fell under the SAR discovery privilege. The discovery commissioner reasoned that "[d]ocuments which constitute a [SAR], if any SAR exists, and/or the policies and procedures that are created to prepare a possible SAR are confidential and protected," while "[f]actual supporting documentation that accompanied a SAR, if one exists, or possible SAR, which have been prepared in the ordinary course of business are not protected." The basis of this decision does not undermine and, in fact, is bolstered by the existing law on this issue. *See id.* at 39-41; *Cotton v. PrivateBank & Tr. Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002); *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 681-82 (S.D. Tex. 2004). Having reviewed the record on appeal, we conclude that the discovery commissioner and the district court applied the correct SAR privilege standard and did not err when they applied the SAR privilege to the five documents in question.[3]

CONCLUSION

Pursuant to the Bank Secrecy Act, the SAR discovery privilege applies to any documents that suggest, directly or indirectly, that a SAR was or was not filed. The discovery commissioner and the district court did not err in concluding that the documents at issue here are protected by the SAR privilege. Accordingly, we affirm the order of the district court dismissing appellant's declaratory relief claim.

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

DAWNETTE R. DAVIDSON, APPELLANT, *v.*
CHRISTOPHER B. DAVIDSON, RESPONDENT.

No. 67698

September 29, 2016 382 P.3d 880

Appeal from a district court order denying a post-decree motion to enforce a provision of a divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Vincent Ochoa, Judge.

Former wife brought action to enforce provision of divorce decree that required former husband to pay former wife one-half the equity in the marital home. The district court denied former wife's

[3]Appellant also did not challenge, and appears to concede, the district court's determination that Wells Fargo had no duty to inform appellant of the reasons why her accounts were closed. This also supports affirming the district court's order dismissing the declaratory relief claim.

motion, and she appealed. The supreme court, CHERRY, J., held that: (1) former wife's action was subject to six-year limitations period for actions on judgments; and (2) six-year limitations period began to run when there was evidence of indebtedness, which occurred on the date former wife delivered quitclaim deed to the marital home.

Affirmed.

Mills, Mills & Anderson and *Gregory S. Mills* and *Daniel W. Anderson*, Las Vegas, for Appellant.

Hofland & Tomsheck and *Bradley J. Hofland*, Las Vegas, for Respondent.

1. DIVORCE.
   The district court's order denying former wife's motion to enforce divorce decree provision that granted her the right to receive half of the equity in the marital residence affected rights growing out of the judgment previously entered and, therefore, constituted an appealable special order entered after final judgment. NRAP 3A(b)(8).
2. DIVORCE.
   Statute that allowed family division to enforce its orders in separate maintenance actions without any time limitations did not apply to former wife's motion to enforce provision of divorce decree, and therefore, former wife's motion was subject to six-year limitations period for actions on judgments. NRS 11.190(1)(a), 11.200, 125.240.
3. APPEAL AND ERROR.
   The supreme court reviews questions of statutory construction de novo.
4. STATUTES.
   The supreme court's goal in construing statutes is to uphold the intent of the Legislature and harmonize the statutes, if possible.
5. STATUTES.
   When construing statutes, the supreme court's task is to ascertain the intent of those who enacted the provisions at issue, and to adopt an interpretation that best captures their objective.
6. STATUTES.
   When construing statutes, the supreme court must give words their plain meaning unless doing so would violate the spirit of the provision.
7. STATUTES.
   Whenever possible, the supreme court will construe statutory provisions so that they are in harmony with each other.
8. STATUTES.
   When construing statutes, specific provisions take precedence over general provisions.
9. LIMITATION OF ACTIONS.
   For statute of limitations purposes, a motion may be treated as an independent action or vice versa as is appropriate.
10. DIVORCE.
    Six-year statute of limitations applicable to former wife's motion to enforce divorce decree provision that required former husband to pay former wife one-half the equity in the marital home began to run when there was evidence of indebtedness, which occurred on the date former wife de-

livered quitclaim deed to the marital home, regardless of how long wife enjoyed the benefits of the marital home. NRS 11.190(1)(a), 11.200.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

Nevada's statute of limitations for actions on judgments, NRS 11.190(1)(a), provides that an action to enforce the provisions of a judgment or decree from any state or federal court be commenced within six years. NRS 11.200 dictates that the limitations period commences "from the last transaction or the last item charged or last credit given." In the underlying district court action, appellant Dawnette Davidson moved the family division of the district court to enforce a term of the parties' decree of divorce, which required her ex-husband, respondent Christopher Davidson, to pay Dawnette one-half of the equity in the marital home according to a 2006 appraisal in exchange for Dawnette quitclaiming the residence to Christopher. Dawnette commenced this action more than six years after she delivered the quitclaim deed. According to Dawnette, her motion was timely because NRS 125.240 allows the family division of the district court to enforce its decrees without time limitations. She also asserts that her motion was timely because the parties resided together in the marital home until 2011 and it was unreasonable for her to pursue payment from Christopher while she enjoyed the benefits of the residence.

We conclude that the Nevada Legislature did not grant the family divisions of the district courts the authority to endlessly enforce divorce decrees except where the Legislature specifically provided for enforcement regardless of the age of the claim, *see, e.g.*, NRS 125B.050 (allowing enforcement of a child support order without a time limitation for commencing the action). We also conclude that the accrual time for the limitations period in an action on a divorce decree commences "from the last transaction or the last item charged or last credit given." *See* NRS 11.200. Here, the last transaction occurred in 2006, when Dawnette delivered the quitclaim deed to Christopher. As Dawnette delivered the quitclaim deed more than six years before she moved the family division of the district court to enforce the decree, her claim is time-barred.

FACTS

The district court granted Christopher and Dawnette a decree of divorce in 2006. Their decree required Dawnette to execute a quit-

[1]THE HONORABLE NANCY M. SAITTA, Justice, having retired, this matter was decided by a six-justice court.

claim deed and release all of her rights in the marital residence. In exchange, the decree required Christopher to pay one-half of the equity in the residence, according to the appraised value in 2006, to Dawnette. Approximately two weeks after the parties divorced, they reconciled and cohabitated in the marital residence until 2011. They never remarried. The parties agree that Dawnette executed the quitclaim deed, and Christopher claims that he refinanced the property and paid half of the equity to Dawnette. However, Dawnette denies that Christopher ever made payment.

In 2014, Dawnette filed a motion to enforce the decree, claiming that she never received her half of the equity in the property. Christopher opposed the motion, arguing that he had previously paid Dawnette her half of the equity. He also argued that the statute of limitations barred Dawnette's claim. In response, Dawnette argued that the statute of limitations had not yet begun to run because the decree did not provide a date by which Christopher was required to tender payment to her. Without deciding whether Christopher paid Dawnette, the district court denied Dawnette's motion. The court concluded that an action to enforce a decree of divorce must be commenced within six years pursuant to NRS 11.190(1)(a) and that Dawnette's claim was therefore untimely.

On appeal, Dawnette argues that (1) the district court erred when it ruled that NRS 11.190(1)(a) barred her action to enforce the decree because NRS 125.240, not NRS 11.190(1)(a), applies to motions to enforce a decree of divorce; and (2) even if NRS 11.190(1)(a) does apply, the statute of limitations had not expired because accrual of the statute of limitations does not begin until demand for performance is made or a reasonable amount of time has passed. Christopher argues that the district court's order denying her motion is not appealable and that the district court correctly ruled that the statute of limitations for Dawnette's claim had passed.

DISCUSSION

Whether this court has jurisdiction to consider Dawnette's appeal

[Headnote 1]

In his answering brief, Christopher argues that no statute or court rule allows this court to review an order denying a motion for enforcement of a judgment. He asserts that although NRAP 3A(b)(8) allows an appeal from an order after final judgment, the order, to be reviewable, must impact a party's rights based on a previous judgment. He asserts that the order at issue *interprets* the parties' previous decree, but the order does not *amend* the decree or *alter* the parties' rights under it. In her reply, Dawnette argues that the district court's order denying her motion is appealable pursuant to NRAP

3A(b)(8) because it impacts her right to one-half of the equity in the marital residence, as set forth in the decree of divorce. We agree with Dawnette.

NRAP 3A(b)(8) allows an appeal from any "special order entered after final judgment." In *Gumm v. Mainor*, 118 Nev. 912, 914, 59 P.3d 1220, 1221 (2002), this court held that, "to be appealable . . . , a special order made after final judgment must be an order affecting the rights of some party to the action, growing out of the judgment previously entered."

In the instant case, Dawnette appeals from the district court's decision and order, which denied her motion to enforce the parties' decree of divorce. The decree of divorce was the final judgment. It adjudicated all of the parties' rights regarding child custody and support, spousal support, and the division of property. *See Gumm*, 118 Nev. at 916, 59 P.3d at 1223. In her motion, Dawnette sought to enforce her right to receive half of the equity in the marital residence, according to the 2006 appraisal value. Her right to receive these funds was established by the decree. Accordingly, the order from which Dawnette appeals is a "special order entered after final judgment," *see* NRAP 3A(b)(8), because the order denied her claim for one-half of the equity in the property and thus affects Dawnette's rights "growing out of the judgment previously entered," *see Gumm*, 118 Nev. at 914, 59 P.3d at 1221. Therefore, this court has jurisdiction to consider the instant appeal.

Whether the family division of the district court may enforce its decrees without time limitations

[Headnote 2]

Notwithstanding NRS 11.190(1)(a), Dawnette argues that NRS 125.240 gives the district court plenary power to enforce a decree of divorce any time after it is entered. She claims that because NRS 11.190(1)(a) and NRS 125.240 conflict with each other, this court must give NRS 125.240 priority over NRS 11.190(1)(a). Christopher asserts that all courts have continuing jurisdiction to enforce their decrees. But, he maintains, continuing jurisdiction does not nullify the statute of limitations and grant a court perpetual authority. We agree with Christopher.

[Headnotes 3-8]

We review questions of statutory construction de novo. *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013). This court's goal in construing statutes is to uphold the intent of the Legislature and harmonize the statutes, if possible.

> Our task is to ascertain the intent of those who enacted the provisions at issue, and to adopt an interpretation that best

> captures their objective. We must give words their plain meaning unless doing so would violate the spirit of the provision. Whenever possible, we construe provisions so that they are in harmony with each other. Specific provisions take precedence over general provisions.

Guinn v. Legislature of State of Nev., 119 Nev. 277, 285, 71 P.3d 1269, 1274-75 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006).

