoption of rules concerning mediation; applicability." NRS 107.087 (2010) provided the requirements for the notice of default and election to sell and the notice of sale for a residential foreclosure.

According to Blaha, we previously determined that NRS 107.080 applies to all challenges to a nonjudicial foreclosure sale in *Building Energetix Corp. v. EHE, LP*, 129 Nev. 78, 85-86, 294 P.3d 1228, 1234 (2013).[6] We disagree. *Building Energetix* involved a delinquent-tax certificate issued to the county treasurer prior to a nonjudicial foreclosure sale. *Id*. at 79-80, 294 P.3d at 1230. The issue was "whether, consistent with NRS 107.080(5), a trust-deed beneficiary who acquires such property on credit bid at the foreclosure sale can later redeem, or obtain reconveyance of, the property from the county treasurer." *Id*. at 79, 294 P.3d at 1230. Thus, we were not confronted with, nor did we decide, whether NRS 107.080 applies to all challenges to an NRS Chapter 107 nonjudicial foreclosure sale.[7]

Blaha also contends that the application of NRS 107.080(5)-(6) to all claims challenging an NRS Chapter 107 foreclosure sale is consistent with the legislative history of the statute, which indicates that the legislators were concerned about individuals having the ability to reverse a foreclosure sale indefinitely. While that concern was stated at the hearing on the legislation, it was in the context of the statutory violations of NRS 107.080. *See* Hearing on S.B. 217 Before the Senate Judiciary Comm., 74th Leg. (Nev., March 21, 2007); Hearing on S.B. 217 Before the Assembly Judiciary Comm., 74th Leg. (Nev., May 2, 2007). The legislators did not discuss scenarios where the deed of trust is void. Thus, we conclude that the legislative history supports the plain language of NRS 107.080 and demonstrates that the legislators were not contemplating challenges to a foreclosing entity's authority. *See* Hearing on S.B. 217 Before the Senate Judiciary Comm., 74th Leg. (Nev., March 21, 2007).

After our consideration of the issue in this case, we agree with LVDG that there are instances apart from those enumerated in NRS

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[6]Blaha also contends that we previously held that all challenges to a nonjudicial foreclosure sale are subject to NRS 107.080's time limitations in *Michniak v. Argent Mortgage Co., LLC*, Docket No. 56334 (Order of Affirmance, Dec. 14, 2012). First, we caution counsel that pursuant to NRAP 36(c)(3), parties can only cite to unpublished dispositions as persuasive authority if they were "issued by the Supreme Court on or after January 1, 2016." Nevertheless, we emphasize that in *Michniak*, the appellant focused its appeal, including its claim for quiet title, only on the provisions of NRS 107.080. Thus, we held that his claims were barred by the time limitations in NRS 107.080. Here, LVDG does not focus its claims on the procedural provisions of NRS 107.080. Thus, Blaha's reliance on *Michniak* is misplaced.

[7]Similarly, Blaha's reliance on *Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077 (D. Nev. 2012), is misplaced. In *Kearney*, the plaintiffs sought quiet title under the theory that they were subsequent good faith purchasers without knowledge of another's interest in the disputed property. *Id*. at 1088. The court held that "a *valid* trustee's foreclosure sale terminates legal and equitable interests in the property" and noted that the plaintiffs had notice of the sale. *Id*. at 1089 (emphasis added). Thus, the court did not consider the same issue that is before us in this case.

107.080(5) in which a court may set aside a nonjudicial foreclosure sale. *See, e.g.*, *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 59-60, 366 P.3d 1105, 1112 (2016) (acknowledging that a court may set aside a nonjudicial foreclosure sale if equitable grounds exist for doing so). Accordingly, we conclude that NRS 107.080(5) only applies to actions challenging the procedural aspects of a nonjudicial deed-of-trust foreclosure sale.