Dawnette's argument that NRS 125.240 allows the family division of the district court to enforce its decrees and judgments without any time limitations is unavailing. NRS 125.240 applies to actions for separate maintenance. However, the parties' action in this case was one for divorce, *see* NRS 125.010 to 125.185, not separate maintenance, *see* NRS 125.190 to 125.280. NRS 125.250 states that "[i]n all cases commenced under NRS 125.190 to 125.280, inclusive, the proceedings and practice must be the same, as nearly as may be, as those provided in actions for divorce." Although the proceedings in a separate maintenance case must mirror divorce proceedings as much as possible, this court has never held that the reverse is also true, and we decline to do so today. Accordingly, even if NRS 125.240 allowed the family division to enforce its orders in separate maintenance actions without any time limitations, the statute does not apply to the instant matter, which concerns a decree of divorce.

Additionally, if the Nevada Legislature intended to eliminate the statute of limitations for enforcement of all family division orders, it would have specifically given the district courts such authority. This is evidenced by another statute applying to the enforcement of family division orders. In NRS 125B.050, the Legislature specifically invested the district courts with the authority to enforce child support orders regardless of the age of the claim:

> 3. If a court has issued an order for the support of a child, *there is no limitation on the time* in which an action may be commenced to:
>
> (a) Collect arrearages in the amount of that support; or
>
> (b) Seek reimbursement of money paid as public assistance for that child.

(Emphasis added.) The Legislature has not provided such authority for family division orders that divide the parties' joint property. Therefore, we conclude that, other than child support orders, Nevada law does not exclude the family division from the limitations period in NRS 11.190(1)(a).

Similarly, in 2015, the Nevada Legislature amended NRS 125.150(3) to provide a limitations period for postjudgment motions to adjudicate omitted assets in divorce, annulment, or separate

maintenance cases. The current statute mandates that the aggrieved party must file such a motion within three years of the discovery "of the facts constituting fraud or mistake." NRS 125.150(3). The same statute provides the family division with "continuing jurisdiction to hear such a motion." *Id.* Thus, we conclude that the Legislature does not equate "continuous jurisdiction" with unending jurisdiction, as the three-year limitations period for postjudgment motions to adjudicate omitted assets demonstrates.

Dawnette further claims that the Legislature did not intend for a divorce litigant to receive a windfall for the full value of a marital property by waiting for the six-year limitations period to end and then selling the property and retaining the full value of the proceeds. While Dawnette's argument has merit, we believe that the Legislature also did not intend for parties to endlessly "sit" on potential claims. *See Doan v. Wilkerson*, 130 Nev. 449, 453, 327 P.3d 498, 501 (2014) ("The policy in favor of finality and certainty . . . applies equally, and some might say especially, to a divorce proceeding."). The Legislature provided NRS 17.214, which Dawnette could have used to prevent Christopher from allegedly receiving a double windfall. NRS 17.214 allows a judgment creditor to renew a judgment and avoid the harsh results that could accompany the expiration of a statute of limitations. Unfortunately, Dawnette failed to avail herself of the statute's protections. Moreover, as we have previously reasoned, "[i]f the legislature had intended to vest the courts with continuing jurisdiction over property rights [in divorce cases], it would have done so expressly." *Id.* (quoting *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980) (alteration in original)).

[Headnote 9]

In *Bongiovi v. Bongiovi*, 94 Nev. 321, 322, 579 P.2d 1246, 1246-47 (1978), this court determined that NRS 11.190 barred a party's recovery of alimony payments that were more than six years old. There, the parties' divorce decree ordered the ex-husband to make ten monthly alimony payments of $1,000 to his ex-wife. *Id.* at 322, 579 P.2d 1246. The first payment was due on July 1, 1971, but the ex-wife never received any payments. *Id.* On November 29, 1977, the ex-wife filed a motion seeking a judgment on the arrearages, and the district court subsequently entered a judgment in the amount of $5,000 on the ex-wife's behalf. *Id.* at 322, 579 P.2d at 1247. The lower court said that recovery of the first five payments was barred by the six-year limitation in NRS 11.190. *Id.* This court agreed that NRS 11.190 applied to the former wife's motion and held that "[t]he six-year period prescribed by that statute commenced to run against each installment as it became due." *Id.* We see no reason to deviate from our prior holding and conclude that a claim to enforce a divorce decree, whether through motion practice or through an in-

dependent action, is governed by the limitations period under NRS 11.190 and NRS 11.200.[2]

Lastly, our holding is consistent with several other states that apply limitations periods to enforcement of property distribution provisions in divorce decrees.[3] Thus, we conclude that no basis exists for us to create a new rule that excuses property distribution provisions in divorce decrees from NRS 11.190(1)(a) and that the six-year statute of limitations in NRS 11.190(1)(a) applies to the instant case.

Whether the statute of limitations has expired for Dawnette's action

[Headnote 10]

Dawnette asserts that even if NRS 11.190(1)(a) does apply, the district court should have concluded that the statute did not begin to run until after the parties' post-decree separation in 2011. She contends that because the decree did not contain a deadline by which Christopher was to tender her interest in the marital property, the time for Christopher's performance was within a reasonable time after the parties' final separation. Dawnette contends that because she was still living in the marital residence and enjoying the benefits of the property, she did not need to seek enforcement of her interest. Christopher charges that even without an express deadline, NRS 11.200 sets when the time begins to run. He explains that the time began to run in 2007, when he refinanced the marital residence because that was when the last undertaking on the property occurred. We conclude that the statute of limitations expired six years after Dawnette delivered the quitclaim deed to Christopher.

NRS 11.200 states as follows:

> The time in NRS 11.190 shall be deemed to date from the last transaction or the last item charged or last credit given; and whenever any payment on principal or interest has been or

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[2]We do not distinguish between a motion and an independent action to enforce a divorce decree because "[a] party is not bound by the label he puts on his papers." *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 652, 218 P.3d 853, 857 (2009) (internal citations and quotation marks omitted). "A motion may be treated as an independent action or vice versa as is appropriate." *Id*.

[3]*See, e.g.*, *Cedergreen v. Cedergreen*, 811 P.2d 784, 786 (Alaska 1991) (limiting actions upon divorce decrees to ten years); *Mark v. Safren*, 38 Cal. Rptr. 500, 503-04 (Dist. Ct. App. 1964) (imposing a ten-year statute of limitations upon a divorce decree); *O'Hearn v. O'Hearn*, 638 A.2d 1192, 1195 (Md. Ct. Spec. App. 1994) (restricting litigation upon a divorce decree to a 12-year statute of limitations); *Tauber v. Lebow*, 483 N.E.2d 1140, 1142 (N.Y. 1985) (placing a six-year statute of limitations on claims from divorce decrees); *Wichman v. Shabino*, 851 N.W.2d 202, 205 (S.D. 2014) (recognizing a limitations period of 20 years to enforce a divorce decree); *Abrams v. Salinas*, 467 S.W.3d 606, 611 (Tex. App. 2015) (subjecting a case upon a decree of divorce to a ten-year limitations statute); *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1229 (Utah Ct. App. 1999) (constraining a suit on a divorce decree to an eight-year statute of limitations).

> shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

According to NRS 11.200, the statute of limitations began running when there was "evidence of indebtedness" for half of the equity in the marital property to Dawnette. NRS 11.200 comports with our holding in *Borden v. Clow*, 21 Nev. 275, 278, 30 P. 821, 822 (1892).[4] There, we explained that the running of the statute of limitations begins when a deed is delivered. This court was asked to determine when the statute of limitations began to run in a case where the defendant gave the plaintiff an absolute deed to real property in order to secure a debt. *Id.* at 276, 30 P. at 821. The parties neglected to set a date upon which the payment would be due and disputed whether the plaintiff's cause of action was barred by the statute of limitations for contracts. *Id.* at 276-77, 30 P. at 821. We concluded that the delivery of the deed triggered the statute of limitations:

> It is a rule in regard to the statute of limitations, *applicable in all cases*, that the statute begins to run when the debt is due, and an action can be instituted upon it. There was no agreement between the parties as to when this indebtedness should be paid; therefore the statute began to run immediately upon the delivery of the deed to the defendant.

Id. at 278, 30 P. at 822 (emphasis added). Thus, evidence of indebtedness occurred with the delivery of the deed. Here, the latest time at which the debt was due, pursuant to *Borden*, was after Dawnette delivered the quitclaim deed to Christopher in 2006. As a result, the statute of limitations for Dawnette's claim has expired. *See* NRS 11.190(1)(a).

Instead of looking to NRS 11.200 and *Borden*, Dawnette relies upon our holding in *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008). She asserts that it was not reasonable for her to pursue her half of the equity in the marital residence while she was still living there—up until 2011. In *Mayfield*, we held that

> a fundamental principle of contract law is that the time for performance under a contract is not considered of the essence unless the contract expressly so provides or the circumstances of the contract so imply. If time is not of the essence, the parties generally must perform under the contract within a reasonable time, which depends upon the nature of the contract and the particular circumstances involved.

[4]Although the *Borden* case is over 100 years old, we have never overruled its holding, nor do we find cause to do so now.

124 Nev. at 349, 184 P.3d at 366 (footnotes and quotations omitted). Even if the decree of divorce were a simple contract, Dawnette does not explain why a "reasonable time," *see id.*, to demand performance under the decree of divorce was after the parties separated in 2011, instead of when she delivered the deed in 2006. We conclude that Dawnette's claim—that it was not reasonable to demand performance while she enjoyed the benefits of the marital residence—is unpersuasive. Dawnette apparently believed that her delivery of the deed was reasonable and Christopher's refinancing of the property was reasonable. Therefore, demanding payment, despite living in the marital residence, was likewise reasonable. Moreover, the consideration for receiving half of the equity was Dawnette's deliverance of the deed so that Christopher could title the house in his name alone. The decree does not indicate that she was to vacate the residence in consideration for half of the equity. Consequently, Christopher became indebted to Dawnette when she delivered the deed to him, not when she vacated the residence in 2011.

Thus, we conclude that NRS 11.200 and our holding in *Borden* apply here and the statute of limitations began running after Dawnette delivered the quitclaim deed to Christopher in 2006. Because the statute of limitations expired in 2012, Dawnette's motion is time-barred pursuant to NRS 11.190(1)(a).

CONCLUSION

We hold that the six-year statute of limitations in NRS 11.190(1)(a) applies to claims for enforcement of a property distribution provision in a divorce decree entered in the family divisions of the district courts. Like any other claim "upon a judgment or decree of any court of the United States, or of [any court of] any state or territory within the United States," *see* NRS 11.190(1)(a), actions to enforce the provisions of a divorce decree must be initiated within six years. We further hold that when a litigant seeks to enforce a provision in a decree awarding him or her half of the equity in marital property, the statute of limitations begins to accrue when there is evidence of indebtedness, which occurred in this case when Dawnette delivered the quitclaim deed to Christopher. Accordingly, we affirm the decision of the district court.

PARRAGUIRRE, C.J., and HARDESTY, DOUGLAS, GIBBONS, and PICKERING, JJ., concur.

RHONDA HELENE MONA; AND MICHAEL J. MONA, JR., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOSEPH HARDY, JR., DISTRICT JUDGE, RESPONDENTS, AND FAR WEST INDUSTRIES, REAL PARTY IN INTEREST.

No. 68434

September 29, 2016 380 P.3d 836

Original petition for a writ of mandamus or prohibition challenging a district court post-judgment sanctions order.

After California court entered judgment against husband-trustee individually and as trustee of family trust in fraud action, and after judgment creditor brought action to domesticate foreign judgment and husband-trustee and wife-cotrustee failed to produce documents related to wife-cotrustee's personal bank accounts, pursuant to court-ordered judgment debtor examination, husband-trustee and wife-cotrustee filed petition for mandamus or prohibition, seeking to compel the district court to vacate order sanctioning husband-trustee and wife-cotrustee and subjecting wife's personal accounts to execution to satisfy judgment. The supreme court, GIBBONS, J., held that: (1) as a matter of first impression, wife-cotrustee was, in her individual capacity, distinct legal person and stranger to wife-cotrustee in her representative capacity as cotrustee of family trust; (2) the district court erred by ordering discovery regarding wife-cotrustee's personal bank; and (3) the district court could not invoke satisfaction-of-judgment statute and order wife-cotrustee's personal bank accounts to be subject to execution.

Petition granted in part and denied in part.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Petitioner Rhonda Helene Mona.

Marquis Aurbach Coffing and *Terry A. Coffing, Micah S. Echols*, and *Tye S. Hanseen*, Las Vegas, for Petitioner Michael J. Mona, Jr.

Holley Driggs Walch Fine Wray Puzey & Thompson and *F. Thomas Edwards, Rachel E. Donn*, and *Andrea M. Gandara*, Las Vegas, for Real Party in Interest Far West Industries.

1. COURTS.
   The supreme court has original jurisdiction to issue writs of mandamus and prohibition. Const. art. 6, § 4(1).
2. COURTS.
   Where there is no plain, speedy, and adequate remedy available at law, extraordinary relief may be available. NRS 34.170.

3. Courts.
   Even if an adequate legal remedy exists, the supreme court will consider a writ petition for extraordinary relief if an important issue of law needs clarification or if review would serve a public policy or judicial economy interest.
4. Courts.
   The supreme court will examine each case individually, granting extraordinary relief if the circumstances reveal urgency or strong necessity.
5. Prohibition.
   A writ of prohibition is the appropriate remedy for a district court's improper exercise of jurisdiction. NRS 34.320.
6. Mandamus.
   A writ of mandamus is available to control an arbitrary or capricious exercise of discretion.
7. Mandamus.
   For purposes of petition for a writ of mandamus, a district court's exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law.
8. Appeal and Error; Constitutional Law.
   As a general principle, the supreme court practices judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand.
9. Appeal and Error.
   A sanctions order is final and appealable.
10. Appeal and Error.
    When the sanctioned party was not a party to the litigation below, he or she has no standing to appeal.
11. Mandamus; Prohibition.
    The supreme court would exercise its discretion to consider husband-trustee's and wife-cotrustee's petition for writ of mandamus or prohibition seeking to compel vacatur of the district court's post-judgment sanction order, in judgment debtor's action to domesticate foreign judgment and collect against husband-trustee and wife-cotrustee, since petition involved the district court's improper exercise of jurisdiction in judgment creditor's attempt to proceed against nonparty in collection matter, which was significant and potentially recurring question of law requiring clarification, and, additionally, since wife-cotrustee was not a party to litigation below she had no standing to appeal.
12. Courts.
    When interpreting Nevada's Rules of Civil Procedure, the supreme court turns to the rules of statutory interpretation.
13. Courts.
    Even in the context of a writ petition, statutory interpretation is a question of law that the supreme court reviews de novo.
14. Statutes.
    Statutory language must be given its plain meaning if it is clear and unambiguous.
15. Appeal and Error.
    Whether personal jurisdiction has been established is a question of law that the supreme court reviews de novo.
16. Appeal and Error.
    The supreme court reviews a district court's imposition of discovery sanctions under the applicable rule for an abuse of discretion. NRCP 37(b)(2).

17. EXECUTION.
The district court may order a third party in possession of property of a judgment debtor to submit to examination regarding such property. NRS 21.300.

18. EXECUTION.
A creditor is always entitled to prosecute the inquiry to such an extent as to enable the creditor to ascertain the true condition of the property and business affairs of the judgment debtor.

19. EXECUTION.
The procedures allowing a judgment creditor to examine a third party in possession of a judgment debtor's property do not automatically entitle the judgment creditor to an order requiring the third party to pay over money in satisfaction of the judgment, unless such person admits the indebtedness and acknowledges the possession or control of the amount due, or these facts are established by clear and indisputable evidence.

20. EXECUTION.
When a writ of execution or garnishment has been issued and a third party admits the debt to a judgment debtor, the district court may order any property of the judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment. NRS 21.320.

21. EXECUTION.
In the event that a third party in possession of the judgment debtor's property claims an adverse interest in the property, the court cannot order that the property be applied toward a judgment.

22. EXECUTION.
When a third party in possession of a judgment debtor's property claims an adverse interest in the property, the applicable statute governing supplementary proceedings to execution of a judgment permits a judgment creditor to institute a separate action against the third party. NRS 21.330.

23. EXECUTION.
Under the statute governing supplementary proceedings to execution of a judgment, a judgment creditor may request that the district court forbid transfer of the interest or debt at issue until the action commences and a judgment is issued. NRS 21.330.

24. PARTIES.
A person's representative capacity is distinguished from his or her individual capacity, and the differing capacities are generally treated as two different legal personages.

25. TRUSTS.
Wife-cotrustee was, in her individual capacity, distinct legal person and stranger to trustee in her representative capacity as co-trustee of family trust, for purposes of statute governing commission of tort by trustee. NRS 163.140(4).

26. EXECUTION.
The district court erred by ordering discovery regarding wife-cotrustee's personal bank accounts and ordering these accounts to be subject to execution by judgment creditor, in judgment creditor's action to satisfy judgment against husband-trustee individually and as trustee of family trust, to extent that order did not affect trust, where wife-cotrustee was managing agent of trust, but wife had not been sued in underlying action and thus was third party to it. NRCP 37.

27. EXECUTION.
The district court could not invoke remedies permitted by statute governing satisfaction of judgment and order wife-cotrustee's personal bank accounts to be subject to execution by judgment creditor, in judgment cred-

itor's action to satisfy judgment against husband-trustee individually and as trustee of family trust, since the district court did not hold hearing or order briefing concerning whether judgment creditor could establish, by clear and indisputable evidence, that funds contained in wife-cotrustee's accounts were community property subject to execution, and thus, the district court did not afford wife-cotrustee full opportunity to contest judgment creditor's contentions. NRS 21.320.

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, J.:

In this opinion, we consider whether the district court may require a co-trustee of a judgment debtor trust to produce documents regarding the co-trustee's personal finances pursuant to NRS 21.270, and subsequently order the co-trustee's personal bank accounts to be subject to execution pursuant to NRCP 37 and NRS 21.320 in partial satisfaction of a judgment. We conclude that the district court erred in ordering the co-trustee to produce documents and appear for an examination regarding her personal finances without the judgment creditor proceeding against the co-trustee in her individual capacity, or without the court clerk issuing a subpoena pursuant to NRCP 45 and the judgment creditor serving the subpoena upon the co-trustee. Additionally, we conclude that the district court erred when it ordered the co-trustee's personal bank accounts to be executed upon pursuant to NRCP 37 and NRS 21.320 and to be applied to partially satisfy a judgment.

FACTS AND PROCEDURAL HISTORY

Petitioners Michael and Rhonda Mona are co-trustees of the Mona Family Trust.[2] Real party in interest and judgment creditor Far West Industries filed suit in California against Michael Mona both individually and in his capacity as trustee of the Mona Family Trust. Far West did not name Michael's wife, Rhonda Mona, either as an individual defendant or as a defendant in her capacity as a trustee of the Mona Family Trust. The California Superior Court found that Michael Mona committed fraud and awarded Far West a $17.8 million judgment against Michael—both individually and in his capacity as trustee of the Mona Family Trust. The California court also found that Michael was the alter ego of the Mona Family Trust, and that both Michael and the Mona Family Trust were liable

[1]THE HONORABLE NANCY M. SAITTA, Justice, having retired, this matter was decided by a six-justice court.

[2]The Mona Family Trust is revocable.

for damages awarded to Far West. Far West then domesticated the California judgment in Nevada against Michael Mona and the Mona Family Trust.[3]

Just before Far West domesticated the California judgment, the Monas entered into a post-marital property settlement agreement, dividing the proceeds from a recent sale of corporate stock equally as their respective sole and separate property. After the California judgment was domesticated, the district court ordered Michael to appear for a judgment debtor examination and produce documents pursuant to NRS 21.270. Michael failed to disclose and produce the post-marital agreement in violation of the court order. Far West subsequently requested to examine Rhonda, as a trustee of the Mona Family Trust, pursuant to NRS 21.270. In response, the district court ordered another round of judgment debtor examinations—one for Michael and one for Rhonda as a trustee of the Mona Family Trust. The district court also ordered the Monas to produce an exhaustive list of documents, which included some of Rhonda's personal financial documents. Rhonda did not produce documents in compliance with the court order. Michael failed to produce documents relating to three bank accounts that may have held community property because the accounts were in Rhonda's name.

The district court entered an order to show cause why Rhonda's accounts should not be subject to execution to satisfy Far West's judgment, and why the court should not find the Monas in contempt for failure to comply with the court orders and for lying during the judgment debtor examinations. Following a hearing, the district court entered an order sanctioning the Monas pursuant to NRCP 37 due to the Monas' failure to produce the post-marital agreement as ordered and disclose bank records for the three bank accounts in Rhonda's name. In considering the sanctions available under NRCP 37, the district court found that the creation and funding of the post-marital agreement was a fraudulent transfer intended to hinder, delay, or defraud Far West pursuant to NRS 112.180. The district court concluded that the funds in Rhonda's three bank accounts were community property and were subject to execution by Far West pursuant to NRS 21.320 to partially satisfy the judgment. The district court further concluded that it had "authority pursuant to NRS 21.280 and, to the extent [Rhonda] is considered a third party, pursuant to NRS 21.330, to order [Michael] and [Rhonda] to not dispose and/or transfer their assets." The Monas subsequently filed this petition for writ of mandamus or prohibition seeking to vacate the district court's post-judgment sanctions order.

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[3]NRS 17.330-.400 govern domestication of foreign judgments. Once domesticated, a foreign judgment "may be enforced or satisfied in" the same manner as a judgment from a district court in this state. NRS 17.350.