LVDG's complaint primarily sought to quiet title to the property and have BANA's foreclosure sale of the property declared void because the first deed of trust had been extinguished by the earlier HOA foreclosure sale. Based on LVDG's arguments under *SFR Investments Pool 1*, 130 Nev. 742, 334 P.3d 408, in which we held that a valid HOA foreclosure sale extinguishes a first deed of trust on the property, it is clear that LVDG is not challenging the procedural aspects of the foreclosure sale, such as BANA's failing to meet the requirements for the notice of default and election to sell, which would invoke the time limitations in NRS 107.080. Rather, LVDG's claim challenges the authority behind the foreclosure sale, which requires a determination of "who holds superior title to a land parcel." *See McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 616, 310 P.3d 555, 559 (2013). This claim, seeking to quiet title and have its rights determined on the merits, is governed by NRS 11.080, which provides for a five-year statute of limitations.[8] *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 27, 388 P.3d 226, 232 (2017). Accordingly, we conclude that LVDG's action for quiet title is appropriately governed by NRS 11.080.

Our decision aligns with Nevada's federal courts that have considered this same issue. For example, in *Las Vegas Development Group, LLC v. Yfantis*, the defendant similarly argued that the plaintiff's claims for wrongful foreclosure were time-barred by NRS 107.080(5). 173 F. Supp. 3d 1046, 1060-61 (D. Nev. 2016). The court determined that the "wrongful foreclosure claim [wa]s not based on a violation of [NRS] 107.080's procedural aspects of foreclosure, and thus [NRS] 107.080(5)'s limitation period d[id] not apply. Rather, [the plaintiff] contends [the defendant] had no authority to conduct the foreclosure sale because its security interest in the property had been extinguished." *Id.* at 1061; *see also Las Vegas Dev. Grp., LLC v. Steven*, No. 2:15-CV-01128-RCJ-CWH, 2016 WL 3381222, at *5 (D. Nev. June 14, 2016) ("[NRS] 107.080(5) does not apply to [the plaintiff's] wrongful foreclosure claim because the claim is not based on the procedural requirements of that section. In-

[8]The parties do not argue, nor do we reach, whether LVDG's remaining causes of action may be time-barred under other statutes of limitations. Rather, our holding is limited to concluding that, because the remaining causes of action are dependent on the validity of BANA's foreclosure sale, those causes of action are not governed by NRS 107.080(5)-(6).

stead, [the plaintiff] challenges the authority behind the foreclosure, not the foreclosure act itself." (internal quotation marks omitted)). Similarly, here, LVDG is challenging the authority behind the sale, not the foreclosure procedure itself. Therefore, we agree that NRS 107.080(5) does not govern LVDG's action to quiet title. Accordingly, we reverse in part the district court's grant of summary judgment and remand for further proceedings consistent with this opinion. We further affirm in part the district court's grant of summary judgment on LVDG's slander of title claim.

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

EUGENIO DOLORES, Appellant, *v*. THE STATE OF NEVADA, EMPLOYMENT SECURITY DIVISION; RENEE OLSON, in Her Capacity as Administrator of the Employment Security Division; and KATIE JOHNSON, in Her Capacity as Chairperson of the Employment Security Division Board of Review, Respondents.

No. 72126

May 3, 2018 416 P.3d 259

Appeal from an order denying a petition for judicial review in an action for unemployment benefits. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

Nevada Legal Services, Inc., and *Dawn R. Miller*, Las Vegas, for Appellant.

Laurie L. Trotter, Senior Legal Counsel, Nevada Employment Security Division, Carson City, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, J.:

In this appeal, we consider whether submitting a resignation when faced with a resign-or-be-fired option is a voluntary resignation under NRS 612.380, thereby disqualifying an individual from unemployment benefits. We hold that where the record shows that

the appellant's decision to resign was freely given and stemming from his own choice, such a resignation is voluntary pursuant to NRS 612.380. Accordingly, we affirm the district court's decision to deny judicial review.

FACTS AND PROCEDURAL HISTORY

Appellant Eugenio Dolores filed an appeal after respondent, the Employment Security Division (ESD), denied his claim for unemployment benefits under NRS 612.380. Dolores worked at the airport as a ground agent for Southwest Airlines for over seven years. The Transportation Security Administration (TSA) requires airport employees to wear a Security Identification Display Area (SIDA) badge, which must be renewed every year. In July 2015, TSA altered its SIDA badge policy and, under this new policy, TSA improperly confiscated Dolores's badge based on a misunderstanding of a previous criminal conviction. Dolores contested this revocation, and his employer, Southwest Airlines, granted him ten days' leave to resolve the matter. When this time lapsed and Dolores had not been reissued a SIDA badge, Southwest informed Dolores that he could either resign or he would be fired. Dolores subsequently submitted a letter of resignation.

Dolores proceeded to file a claim for unemployment insurance benefits with ESD. An ESD claims adjudicator denied Dolores's claim based on NRS 612.380, stating that Dolores resigned from his "employment in anticipation of being discharged or laid off" and therefore voluntarily resigned. Dolores appealed the decision. An administrative referee ultimately denied the claim, finding that Dolores voluntarily resigned under NRS 612.380. Dolores appealed the referee's decision to the Board of Review, which affirmed the referee's decision. Dolores then filed a petition for judicial review in district court, which was denied. Dolores now appeals to this court.

DISCUSSION

Dolores argues that pursuant to NRS 612.380, his resignation was not voluntary and was for good cause because he was told he could resign or be fired. We disagree.

Dolores voluntarily resigned

First, we address whether Dolores voluntarily resigned under NRS 612.380. "This court reviews questions of statutory construction and the district court's legal conclusions de novo. In interpreting a statute, this court will look to the plain language of its text and construe the statute according to its fair meaning and so as not to produce unreasonable results." *I. Cox Constr. Co., LLC v. CH2*

Invs., LLC, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013) (internal citations omitted). Nevada has not yet defined "voluntary" for purposes of unemployment benefits; however, other jurisdictions have defined it as "a decision to quit that is freely given and proceeding from one's own choice or full consent." 76 Am. Jur. 2d *Unemployment Compensation* § 104 (2016) (citing *Thompson v. Kentucky Unemployment Ins. Comm'n*, 85 S.W.3d 621 (Ky. Ct. App. 2002), and *Ward v. Acoustiseal, Inc.*, 129 S.W.3d 392 (Mo. Ct. App. 2004)). Applying that definition to Dolores's case, the question here is whether Dolores's decision to resign was freely given despite the fact that he was given a resign-or-be-fired ultimatum.

Because Nevada has not yet addressed unemployment benefits in the "resign-or-be-fired" context, we look to how other jurisdictions have addressed the issue. In *Thomas v. District of Columbia Department of Labor*, the Court of Appeals for the District of Columbia held that in a quit-or-be-fired situation, "it is not proper to take such a quit, tendered in lieu of termination, out of its context and regard it as dispositive on the issue of voluntariness for unemployment benefits determination purposes." 409 A.2d 164, 170 (D.C. 1979) (acknowledging the benefits both employees and employers gain from such an agreement). The *Thomas* court concluded that a claimant who was previously threatened with termination, instructed to train her replacement directly prior to her resignation, and advised to resign when she sought advice from her union representative at her employer's suggestion did not voluntarily resign. *Id.* at 173.

The Minnesota Court of Appeals, however, has held that "[w]hen an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause." *Ramirez v. Metro Waste Control Comm'n*, 340 N.W.2d 355, 357-58 (Minn. Ct. App. 1983). Specifically, in *Seacrist v. City of Cottage Grove*, the Minnesota Court of Appeals held that an employee who resigned in order to protect his work record did so voluntarily when told to resign or else disciplinary action resulting in termination would result. 344 N.W.2d 889, 891-92 (Minn. Ct. App. 1984). The *Seacrist* court determined that the claimant's letter of resignation was unequivocal and that "[w]hen an employee says he is quitting, an employer has a right to rely on the employee's word." *Id.* at 892; *see also Fallstrom v. Dep't of Workforce Servs.*, 367 P.3d 1034, 1035 (Utah Ct. App. 2016) ("A termination of employment is considered a voluntary quit when the employee is the moving party in ending the employment relationship.").

Like the claimants in the aforementioned cases, Dolores resigned when presented a resign-or-be-fired option. While the Minnesota cases involved employees who almost certainly would have been

terminated for misconduct had they not resigned, and thus are not entirely factually analogous, we conclude that the legal analysis from the Minnesota Court of Appeals is most applicable and adopt it here. Accordingly, we hold that an employee presented with a decision to either resign or face termination voluntarily resigns under NRS 612.380 when the employee submits a resignation rather than exercising the right to have the allegations resolved through other available means.