DISCUSSION

Consideration of the writ petition

The Monas argue that this court should entertain the petition because (1) Rhonda was not a party to the district court litigation and cannot appeal or exercise any other remedy available at law, (2) the sanctions order is not appealable, and (3) the matter is urgent because the district court's post-judgment sanctions order will result in the release of all funds in Rhonda's separate bank account unless this court intervenes.

[Headnotes 1-4]

"This court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); *see also* Nev. Const. art. 6, § 4(1). Where there is no "plain, speedy, and adequate remedy" available at law, extraordinary relief may be available. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). However, even if an adequate legal remedy exists, this court will consider a writ petition if an important issue of law needs clarification or if review would serve a public policy or judicial economy interest. *See Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000). This court will examine each case individually, granting extraordinary relief if the "circumstances reveal urgency or strong necessity." *See Jeep Corp. v. Second Judicial Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

[Headnotes 5-8]

A writ of prohibition is the appropriate remedy for a district court's improper exercise of jurisdiction. *See* NRS 34.320; *see also Smith*, 107 Nev. at 677, 818 P.2d at 851. "A writ of mandamus is available . . . to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). "An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law." *Nev. Dep't of Pub. Safety v. Coley*, 132 Nev. 149, 153, 368 P.3d 758, 760 (2016) (internal quotations omitted). As a general principle, we practice judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand. *Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008).

[Headnotes 9, 10]

A sanctions order is final and appealable. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 245-46, 235 P.3d 592, 594 (2010).

However, where the sanctioned party was not a party to the litigation below, he or she has no standing to appeal. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011) (concluding that a party's sanctioned attorney had no standing to appeal).

[Headnote 11]

In this matter, we exercise our discretion to consider this writ petition because the petition involves the district court's improper exercise of jurisdiction in a judgment creditor's attempt to proceed against a nonparty in a collection matter. This is a significant and potentially recurring question of law that requires clarification. Additionally, since Rhonda was not a party to the litigation below, she has no standing to appeal. Therefore, we conclude that extraordinary relief is warranted.

Merits of the writ petition

[Headnotes 12-16]

"When interpreting Nevada's Rules of Civil Procedure, we turn to the rules of statutory interpretation." *Rock Bay, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 205, 210, 298 P.3d 441, 445 (2013). Even in the context of a writ petition, statutory interpretation is a question of law that this court reviews de novo. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 808, 312 P.3d 491, 498 (2013). Statutory language must be given its plain meaning if it is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). Additionally, whether personal jurisdiction has been established is a question of law that this court reviews de novo. *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 374, 328 P.3d 1152, 1156 (2014). However, we review a district court's imposition of discovery sanctions under NRCP 37(b)(2) for an abuse of discretion. *See Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010).

Writ relief requested as to Michael

After reviewing the petition, we conclude that Michael is not entitled to relief from the post-judgment sanctions order. The district court properly ordered Michael as a party to appear for a judgment debtor examination and produce the identified documents pursuant to NRS 21.270, NRCP 34, and NRCP 69. As Michael was a named defendant, the district court had personal jurisdiction over Michael and could sanction him under NRCP 37 for his failure to comply with the discovery order. Having reviewed the sanctions order, we conclude that it was not arbitrary or capricious as applied to Michael. Accordingly, we deny the petition for mandamus or prohibition relief as to Michael.

Writ relief requested as to Rhonda

The Monas argue that the district court's post-judgment sanctions order should be vacated as to Rhonda because the district court erred in sanctioning her pursuant to NRCP 37(b)(2) and NRS 21.320. Additionally, the Monas argue that Far West failed to bring a separate action and obtain a judgment against Rhonda before seeking to execute upon three bank accounts in her name. We agree that the district court erred when entering the sanctions order against Rhonda and grant the petition as to her.

Nevada law on execution of judgments

Nevada law provides procedures governing execution on a judgment, *see* NRS 21.010-.260, including proceedings supplementary to execution to aid the judgment creditor in collecting the judgment, *see Greene v. Eighth Judicial Dist. Court*, 115 Nev. 391, 395, 990 P.2d 184, 186 (1999); *see also* NRS 21.270-.340; NRCP 69(a) (providing that proceedings "in aid of execution shall be in accordance with the practice and procedure of the State," i.e., NRS Chapters 21 and 31). Under these procedures, a judgment creditor may conduct the examination of a judgment debtor "at any time after the judgment is entered," NRS 21.270(1), subject to the automatic stay procedures in NRCP 62(a) (10-day stay) and NRS 17.360(3) (30-day stay). NRCP 69(a) also authorizes the judgment creditor to "obtain discovery from any person, including the judgment debtor, in the manner provided in" the NRCP, which we have interpreted as authorizing the use of a subpoena to take limited discovery from third parties in certain circumstances. *See* NRCP 45; *Rock Bay*, 129 Nev. at 210, 298 P.3d at 445-46; *see also* NRS 21.310 ("Witnesses may be required to appear and testify before the judge or master conducting any proceeding under this chapter in the same manner as upon the trial of an issue.").

[Headnotes 17, 18]

Other procedures become available to a judgment creditor and the district court once writs of garnishment or execution have issued and the returns have been filed. For instance, if the "debtor unjustly refuses to apply [property] toward the satisfaction of the judgment," the district court may order the judgment debtor to appear and answer questions regarding property and may order the arrest and imprisonment of the debtor if the debtor is in danger of absconding and refuses to post sufficient surety for the judgment. NRS 21.280. The district court may also "order a third party in possession of property of the judgment debtor to . . . submit to examination regarding such property." *Greene*, 115 Nev. at 395, 990 P.2d at 186; *see* NRS 21.300. These procedures have existed and been largely unchanged

since Nevada became a state, and now, as then, "[t]he creditor is always entitled to prosecute the inquiry to such an extent as to enable him to ascertain the true condition of the property and business affairs of the judgment debtor." *Hagerman v. Tong Lee*, 12 Nev. 331, 334-35 (1877).

[Headnotes 19-23]

But these procedures do not automatically entitle a judgment creditor to an order requiring a third party "to pay over money in satisfaction of the judgment, unless such person admits the indebtedness and acknowledges the possession or control of the amount due, or these facts are established by clear and indisputable evidence." *Id.* at 335. Thus, where a writ of execution or garnishment has been issued and the third party admits the debt to the judgment debtor, the district court "may order any property of the judgment debtor not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment." NRS 21.320. However, in the event that a "third party [in possession of the judgment debtor's property] claims an adverse interest in the property, the court cannot order that the property be applied toward the judgment." *Greene*, 115 Nev. at 395, 990 P.2d at 186; *Hagerman*, 12 Nev. at 335-36 ("When these various sections are considered together, it seems perfectly plain that the judge or referee can only order property to be applied to the satisfaction of the judgment when the debtor's title thereto is clear and undisputed."). "Instead, NRS 21.330 permits a judgment creditor to institute [a separate] action against the third parties with adverse claims to the property of a judgment debtor." *Greene*, 115 Nev. at 395, 990 P.2d at 186. Under NRS 21.330, a judgment creditor may also request that the district court forbid transfer of the interest or debt at issue until the action commences and a judgment is issued.

Rhonda, in her individual capacity, is a third party to the collection action

Given that differing procedures apply to judgment debtors versus third parties, we must consider Rhonda's status as a co-trustee of the Mona Family Trust and how these procedures apply to her in that capacity. Far West requested discovery from Rhonda in her capacity as a trustee of the Mona Family Trust, but demanded her personal financial documents in addition to trust-related documents. The district court sanctioned Rhonda for her failure to produce documents relating to her personal bank accounts, not accounts in the name of the trust, and ordered the amounts in her personal accounts to be used to satisfy Far West's judgment. We have not previously addressed the distinction between a person's individual capacity and her representative capacity as a trustee.

[Headnotes 24, 25]

At common law, a trustee was not a juristic entity that could sue or be sued; thus, a trustee was individually liable for injuries to third parties. *Richardson v. Klaesson*, 210 F.3d 811, 813-14 (8th Cir. 2000); *see also* 4 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* § 26.1, at 1870-71 (5th ed. 2007). Modernly, however, a person's representative capacity is distinguished from her individual capacity, and the differing "capacities are generally treated as . . . two different legal personages." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543-44 & n.6 (1986) (internal quotation marks omitted); *see also Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862 (2d Cir. 1995) ("Where a party sues or is sued in a representative capacity, however, its legal status is regarded as distinct from its position when it operates in an individual capacity."); *N. Tr. Co. v. Bunge Corp.*, 899 F.2d 591, 595 (7th Cir. 1990) ("In the eyes of the law a person who sues or is sued in a representative capacity is distinct from that person in his individual capacity."); Restatement (Third) of Trusts § 105 cmt. c (Am. Law Inst. 2012). The Nevada Legislature has recognized this distinction in NRS 163.140(4), which provides that a trustee may be held personally liable for a tort only if the trustee is personally at fault. *See also* NRS 163.120(3) (providing that a trustee is generally not personally liable on a contract entered into in a representative capacity). Thus, Rhonda, in her individual capacity, is a distinct legal person and is a stranger to Rhonda in her representative capacity as a trustee of the Mona Family Trust. *See Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966).

As applied to this matter, Rhonda, in her individual capacity, is a third party to the domesticated California judgment and the collection action because Far West failed to name her as a party to the initial suit in California. However, Rhonda, in her representative capacity as a trustee of the Mona Family Trust, is a "managing agent of a party," the trust, as stated in NRCP 37. *See* NRCP 37(b)(2) (permitting sanctions against a "managing agent of a party" if the managing agent fails to obey an order to provide or permit discovery).

> *The district court erred in ordering Rhonda to produce documents and appear for an examination about her personal accounts and in ordering her bank accounts to be subject to execution pursuant to NRCP 37 and NRS 21.320*

[Headnote 26]

We conclude that the district court erred by ordering discovery regarding Rhonda's personal bank accounts and ordering that those

accounts are subject to execution. First, Far West moved to examine Rhonda as a managing agent of the Mona Family Trust, and the district court ordered Rhonda's examination and ordered her to produce documents. The district court order, however, directed Rhonda to produce both the trust's and her personal financial documents. To the extent that the order affected the trust, the order was proper. In her representative capacity as trustee, Rhonda is a managing agent of the trust and may be ordered to produce documents regarding the trust's finances and affairs under NRCP 34 and NRCP 69, and answer questions concerning the same under NRS 21.270. However, because Rhonda in her representative capacity is a different legal personage than Rhonda in her individual capacity, NRCP 34 and NRS 21.270 may not be used to compel Rhonda to produce documents or answer questions concerning her personal finances and affairs because she, in her individual capacity, is a third party to the underlying action. Therefore, both Far West and the district court incorrectly conflated Rhonda's individual capacity with her representative capacity as a trustee and managing agent of the Mona Family Trust.