Dolores submitted his unequivocal resignation letter when he faced termination for failing to obtain the SIDA badge required for his job. Although the TSA's application of its policy may have been incorrect, Dolores consciously chose to resign rather than wait and resolve the issue through the union or explore other options. *Edwards v. Indep. Servs.*, 104 P.3d 954, 957 (Idaho 2004) ("When an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits."). Dolores testified that he resigned because he lost his SIDA badge, to maintain his vacation pay and profit sharing benefits, and because he did not want to wait for the union to clear his case. While we recognize that the loss of his SIDA badge was not an immediately resolvable issue within Dolores's control, Dolores electing to resign to preserve his benefits and foregoing the process to resolve the issue through his union demonstrate that his resignation was a conscious decision. Thus, because the record shows that Dolores considered multiple factors, and that the decision to resign was freely given and proceeding from his own choice, we conclude that Dolores voluntarily resigned pursuant to NRS 612.380.

Dolores lacked good cause to resign

Second, we consider whether Dolores had good cause to resign. Dolores argues that TSA's new SIDA badge requirements were a substantial change in his working conditions, constituting good cause for him to resign. Dolores argued below that he had good cause to resign because he had no "reasonable alternatives" to resignation; he did not, however, argue a theory of substantial change in his working conditions. Issues not argued below are "deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Thus, we hold Dolores's argument that the change in working conditions constituted good cause waived and decline to consider this argument.

As we have noted above, Dolores considered many factors when deciding to resign rather than face termination, and he elected to not pursue other options that could have allowed him to maintain his employment. We therefore conclude that substantial evidence sup-

ports the appeals referee's determination that Dolores lacked good cause to resign, which rendered him ineligible for unemployment benefits. NRS 612.380; *Edwards v. Indep. Servs.*, 104 P.3d 954, 957 (Idaho 2004) ("When an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits."); *see also Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (setting forth the standard of review).

CONCLUSION

Accordingly, for the reasons set forth above, we affirm the district court's order denying Dolores's petition for judicial review for unemployment benefits.

Douglas, C.J., and Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

Cherry, J., concurs:

I concur in the result only.

RANDOLPH MOORE, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 66652

May 17, 2018 417 P.3d 356

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and *Randolph M. Fiedler* and *Tiffani D. Hurst*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Cherry, Gibbons, Pickering, Hardesty, Parraguirre and Stiglich, JJ.[1]

[1]The Honorable Michael Douglas, Chief Justice, did not participate in the decision of this matter.

OPINION

Per Curiam:

The district court denied appellant Randolph Moore's postconviction petition for a writ of habeas corpus as procedurally barred without conducting an evidentiary hearing. We affirm.[2]

Moore was convicted of first-degree murder and sentenced to death for his involvement in killing his friend Dale Flanagan's grandparents. *See Flanagan v. State*, 112 Nev. 1409, 1412, 930 P.2d 691, 693 (1996). Moore filed the postconviction petition at issue in this case on September 19, 2013, more than one year after remittitur issued from his direct appeal. Thus, the petition was untimely filed. *See* NRS 34.726(1). The petition was also successive because Moore had previously sought postconviction relief. *See* NRS 34.810(1)(b); NRS 34.810(2). Accordingly, the petition was procedurally barred absent a demonstration of good cause and prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b), (2), (3). Moreover, because the State pleaded laches, Moore was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

To overcome the procedural bars, Moore argues that: (1) the State's withholding of impeachment evidence violated *Brady v. Maryland*, 373 U.S. 83 (1963), (2) his attorneys were ineffective throughout the litigation of his prior postconviction petition, and (3) he is actually innocent of the death penalty.[3]

Brady v. Maryland

Moore claims that the State violated *Brady* by failing to disclose evidence that would have impeached a witness who testified at his trial, Angela Saldana.[4] There are three components to a successful *Brady* claim: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). When a *Brady* claim is raised in the context of a procedurally barred postconviction petition, the petitioner has the burden of demonstrating

[2]We previously issued our decision in this matter in an unpublished order. Cause appearing, we grant the State's motion to reissue the order as an opinion, *see* NRAP 36(f), and issue this opinion in place of our prior order.