Far West did not treat Rhonda, in her individual capacity, as a third party and did not request the district court clerk to issue a subpoena and a subpoena duces tecum pursuant to NRCP 45(a)(1) requiring Rhonda to appear and testify and produce documents. In response to such a subpoena, Rhonda would have had the opportunity to object and request a protective order pursuant to NRCP 45(b)(1) and NRCP 45(d)(1). *See also Rock Bay*, 129 Nev. at 211, 298 P.3d at 445-46 (discussing the circumstances under which discovery is available from third parties in collection actions). In turn, the district court could have sanctioned Rhonda upon a showing of willful disregard for the procedures outlined in NRCP 45. *See Humana Inc. v. Eighth Judicial Dist. Court*, 110 Nev. 121, 123, 867 P.2d 1147, 1149 (1994).

Nor did Far West cause a writ of execution or garnishment to be served upon Rhonda, in her individual capacity, as a third party to the action and a debtor of the judgment debtor Michael.[4] Thus, Rhonda had no opportunity to file a return and object to execution of the judgment upon her personal accounts. *See* NRS 21.040; NRS

[4]Because Rhonda's individual and representative capacities are viewed as separate legal persons, service on Rhonda, in her individual capacity, must satisfy all requisite service requirements, unless waived, in order to establish the district court's personal jurisdiction over her. *See* NRCP 45(b); NRS 21.075; NRS 21.076; NRS 21.120; NRS 31.270; *see also C.H.A. Venture v. G.C. Wallace Consulting Eng'rs, Inc.*, 106 Nev. 381, 384, 794 P.2d 707, 709 (1990) ("[N]otice is not a substitute for service of process. Personal service or a legally provided substitute must still occur in order to obtain jurisdiction over a party.").

21.330; *see also* NRS 21.300 (permitting an examination of a debtor of a judgment debtor "[a]fter the issuing or return of an execution against property of the judgment debtor").

Second, to the extent that the district court was attempting to sanction Rhonda under NRCP 37, as trustee of the Mona Family Trust, for failing to produce documents concerning the trust or to appear for an examination, the district court erred in ordering Rhonda's three bank accounts to be subject to execution by Far West to attempt to satisfy the judgment. While sanctions against a managing agent of a party are available under NRCP 37, including the ability to hold a managing agent in contempt, the district court may not subject a managing agent's personal assets to execution to attempt to satisfy a judgment as sanctions under NRCP 37.

[Headnote 27]

Third, the district court erred in invoking remedies pursuant to NRS 21.320. Initially, the remedies in NRS 21.320 may only be invoked after a writ of execution or garnishment has been issued—the judgment creditor and the district court are not entitled to unilaterally seize a third party's assets without following the post-judgment execution procedures. Even if the writs had issued properly, however, the district court did not follow the proper procedure because Rhonda was not afforded a full opportunity to contest Far West's contentions regarding the status of the funds in her three bank accounts. NRS 21.320 allows the district court to judicially assign the judgment debtor's property, or property due the judgment debtor, in the hands of a third party towards satisfaction of the judgment if the third party "admits the indebtedness and acknowledges the possession or control of the amount due, or these facts are established by clear and indisputable evidence." *Hagerman*, 12 Nev. at 335. Rhonda argued in the district court that the funds contained in her three personal bank accounts constituted her sole and separate property. Because Rhonda claimed an adverse interest in the property, the district court erred in summarily concluding that the funds in her account constituted community property and ordering that the proceeds of Rhonda's accounts be applied towards partial satisfaction of the judgment against Michael. *See Greene*, 115 Nev. at 395, 990 P.2d at 186. Instead, the district court should have held a hearing or ordered briefing concerning whether Far West could establish, "by clear and indisputable evidence," *Hagerman*, 12 Nev. at 335, that the funds were community property. If such could not be established, then the district court cannot order the accounts to be applied towards partial satisfaction of the judgment against Michael, but may issue an order forbidding the transfer of the funds and authorizing Far West to institute a separate action to recover

the funds in Rhonda's personal bank accounts. *See id.*; *see also* NRS 21.330.

CONCLUSION

We choose to entertain the Monas' petition for a writ of mandamus or prohibition. In doing so, we deny relief as to Michael. However, we conclude that the district court erred in ordering Rhonda to appear for an examination and produce personal financial documents without the district court clerk issuing a subpoena and subpoena duces tecum pursuant to NRCP 45 and Far West serving the subpoenas upon Rhonda, or without a writ of execution or attachment being issued and served upon her in her individual capacity. Additionally, we conclude that the district court erred when it sanctioned Rhonda under NRCP 37 and ordered the proceeds of Rhonda's personal bank accounts to be subject to execution to attempt to satisfy the judgment. An individual's personal assets are not subject to discovery or execution merely because the individual also serves as the managing agent of a judgment debtor in a representative capacity. Accordingly, we grant the petition as to Rhonda. We direct the clerk of court to issue a writ of prohibition directing the district court to vacate the post-judgment sanctions order as to Rhonda and instructing the district court to conduct further proceedings consistent with this opinion.[5]

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

[5]We decline to address the applicability of *Randono v. Turk*, 86 Nev. 123, 466 P.2d 218 (1970), or whether Rhonda's personal accounts may ultimately be subject to execution because this matter does not involve a writ of execution or attachment issued against Rhonda, in her individual capacity, or a separate action against her personally. Thus, the parties' arguments regarding these issues are premature.

DAN SCHWARTZ, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NEVADA, APPELLANT, *v.* HELLEN QUAN LOPEZ, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, C.Q.; MICHELLE GORELOW, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, A.G. AND H.G.; ELECTRA SKRYZDLEWSKI, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, L.M.; JENNIFER CARR, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, W.C., A.C., AND E.C.; LINDA JOHNSON, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K.J.; AND SARAH SOLOMON AND BRIAN SOLOMON, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, D.S. AND K.S., RESPONDENTS.

No. 69611

RUBY DUNCAN, AN INDIVIDUAL; RABBI MEL HECHT, AN INDIVIDUAL; HOWARD WATTS, III, AN INDIVIDUAL; LEORA OLIVAS, AN INDIVIDUAL; AND ADAM BERGER, AN INDIVIDUAL, APPELLANTS, *v.* THE STATE OF NEVADA OFFICE OF THE STATE TREASURER; THE STATE OF NEVADA DEPARTMENT OF EDUCATION; DAN SCHWARTZ, NEVADA STATE TREASURER, IN HIS OFFICIAL CAPACITY; STEVE CANAVERO, INTERIM SUPERINTENDENT OF PUBLIC INSTRUCTION, IN HIS OFFICIAL CAPACITY; AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; AND TRINA SMITH, RESPONDENTS.

No. 70648

September 29, 2016 382 P.3d 886

Appeals from a district court order granting a preliminary injunction (Docket No. 69611) and from a district court order dismissing a complaint (Docket No. 70648). First Judicial District Court, Carson City; James E. Wilson, Judge (Docket No. 69611), and Eighth Judicial District Court, Clark County; Eric Johnson, Judge (Docket No. 70648).

In Docket No. 69611, Nevada citizens and parents of children enrolled in public schools filed complaint against State Treasurer, seeking declaration that legislation creating education savings accounts into which public funds were transferred from state Distributive School Account for parents to use to subsidize private school, tutoring, or other non-public educational services was unconstitutional and sought injunctive relief. The First Judicial District Court, Carson City, James E. Wilson, J., granted preliminary injunction, but rejected constitutional challenge. State Treasurer appealed. In Docket No. 70648, citizens filed complaint challenging constitutionality of education savings account program. Parents of children

who had opened such accounts intervened. The Eighth Judicial District Court, Clark County, Eric Johnson, J., dismissed complaint. Citizens appealed. The supreme court, HARDESTY, J., held that: (1) plaintiffs had standing, under public-importance exception to injury requirement, to assert constitutional challenge to legislation establishing education spending account program; (2) legislation creating education savings accounts did not violate provision of Nevada Constitution requiring Legislature to provide for uniform system of common schools by allegedly allowing for use of funds to subsidize non-common, non-uniform private schools and home-based schooling that were not subject to curriculum requirements and performance standards; (3) legislation creating education savings accounts program did not violate provision of Nevada Constitution prohibiting use of public funds for sectarian purpose; (4) legislation creating education savings account program was not appropriation of public funds for education savings accounts; and (5) use of public funds from amount appropriated to DSA to fund education savings accounts violated Nevada Constitution's provisions requiring establishment of uniform system of common schools and appropriation of public funds to operate public schools.

Affirmed in part, reversed in part, and remanded (Docket No. 69611); affirmed in part, reversed in part, and remanded (Docket No. 70648).

DOUGLAS, J., with whom CHERRY, J., agreed, dissented in part.

Adam Paul Laxalt, Attorney General, *Lawrence VanDyke*, Solicitor General, *Ketan Bhirud*, General Counsel, *Joseph Tartakovsky*, Deputy Solicitor General, and *Jordan T. Smith*, Assistant Solicitor General, Carson City; *Bancroft PLLC* and *Paul D. Clement*, Washington, D.C., for Dan Schwartz, Steve Canavero, the Nevada Office of the Treasurer, and the Nevada Department of Education.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Don Springmeyer, Justin C. Jones*, and *Bradley S. Schrager*, Las Vegas; *Munger, Tolles & Olson LLP* and *Tamerlin J. Godley, Thomas Paul Clancy*, and *Samuel T. Boyd*, Los Angeles, California; *Education Law Center* and *David G. Sciarra* and *Amanda Morgan*, Newark, New Jersey, for Jennifer Carr, Michelle Gorelow, Linda Johnson, Hellen Quan Lopez, Electra Skryzdlewski, Brian Solomon, and Sarah Solomon.

American Civil Liberties Union of Nevada and *Amy M. Rose*, Las Vegas; *Americans United for Separation of Church and State* and *Richard B. Katskee* and *Gregory M. Lipper*, Washington, D.C.; *American Civil Liberties Union Foundation* and *Daniel Mach* and *Heather L. Weaver*, Washington, D.C.; *Covington & Burling LLP*

and *Nitin Subhedar* and *Samuel Jacob Edwards*, San Francisco, California, for Adam Berger, Ruby Duncan, Mel Hecht, Leora Olivas, and Howard Watts, III.

Kolesar & Leatham, Chtd., and *Matthew T. Dushoff* and *Lisa J. Zastrow*, Las Vegas; *Institute for Justice* and *Timothy D. Keller* and *Keith E. Diggs*, Tempe, Arizona, for Lara Allen, Aurora Espinoza, Aimee Hairr, Elizabeth Robbins, Jeffrey Smith, and Trina Smith.

Ashcraft & Barr LLP and *Jeffrey F. Barr*, Las Vegas; *Eric C. Rassbach, Diana M. Verm*, and *Lori H. Windham*, Washington, D.C., for Amicus Curiae The Becket Fund for Religious Liberty.