[3]We reject Moore's request to remand this matter for the district court to make better findings regarding the procedural bars.

[4]Moore also argues that first postconviction counsel was ineffective for failing to uncover the evidence supporting his *Brady* claim. However, he provides no explanation as to how a reasonable postconviction attorney would have uncovered the evidence, and for the reasons explained below, the *Brady* claim fails.

good cause for his failure to present the claim earlier and actual prejudice. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). As a general rule, "[g]ood cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *Id*.

Before discussing this claim in more detail, we note that it is inadequately pleaded. Before trial, the parties knew that Saldana had been working with law enforcement and her uncle, Robert Peoples, in order to obtain information about the murders. Since then, Moore has consistently challenged Saldana's role in the case. Although he alleges in his opening brief that he has recently discovered new facts putting the claim in a different light, he fails to identify with specificity which facts this court previously considered and which facts are new. Moore actually asserts that he is under *no obligation* to "distinguish between 'new' facts and facts which were known and previously presented." He is mistaken, as he bears the burden of demonstrating that relief is warranted, which means he must explain why he is raising this claim again, or if it is new, why he did not raise it sooner. *See* NRS 34.810; NRS 34.810(1)(b). He also bears the burden of demonstrating that the district court erred, which means he must demonstrate that the State withheld material evidence and that he raised the claim within a reasonable time. *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012). Meeting these burdens requires being forthright: a party cannot force the district court to hold an evidentiary hearing by withholding information about a claim. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (recognizing that a petitioner is entitled to an evidentiary hearing regarding his claim if it is not belied by the record and, if true, would warrant relief).

Moore provided some clarity at oral argument in this court. Considering those assertions along with those raised in his opening brief, what forms the basis of his *Brady* claim is apparently the notion that rather than being a willing participant in the investigation into Moore's codefendant as previously believed, Saldana was forced to participate against her will and was fed information by Peoples, who had access to police reports. Assuming, without deciding, that Moore raised this claim within a reasonable time, we nevertheless conclude that he fails to demonstrate that relief is warranted.

Accepting Moore's assertions as true, evidence that Peoples coached and coerced Saldana's testimony constitutes favorable evidence, *see United States v. Scheer*, 168 F.3d 445, 449 (11th Cir. 1999) (holding that by "withholding information regarding the prosecutor's threatening remarks to a key prosecution witness, the government failed to divulge material impeachment evidence that was, in essence, exculpatory by virtue of its ability to cast substantial doubt on the credibility of the witness"); *see also Hunter v. State*, 29 So. 3d 256, 269 (Fla. 2008) (evidence that the State threatened a wit-

ness with a life sentence if she failed to testify against the defendant satisfied the first two prongs of *Brady*), in the State's possession.[5] However, we conclude that the allegedly withheld evidence is not material. Moore asserts that the evidence was material because the State needed Saldana's testimony to corroborate the other witnesses' testimony pursuant to NRS 175.291 (requiring corroboration for accomplice testimony). But an accomplice is defined as one who is liable for the identical offense charged against the defendant, NRS 175.291(2), and several of the witnesses who testified against Moore were not liable for first-degree murder; further, impeaching Saldana would not have eliminated her testimony, and therefore, it still could have been used to corroborate the other witnesses.

Regardless, materiality for the purposes of *Brady* focuses on whether the withheld evidence might create a reasonable doubt in the mind of the jury, *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) ("Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." (internal quotation marks omitted)); *Huebler*, 128 Nev. at 202, 275 P.3d at 98 ("Normally, evidence is material if it creates a reasonable doubt." (internal quotation marks omitted)), not whether it implicates a state statute requiring corroboration. Applying that test, Moore's claim still fails. Saldana's secondhand testimony was not a crucial part of the State's case. In contrast, numerous witnesses testified that they observed Moore plan, commit, and confess to the murders, including witnesses who participated in the killings. *See generally Turner v. United States*, 137 S. Ct. 1885, 1894 (2017) (concluding that withheld evidence was not material when it would have required the jury to believe that two witnesses falsely confessed even though their testimony was "highly similar" to that of other witnesses). Impeaching Saldana would not have undermined this testimony. In light of this, Moore seems to acknowledge that he played a role in the crime and that the jury would have so concluded even if the allegedly withheld evidence was presented to impeach Saldana, but he argues that it might have led to a different penalty determination because it might have caused the jury to doubt the *level* of his involvement or the *motive* behind the murders. Moore fails to demonstrate that the withheld evidence would have affected the outcome of the penalty hearing as it does not affirmatively undermine the evidence presented to the jury as to Moore's involvement, the motive for the murders, or the aggravating circumstances.

[5]We note that Moore summarily concludes that the State possessed this evidence because "an investigator with the Clark County District Attorney's office was very involved with Mr. Peoples in coercing Ms. Saldana," but he admits that the investigator was not involved at all stages of the alleged coercion campaign and that the investigator and the other actors involved were acting outside of their official capacities. Nevertheless, because the district court did not hold an evidentiary hearing on this claim, we will assume that the evidence was in the State's possession.

For all of these reasons, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Ineffective assistance of postconviction counsel

Moore contends that he demonstrated good cause and prejudice to excuse the procedural bars because postconviction counsel was ineffective. Because a petitioner sentenced to death is entitled to the appointment of counsel for his first postconviction proceeding, *see* NRS 34.820(1), he is entitled to the effective assistance of that counsel, and a meritorious claim that postconviction counsel was ineffective can provide cause to excuse the procedural bars, *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 253 (1997).[6]

Mitigating evidence regarding Moore's upbringing

Moore argues that postconviction counsel should have found evidence to support the claim that trial counsel was ineffective for failing to present mitigating evidence regarding Moore's background. Moore fails to demonstrate deficient performance. *See Crump*, 113 Nev. at 304 & n.6, 934 P.2d at 254 & n.6 (applying the deficiency-and-prejudice test of *Strickland v. Washington*, 466 U.S. 668 (1984), to postconviction counsel). Although he provides a colorful narrative of his life, including quotes from witnesses and citations to the record, he routinely fails to identify who the witnesses are or how they came to know something about him. Having reviewed the included declarations, it seems these derelictions were intentional. Many of the alleged witnesses appear to have had little to no involvement in Moore's life, and he provides no explanation as to why a reasonable postconviction attorney conducting a reasonable investigation would have sought them out. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005) ("[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up."). Thus, although Moore has apparently uncovered many witnesses over the last several decades, he fails to demonstrate that postconviction counsel acted unreasonably by failing to do the same. *See In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012) ("[T]he mere fact that new counsel has discovered some background information concerning a defendant's family, educational or medical history that was not presented to the jury at trial in mitigation of penalty is insufficient, standing alone, to demonstrate prior counsel's actions fell below the standard of professional competence.").

[6]We note that the district court incorrectly concluded that some of Moore's ineffective-assistance-of-postconviction-counsel claims were not raised within a reasonable time, as these claims were not available until the first postconviction proceedings concluded.

Moore also fails to demonstrate prejudice. Trial counsel presented similar evidence about the same mitigating themes. Although no one testified about Moore's mother's contribution to his problematic childhood, and his drug use was only casually referenced, the jury heard about his difficult upbringing, the lack of a father figure, the traumatic deaths of his loved ones, and his compromised thinking around the time of the murders. Additional evidence might have provided more details about Moore's life, but it would not have altered the picture of Moore that trial counsel presented in any meaningful way. *See Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (denying relief where the sentencing jury was aware of the defendant's background and "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all").

Mitigating evidence in the form of expert testimony

Moore argues that postconviction counsel should have presented mitigating testimony from experts. Moore fails to demonstrate deficient performance and prejudice. Although he correctly points out that postconviction counsel faulted trial counsel for not presenting such testimony, Moore fails to demonstrate that the challenge to trial counsel's performance would have succeeded as he points to nothing in the record which establishes that trial counsel should have suspected that his mental health was at issue at the time. *See generally Riley v. State*, 110 Nev. 638, 650-51, 878 P.2d 272, 280 (1994) (explaining that trial counsel was not ineffective for failing to have the defendant psychologically evaluated despite indications that the defendant had previously been hospitalized and had abused drugs); *see also Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Further, expert testimony regarding the "humanizing" evidence would merely have added an expert's gloss to the testimony the jury already heard. *See Belmontes*, 558 U.S. at 24. While it may have reinforced the mitigating theme that Moore committed the murders while in a period of emotional tumult, this theme was "neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make." *Id*. We therefore conclude that the district court did not err by denying this claim without an evidentiary hearing.