Muehlbauer Law Office, Ltd., and *Andrew R. Muehlbauer*, Las Vegas; *Wisconsin Institute for Law & Liberty* and *Richard M. Esenberg* and *CJ Szafir*, Milwaukee, Wisconsin, for Amici Curiae The American Federation for Children, Hispanics for School Choice, School Choice Wisconsin, Dr. Patrick J. Wolf, and Wisconsin Institute for Law & Liberty.

Sande Law Group and *John P. Sande, IV*, and *Victor Salcido*, Las Vegas, for Amicus Curiae Friedman Foundation for Educational Choice.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Amici Curiae National School Boards Association and Nevada Association of School Boards.

Leon Greenberg Professional Corporation and *Leon M. Greenberg* and *Julie Underwood*, Las Vegas, for Amici Curiae Association of Wisconsin School Administrators, Horace Mann League, Network for Public Education, Wisconsin Alliance for Excellent Schools, and Wisconsin Association of School District Administrators.

Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty and *Francis C. Flaherty* and *Casey A. Gillham*, Carson City; *National Education Association* and *Kristen L. Hollar*, Washington, D.C., for Amici Curiae National Educational Association and Nevada State Education Association.

Reisman Sorokac and *Joshua H. Reisman* and *Heidi J. Parry Stern*, Las Vegas, for Amici Curiae Baptist Joint Committee for Religious Liberty and Hindu American Foundation.

Marquis Aurbach Coffing and *Micah S. Echols*, Las Vegas; *Wilmer Cutler Pickering Hale and Dorr LLP* and *Todd Zubler,*

Daniel Hartman, and *Kevin Gallagher*, Washington, D.C., for Amicus Curiae Foundation for Excellence in Education.

Woodburn & Wedge and *W. Chris Wicker*, Reno, for Amici Curiae Mexican-American Legal Defense and Educational Fund, Las Vegas NAACP, and Southern Poverty Law Center.

1. Action.
   The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation.
2. Action.
   The primary purpose of the standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party.
3. Constitutional Law.
   Parents of children attending public schools had standing, under public-importance exception to injury requirement, to assert constitutional challenge to legislation establishing education spending account program, which allowed public funds to be transferred from state distributive school account to private education savings accounts maintained for benefit of children attending private schools, tutoring, and other non-public educational services, where funding of public education was matter of significant statewide importance, parents were challenging legislation affecting funding of public education as violative of various provisions of Nevada Constitution, and parents were appropriate parties, as there was no one else in better position to raise constitutional challenge.
4. Action.
   In order to have standing, a party must generally show a personal injury and not merely a general interest that is common to all members of the public.
5. Action.
   Under the public-importance exception to the injury requirement for standing, the supreme court may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury.
6. Action.
   The public-importance exception to the injury requirement for standing is narrow and available only if the following criteria are met: (1) the case must involve an issue of significant public importance; (2) the case must involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution; and (3) the plaintiff must be an "appropriate party," meaning that there is no one else in a better position who will likely bring an action and that the plaintiff is capable of fully advocating his or her position in court.
7. Appeal and Error.
   The constitutionality of a statute is a legal question reviewed de novo by the supreme court.
8. Constitutional Law.
   In considering a constitutional challenge to a statute, the supreme court must start with the presumption in favor of constitutionality, and therefore, the supreme court will interfere only when the constitution is clearly violated.

9. Constitutional Law.
When making a facial challenge to the constitutionality of a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid.

10. Constitutional Law.
The rules of statutory construction apply when interpreting a constitutional provision.

11. Constitutional Law.
In interpreting a provision of the constitution, the supreme court will look to the plain language of the provision if it is unambiguous; if, however, the provision is subject to more than one reasonable interpretation, the provision is ambiguous, and the supreme court will look beyond the plain language and consider the provision's history, public policy, and reason in order to ascertain the intent of the drafters.

12. Constitutional Law.
The interpretation of an ambiguous constitutional provision must take into consideration the spirit of the provision and avoid absurd results.

13. Education.
Legislation establishing education spending account program, which allowed public funds to be transferred from state distributive school account to private education savings accounts maintained for benefit of children attending private schools, tutoring, and other non-public educational services, did not violate provision of Nevada Constitution requiring Legislature to provide for uniform system of common schools, by allegedly allowing for use of funds to subsidize non-common, non-uniform private schools and home-based schooling that were not subject to curriculum requirements and performance standards, where uniform requirement was concerned with uniformity within public schools, education spending account program did not alter existence or structure of public school system, and program was consistent with other provision of constitution requiring Legislature to encourage education by all suitable means. Const. art. 11, §§ 1, 2; NRS 353B.700 *et seq.*

14. Education.
The legislative duty to maintain a uniform public school system is not a ceiling but a floor upon which the Legislature can build additional opportunities for school children. Const. art. 11, § 2.

15. Constitutional Law; Education.
Legislation establishing education spending account program, which allowed public funds to be transferred from state distributive school account to private education savings accounts opened by parents and maintained for benefit of children attending private schools, tutoring, and other non-public educational services, did not violate provision of Nevada Constitution prohibiting use of public funds for sectarian purpose; once funds were transferred to account, they were no longer public funds but instead were funds that belonged to parent who established account, parent decided how that money was spent for child's education, parent could choose from variety of approved schools, both sectarian and non-sectarian, for which funds could be used, and fact that funds could be used only for authorized educational expenses did not alter fact that funds belonged to parent. Const. art. 11, § 10; NRS 353B.700 *et seq.*

16. Education.
Legislation establishing education spending account program, which allowed public funds to be transferred from state distributive school ac-

count to private education savings accounts opened by parents and maintained for benefit of children attending private schools, tutoring, and other non-public educational services, was not appropriation of public funds for education savings accounts; program did not limit number of education savings accounts that could be created nor maximum sum that would be utilized to fund accounts, and legislation was passed prior to statute appropriating funds for public education, which, if passed as appropriation would have violated Nevada Constitution's requirement that Legislature enact one or more appropriations to fund operation of public schools for grades K through 12 before any other appropriation is enacted to fund portion of state budget. Const. art. 4, § 19; Const. art. 11, § 6(2); NRS 353B.700 *et seq*.

17. States.

An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.

18. States.

General legislation may contain an appropriation to fund its operation.

19. States.

No technical words are necessary to constitute an appropriation if there is a clear legislative intent authorizing the expenditure and a maximum amount set aside for the payment of claims or at least a formula by which the amount can be determined; in other words, there must be clear language manifesting a clear intent to appropriate.

20. Appeal and Error.

The supreme court may raise sua sponte a constitutional issue not asserted in the district court.

21. Education.

Statute appropriating $2 billion to State Distributive School Account (DSA) for biennium was not deemed to fund both public school system and education savings accounts program that allowed public funds to be transferred from DSA to private education savings accounts opened by parents and maintained for benefit of children attending private schools, tutoring, and other non-public educational services, and thus, use of public funds from amount appropriated to DSA to fund education savings accounts violated Nevada Constitution's provisions requiring establishment of uniform system of common schools and appropriation of public funds to operate public schools each biennium before any other appropriation was enacted; statute did not mention, let alone appropriate, any funds for education savings accounts, statute stated that it was act ensuring funding of K-12 public education for 2015-2017 biennium, and there was no line item for funding education savings accounts. Const. art. 11, §§ 2, 6(2); NRS 353B.700 *et seq*.

22. States.

The supreme court will not infer an appropriation for a specific purpose when the legislative act does not expressly authorize the expenditure for that purpose.

Before the Court En Banc.*

***Reporter's Note:** The Honorable Nancy M. Saitta, Justice, having retired, this matter was decided by a six-justice court.

OPINION

By the Court, HARDESTY, J.:

In 2015, the Nevada Legislature passed the Education Savings Account (ESA) program, which allows public funds to be transferred from the State Distributive School Account into private education savings accounts maintained for the benefit of school-aged children to pay for private schooling, tutoring, and other non-public educational services and expenses. Two separate complaints were filed challenging the ESA program as violating several provisions of the Education Article in the Nevada Constitution. In one case, the district court rejected all of the constitutional claims and dismissed the complaint. In the other case, the district court found that one of the constitutional challenges had merit and granted a preliminary injunction. These appeals were brought, and because they share common legal questions as to the constitutionality of the ESA program, we resolve them together in this opinion.

We are asked to decide whether the ESA program is constitutional under Nevada Constitution Article 11, Section 2 (requiring a uniform system of common schools), Section 6 (obligating the Legislature to appropriate funds to operate the public schools before any other appropriation is enacted for the biennium), and Section 10 (prohibiting the use of public funds for a sectarian purpose). We must emphasize that the merit and efficacy of the ESA program is not before us, for those considerations involve public policy choices left to the sound wisdom and discretion of our state Legislature. But it is the judiciary's role to determine the meaning of the Constitution and to uphold it against contrary legislation. Thus, the scope of our inquiry is whether the ESA program complies with these constitutional provisions.

For the reasons set forth in this opinion, we conclude that Article 11, Section 1 does not limit the Legislature's discretion to encourage other methods of education. Based on that reasoning, the ESA program is not contrary to the Legislature's duty under Article 11, Section 2 to provide for a uniform system of common schools. We also conclude that funds placed in education savings accounts under SB 302 belong to the parents and are not "public funds" subject to Article 11, Section 10.

The issue remaining relates to the funding of the education savings accounts. Based on the State Treasurer's concession that SB 302 does not operate as an appropriation bill, and that nothing in the legislative measure creating the State Distributive School Account funding for public education provides an appropriation for education savings accounts, we must conclude that the use of money that the Legislature appropriated for K-12 public education to instead fund education savings accounts undermines the constitutional mandates

under Sections 2 and 6 to fund public education. Accordingly, we affirm in part and reverse in part the district court orders in both cases, and we remand each case for the entry of a final declaratory judgment and a permanent injunction enjoining the use of any money appropriated for K-12 public education in the State Distributive School Account to instead fund the education savings accounts.

I.

A.