Additional expert testimony

Moore argues that postconviction counsel should have argued that trial counsel was ineffective for failing to hire a criminalist, whose testimony would have cast doubt upon "the authenticity of the testimony regarding the guns, and whether the guns could be

connected to the bullets or casings found[ ] at the crime scene." Moore also argues that postconviction counsel should have argued that trial counsel was ineffective for failing to hire an expert in substance abuse, whose testimony would have undermined "the mens rea requirement for first-degree murder." Moore fails to demonstrate deficient performance or prejudice; he does not, for example, explain how testimony regarding guns and ammunition was used at trial, what conclusions an expert could have provided that would have changed the result, nor how expert testimony would have shown he did not meet the mens rea requirement for murder. These bare assertions are insufficient to warrant relief and therefore Moore fails to demonstrate that the district court erred by denying this claim without an evidentiary hearing.

Other ineffective-assistance claims

Moore also argues that postconviction counsel should have argued that: (1) the prosecutors engaged in repeated misconduct, (2) a penalty-phase juror was not proficient in English, and (3) the trial court failed to change venue. These claims were waived by the time of the first postconviction proceeding because they could have been raised on direct appeal and Moore failed to demonstrate good cause and prejudice for the failure to do so. *See* NRS 34.810(1)(b).[7] Therefore, he fails to demonstrate that the district court erred by denying this claim without conducting an evidentiary hearing.

Actual innocence

Moore contends that the district court erred by denying his petition because he is actually innocent of the death penalty, which may excuse the failure to show good cause. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). In the death penalty context, actual innocence means that no rational juror would have found Moore eligible for the death penalty. *See Lisle v. State*, 131 Nev. 356, 362, 351 P.3d 725, 730 (2015).

Moore first asserts that he is actually innocent because the aggravating circumstance that the murder was committed by a person who knowingly created a great risk of death to more than one person is invalid on its face and unconstitutional as applied to him. This court has rejected these arguments, *see Flanagan v. State*, 112 Nev. 1409, 1421, 930 P.2d 691, 699 (1996), and Moore provides no cause to reconsider the decisions, *see Lisle*, 131 Nev. at 362,

[7]Moore asserts that the district court's failure to appoint an investigator and conduct an evidentiary hearing during the first postconviction proceeding constitutes good cause and prejudice. Any failure on the part of the district court should have been raised on the appeal from the denial of that petition.

351 P.3d at 730 (concluding that a petitioner was not entitled to relief on his actual-innocence challenge where he "points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance[,] [n]or do his arguments present any issue of first impression as to the legal validity of the aggravating circumstance" (citation omitted)). Moreover, there remains another aggravating circumstance, and therefore, Moore is still eligible for death such that he is not actually innocent of the death penalty. *See id.* at 364, 351 P.3d at 733-34.

Moore also contends that he is actually innocent because this court did not appropriately conduct a reweighing analysis when resolving a prior appeal. This argument constitutes legal innocence rather than factual innocence and does not relate to death eligibility. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) ("Actual innocence means factual innocence, not mere legal insufficiency." (internal quotation marks omitted)). Therefore, we conclude that the district court did not err by denying this claim.

Procedurally barred claims

Moore argues that, under a cumulative-error theory, this court must consider other claims which were previously raised and rejected by this court. We disagree. Many of the claims are bereft of legal analysis or citations to controlling authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Further, Moore fails to identify the prior proceeding where the claim was raised, the nature of the error this court found, why this court concluded that the error was harmless, and how any error in this proceeding cumulates with the prior error. *See Reno*, 283 P.3d at 1223.[8]

As Moore fails to demonstrate that the district court erred, we affirm the district court's judgment.

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[8]Moore's claim that lethal injection violates the Eighth Amendment is premature. *See McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009).