The ESA program is contained in Senate Bill (SB) 302, passed by the Nevada Legislature in 2015. It allows grants of public funds to be transferred into private education savings accounts for Nevada school-aged children to pay for their private schooling, tutoring, and other non-public educational services and expenses. The ESA program provides financial resources for children to pay for an alternative to education in the public school system. SB 302 was passed by the Legislature on May 29, 2015, and signed into law by the governor on June 2, 2015. 2015 Nev. Stat., ch. 332, at 1824.[1]

An education savings account is established when a parent enters into an agreement with the State Treasurer for the creation of the account. NRS 353B.850(1). To be eligible for an account, a child must have been enrolled in public school for 100 consecutive days immediately preceding the account's establishment. *Id.* The accounts are administered by the Treasurer and must be maintained with a financial management firm chosen by the Treasurer. NRS 353B.850(1), (2); NRS 353B.880(1). Once an account is created, the amount of money deposited into it by the Treasurer each year is equal to a percentage of the statewide average basic support guarantee per pupil: 100 percent for disabled and low-income children ($5,710 for the 2015-16 school year) and 90 percent for all other children ($5,139 for the 2015-16 school year). NRS 353B.860(2); 2015 Nev. Stat., ch. 537, § 1, at 3736. The money is deposited in quarterly installments and may be carried forward from year to year if the agreement is renewed for that student. NRS 353B.860(5), (6). An ESA agreement is valid for one school year but may be terminated early. NRS 353B.850(4). If the child's parent terminates the ESA agreement, or if the child graduates from high school or moves out of state after an account is created, unused funds revert to the State General Fund. NRS 353B.850(5); NRS 353B.860(6)(b). The statutory provisions governing the ESA program contain no limit on the number of education savings accounts that can be created and no maximum sum of money that can be utilized to fund the accounts for the biennium. NRS 353B.700-.930.

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[1]The provisions governing the ESA program are codified in NRS 353B.700-.930. *See* 2015 Nev. Stat., ch. 332, §§ 2-15, at 1826-31. SB 302 became effective on January 1, 2016. 2015 Nev. Stat., ch. 332, § 17(1), at 1848.

The ESA program requires participating students to receive instruction from one or more "participating entities," which include private schools, a university, a program of distance education, tutors, and parents. NRS 353B.850(1)(a); NRS 353B.900. For a private school to qualify as a participating entity, it must be licensed or exempt from such licensing pursuant to NRS 394.211; "[e]lementary and secondary educational institutions operated by churches, religious organizations and faith-based ministries" are exempt from licensing under NRS 394.211 and thus may qualify as a participating entity. NRS 353B.900(1)(a); NRS 394.211(1)(d). The ESA funds may only be spent on authorized educational expenses, which include tuition and fees, textbooks, tutoring or teaching services, testing and assessment fees, disability services, and transportation to and from the participating entities. NRS 353B.870(1). An account may be frozen or dissolved if the Treasurer determines that there has been a substantial misuse of funds. NRS 353B.880(3).

B.

On June 1, 2015, three days after passing SB 302, the Nevada Legislature passed SB 515, an appropriations bill to fund K-12 public education for the 2015-17 biennium. SB 515 was approved by the governor on June 11, 2015. 2015 Nev. Stat., ch. 537, at 3736. In SB 515, the Legislature applied a formula-based statutory framework known as the Nevada Plan to establish the basic support guarantee for each school district, which is the amount of money each district is guaranteed to fund the operation of its schools. *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. 35, 49 n.8, 293 P.3d 874, 883 n.8 (2013); *Rogers v. Heller*, 117 Nev. 169, 174, 18 P.3d 1034, 1037 (2001) (describing the Nevada Plan). The basic support guarantee is established as a per-pupil amount for each school district, and the amount varies between districts based on the historical cost of educating a child in that district. NRS 387.122(1). The per-pupil basic support guarantee is then multiplied by the district's enrollment. NRS 387.1223(2). Once the total amount of the basic support guarantee is established for each district, the State determines how much each school district can contribute from locally collected revenue, and the State makes up the disparity by paying to each district the difference between the basic support guarantee and the local funding. *See* NRS 387.121(1).

To fund the basic support guarantee, state revenue is deposited into the State Distributive School Account (DSA), which is located in the State General Fund. NRS 387.030. Money placed in the DSA must "be apportioned among the several school districts and charter schools of this State at the times and in the manner provided by law." NRS 387.030(2). Additional funds may be advanced if the DSA is insufficient to pay the basic support guarantee. 2015

Nev. Stat., ch. 537, § 9, at 3741. Because student enrollment may fluctuate from year to year, a "hold-harmless" provision allows a district's DSA funding to be based on enrollment from the prior year if enrollment in that particular district decreases by five percent or more from one year to the next. NRS 387.1223(3).

SB 515 sets forth the specific amounts of the per-pupil basic support guarantee for each district. 2015 Nev. Stat., ch. 537, §§ 1-2, at 3736-37. Although the amounts vary from district to district, the *average* basic support guarantee per pupil is $5,710 for FY2015-16 and $5,774 for FY2016-17. *Id.* §§ 1-2(1), at 3736. To fund the basic support guarantee for K-12 public schools, SB 515 appropriated a total of just over $2 billion from the State General Fund to the DSA for the 2015-17 biennium. *Id.* § 7, at 3740.

C.

When an education savings account is created, the amount of money deposited by the Treasurer into an account for a child within a particular school district is deducted from that school district's apportionment of legislatively appropriated funds in the DSA. Specifically, Section 16 of SB 302 amended NRS 387.124(1) to provide that the apportionment of funds from the DSA to the school districts, computed on a yearly basis, equals the difference between the basic support guarantee and the local funds available[2] *minus* "all the funds deposited in education savings accounts established on behalf of children who reside in the county pursuant to NRS 353B.700 to NRS 353B.930." *See* 2015 Nev. Stat., ch. 332, § 16, at 1839-40. According to the Treasurer's estimate, over 7,000 students have applied for an education savings account so far.

II.

A.

The plaintiffs/respondents in *Schwartz v. Lopez*, Docket No. 69611, are seven Nevada citizens and parents of children enrolled in Nevada public schools who filed a complaint seeking a judicial declaration that SB 302 is unconstitutional and an injunction enjoining its implementation. The complaint named as the defendant State Treasurer Dan Schwartz, who is charged with enforcement and administration of the ESA program. The complaint alleged that SB 302 violates the requirement for a uniform school system under

[2]To illustrate how the basic support guarantee operates by district, according to information provided in the record, Clark County had a basic support guarantee of $5,393 per pupil for FY 2014, and of that amount, $2,213 constituted the state's portion of the funding and the remaining $3,180 was paid from local funds. For the same period in Washoe County, the basic support guarantee was $5,433 per pupil, which consisted of $2,452 from state funding and $2,981 from the local funds.

Article 11, Section 2; diverts public school funds contrary to Article 11, Section 2 and Section 6; and seeks a permanent injunction enjoining the State Treasurer from implementing the ESA program.[3]

The *Lopez* plaintiffs moved for a preliminary injunction, arguing that they were likely to prevail on the merits because SB 302 was clearly unconstitutional and that Nevada's public school children will suffer irreparable harm because the education savings accounts will divert substantial funds from public schools. After a hearing, the district court granted a preliminary injunction, concluding that SB 302 violated Section 6 and thus the *Lopez* plaintiffs were likely to succeed on their constitutional claim, and that the balance of potential hardship to the *Lopez* plaintiffs' children outweighed the interests of the State Treasurer and others. The district court rejected the constitutional challenge under Section 2. The Treasurer now appeals.

B.

The plaintiffs/appellants in *Duncan v. Nevada State Treasurer*, Docket No. 70648, are five Nevada citizens who filed a complaint for injunctive and declaratory relief, asserting a constitutional challenge to SB 302 and alleging that it diverts public funds to private schools, many of which are religious, in violation of Article 11, Section 10 (prohibiting public funds from being used for sectarian purpose) and Article 11, Section 2 (requiring the Legislature to provide for a "uniform system of common schools"). The complaint named as defendants the Office of the State Treasurer of Nevada, the Nevada Department of Education, State Treasurer Dan Schwartz in his official capacity, and Interim Superintendent of Public Instruction Steve Canavero in his official capacity. Six parents who wish to register their children in the ESA program were permitted to intervene as defendants.

The State Treasurer, joined by the intervenor-parents, filed a motion to dismiss for failure to state a claim and for lack of jurisdiction. The State Treasurer argued that the *Duncan* plaintiffs lacked standing to challenge SB 302 and that the constitutional challenges were without merit. In granting the State Treasurer's motion to dismiss, the district court found that the *Duncan* plaintiffs had standing to bring facial challenges to the ESA program but that the facial challenges under Sections 2 and 10 were without merit. The *Duncan* plaintiffs appealed.

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[3]The *Lopez* plaintiffs also asserted a challenge under Article 11, Section 3 (requiring that certain property and proceeds pledged for educational purposes not be used for other purposes), which the district court rejected. Because the parties' appellate briefs do not develop an argument as to the Section 3 challenge, we do not address it in this opinion.

III.

[Headnotes 1-3]

As a threshold argument, the State Treasurer contends that the plaintiffs lack standing to challenge SB 302 because they cannot show that they will suffer any special injury. The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation. *See Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983) (citing *Harman v. City & Cty. of San Francisco*, 496 P.2d 1248, 1254 (Cal. 1972) (" 'The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a . . . court.' ")). The primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party. *See Harman*, 496 P.2d at 1254.

[Headnote 4]

Generally, a party must show a personal injury and not merely a general interest that is common to all members of the public. *See, e.g.*, *Doe v. Bryan*, 102 Nev. 523, 525-26, 728 P.2d 443, 444-45 (1986) (requiring plaintiffs, who sought to have criminal statute declared unconstitutional, to first demonstrate a personal injury, i.e., that they were arrested or threatened with prosecution under the statute); *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929) (requiring property owner to show that he would suffer a special or peculiar injury different from that sustained by the general public in order to maintain complaint for injunctive relief).

[Headnotes 5, 6]

We now recognize an exception to this injury requirement in certain cases involving issues of significant public importance. Under this public-importance exception, we may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury. We stress, as have other jurisdictions recognizing a similar exception to the general standing requirements, that this public-importance exception is narrow and available only if the following criteria are met. First, the case must involve an issue of significant public importance. *See, e.g.*, *Trs. for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987). Second, the case must involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution. *See Dep't of Admin. v. Horne*, 269 So. 2d 659, 662-63 (Fla. 1972). And third, the plaintiff must be an "appropriate" party, meaning that there is no one else in a better position who will likely bring an action and that the plaintiff is capable of fully advocating his or her position in court. *See Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 972-73 (Utah 2006); *Trs. for Alaska*, 736 P.2d at 329-30.

The plaintiffs here are citizens and taxpayers of Nevada, and most are also parents of children who attend public schools.[4] They allege that SB 302 allows millions of dollars of public funds to be diverted from public school districts to private schools, in clear violation of specific provisions in the Nevada Constitution, which will result in irreparable harm to the public school system. These cases, which raise concerns about the public funding of education, are of significant statewide importance. Public education is a priority to the citizens of this state, so much so that our Constitution was amended just ten years ago to require the Legislature to sufficiently fund public education before making any other appropriation. *See* Nev. Const. art. 11, § 6(1). The plaintiffs allege that SB 302 specifically contravenes this constitutional mandate and also violates other constitutional provisions regarding the support of public schools and the use of public funds. The plaintiffs are appropriate parties to litigate these claims. There is no one else in a better position to challenge SB 302, given that the financial officer of this state charged with implementing SB 302 has indicated his clear intent to comply with the legislation and defend it against constitutional challenge. Further, the plaintiffs have demonstrated an ability to competently and vigorously advocate their interests in court and fully litigate their claims. We conclude that, under the particular facts involved here, the plaintiffs in these cases have demonstrated standing under the public-importance exception test.[5]

IV.

[Headnote 7]

We now turn to the plaintiffs' constitutional claims. Initially, we note that these cases come before us in different procedural contexts—one from an order granting a preliminary injunction and the other from an order dismissing a complaint for failure to state a claim. Consequently, these proceedings would ordinarily be governed by different standards. *Compare* NRS 33.010 (injunction), *with* NRCP 12(b)(5) (motion to dismiss for failure to state a claim upon which relief can be granted). In each case, however, the district court rendered a decision as to the constitutionality of SB 302, which is purely a legal question reviewed de novo by this court. *See Hernandez v. Bennett-Haron*, 128 Nev. 580, 586, 287 P.3d 305, 310 (2012) ("[T]his court reviews de novo determinations of whether

[4]All of the *Lopez* plaintiffs have children in the Nevada public school system, and one of the *Duncan* plaintiffs has a child in public school and is also a teacher at a public school in Nevada.

[5]Because we conclude the plaintiffs have standing under the public-importance exception, we decline to consider the parties' arguments regarding whether the plaintiffs have taxpayer standing.

a statute is constitutional."). Thus, our review in these cases is de novo, and we apply the standards governing facial challenges to a statute's constitutionality.

[Headnotes 8-12]

In considering a constitutional challenge to a statute, we must start with the presumption in favor of constitutionality, and therefore we "will interfere only when the Constitution is clearly violated." *List v. Whisler*, 99 Nev. 133, 137, 660 P.2d 104, 106 (1983). "When making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid." *Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. 719, 727, 334 P.3d 392, 398 (2014). The rules of statutory construction apply when interpreting a constitutional provision. *Lorton v. Jones*, 130 Nev. 51, 56, 322 P.3d 1051, 1054 (2014). This court will look to the plain language of the provision if it is unambiguous. *See City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 359, 302 P.3d 1118, 1126 (2013). If, however, the provision is subject to more than one reasonable interpretation, the provision is ambiguous, and this court will look beyond the plain language and consider the provision's history, public policy, and reason in order to ascertain the intent of the drafters. *Id.* Our interpretation of an ambiguous provision also must take into consideration the spirit of the provision and avoid absurd results. *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011).

V.

[Headnote 13]

The plaintiffs first argue that the ESA program violates Section 2 of Article 11 in the Nevada Constitution, which requires the Legislature to provide for "a uniform system of common schools." The plaintiffs contend that SB 302 violates Section 2 by using public funds to subsidize an alternative system of education that includes non-common, non-uniform private schools and home-based schooling, which are not subject to curriculum requirements and performance standards and which can discriminate in their admission practices. For support, the plaintiffs cite the maxim *expressio unius est exclusio alterius*, to argue that the expression in Section 2 requiring the Legislature to maintain a uniform system of common schools necessarily forbids the Legislature from simultaneously using public funding to pay for private education that is wholly outside of the public school system. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of

any power in the legislature to establish a different policy." (quoting *State v. Hallock*, 14 Nev. 202, 205-06 (1879))).

The State Treasurer, on the other hand, argues that the "uniform" requirement in Section 2 is concerned with maintaining uniformity within the public school system, by avoiding differences between public schools across the state, and the Legislature has fulfilled its duty by maintaining public schools that are uniform, free of charge, and open to all. The State Treasurer also asserts that Section 2 must be read in conjunction with the broader mandate of Section 1 of Article 11, requiring the Legislature to encourage education "by all suitable means," and that nothing prohibits the Legislature from promoting education outside of public schools.

A.

We begin our analysis with the text of Section 2 of Article 11, which states:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.

Nev. Const. art. 11, § 2. Looking to the plain language of Section 2, it is clearly directed at maintaining uniformity *within* the public school system. *See State v. Tilford*, 1 Nev. 240, 245 (1865) (upholding under Section 2 the Legislature's abolition of Storey County's Board of Education, which was different from any other county). Section 2 requires that a school be maintained in each school district at least six months each year, provides that funding may be withheld from any school district that allows sectarian instruction, and permits the Legislature to set parameters on attendance "in each school district upon *said public schools*." (Emphasis added.)

The plaintiffs do not dispute that Nevada's public school system is uniform, free of charge, and open to all students. SB 302 does not alter the existence or structure of the public school system. Nor does SB 302 transform private schools or its other participating entities into public schools. Indeed, NRS 353B.930 states that nothing in the provisions governing education savings accounts "shall be deemed to limit the independence or autonomy of a participating entity or to make the actions of a participating entity the actions of the State

Government." Thus, SB 302 is not contrary to Section 2's mandate to provide for a uniform system of common schools.

B.

We find additional support for this conclusion in Section 1 of Article 11, which requires the Legislature to encourage education "by all suitable means." Section 1 of Article 11 states:

> The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof.

Nev. Const. art. 11, § 1. Use of the phrase "by all suitable means" reflects the framers' intent to confer broad discretion on the Legislature in fulfilling its duty to promote intellectual, literary, scientific, and other such improvements, and to encourage other methods in addition to the public school system.

The plaintiffs argue that Section 1 cannot be read in isolation to permit the Legislature to take any action as long as it tends to encourage education, and that the mandate in the second clause requiring a superintendent of public instruction, as well as the debates surrounding the adoption of Article 11, show that Section 1 was meant to apply only to public education. Yet, use of the phrase "and also" to separate the superintendent clause from the suitable means clause signifies two separate legislative duties: the first *to encourage* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements; and the second *to provide* for a superintendent of public instruction. *See Meredith v. Pence*, 984 N.E.2d 1213, 1221 (Ind. 2013) (interpreting use of the word "and" in the Indiana Constitution's education clause as setting forth two separate and distinct duties). While both clauses pertain to education, they operate independently, and the second duty is not a limitation on the first. And although the debates surrounding the enactment of Article 11 reveal that the delegates discussed the establishment of a system of public education and its funding, they also noted the importance of parental freedom over the education of their children, rejected the notion of making public school attendance compulsory, and acknowledged the need to vest the Legislature with discretion over education into the future. *See Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 565-77 (Andrew J. Marsh off. rep., 1866); *see also* Thomas W. Stewart & Brittany Walker, *Nevada's Education Savings Accounts: A Constitutional Analysis* (2016) (Nevada Supreme Court Summaries), http://scholars.law.unlv.edu/nvscs/950, at 12-15 (discussing

the history of Nevada Constitution Article 11, Section 2). If, as the plaintiffs argue, the framers had intended Section 2's requirement for a uniform school system to be the *only* means by which the Legislature could promote educational advancements under Section 1, they could have expressly stated that, but instead they placed these directives in two separate sections of Article 11, neither of which references the other. To accept the narrow reading urged by the plaintiffs would mean that the public school system is the *only* means by which the Legislature could encourage education in Nevada. We decline to adopt such a limited interpretation. *See State v. Westerfield*, 23 Nev. 468, 474, 49 P. 119, 121 (1897) (authorizing expenditure of general fund money to pay a teacher's salary at a non-public school).

Our holding is consistent with the Indiana Supreme Court's decision in *Meredith v. Pence*, which upheld an education choice program against a challenge brought under the Indiana Constitution's school uniformity clause similar to Nevada's. 984 N.E.2d at 1223. That case involved the state's statutory school voucher program, which permits eligible students to use public funds to attend private instead of public schools. *Id.* at 1223. The education clause at issue stated:

> [I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Id. at 1217 n.1 (quoting Ind. Const. art. 8, § 1). Focusing in part on the use of the conjunction "and," the court interpreted this provision as plainly setting forth two separate and distinct duties—the first *to encourage*, by all suitable means, moral, intellectual, scientific, and agricultural improvement, and the second *to provide* for a general and uniform system of common schools—and concluded that the second duty cannot be read as a restriction on the first. *Id.* at 1221, 1224. Because the public school system remained in place and available to all school children and the voucher program did not alter its structure or components, the court held that the voucher program did not conflict with the legislature's imperative to provide for a general and uniform system of common schools. *Id.* at 1223. The Indiana court instead concluded that the program fell within the legislature's independent and broader duty to encourage moral, intellectual, scientific, and agricultural improvement. *Id.* at 1224-25. The court also interpreted the phrase "by all suitable means" as demonstrating an intent to confer broad legislative discretion, and was not persuaded by the plaintiffs' argument in that case to apply the *expressio unius* canon in part because it would limit, contrary to

the framers' intent, this broad delegation of legislative authority. *Id.* at 1222 & 1224 n.17.[6]

The plaintiffs' reliance on *Bush v. Holmes*, wherein the Florida Supreme Court held unconstitutional the state's Opportunity Scholarship Program (OSP) that permitted expenditure of public funds to allow students to attend private schools, is inapposite. 919 So. 2d 392, 407 (Fla. 2006). Florida's constitutional uniformity provision is different than Nevada's, providing:

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .

Fla. Const. art. 9, § 1(a) (West 2010). The Florida court stated that the second sentence imposed a "paramount duty" on the state to make "adequate provision" for the education of all children within the state, but the third sentence contains a restriction on the execution of that duty by requiring "a uniform, efficient, safe, secure, and high quality system of free public schools" that allows students to obtain a high quality education. *Bush*, 919 So. 2d at 406-07. The court held that the OSP violated this section by "devoting the state's resources to the education of children within [Florida] through means other than a system of free public schools." *Id.* at 407. The *Meredith* court distinguished the *Bush* decision because the Indiana Constitution contained no "adequate provision" clause and no restriction on the mandate to provide a free public school system, and instead contained two distinct duties—"to encourage . . . moral, intellectual, scientific, and agricultural improvement," and "to provide . . . for a general and uniform system of Common Schools." *Meredith*, 984 N.E.2d at 1224.

[Headnote 14]

Similarly here, the Nevada Constitution contains two distinct duties set forth in two separate sections of Article 11—one to encour-

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[6]The Supreme Courts of North Carolina and Wisconsin have likewise upheld educational choice programs against challenges under their state's uniform-school provisions. *See Hart v. State*, 774 S.E.2d 281, 289-90 (N.C. 2015) (holding that the uniformity clause applied exclusively to the public school system, mandating public schools of like kind throughout the state, and did not prevent the legislature from funding educational initiatives outside that system); *Davis v. Grover*, 480 N.W.2d 460, 473-74 (Wis. 1992) (holding that the uniformity clause requires the legislature to provide the state's school children with the opportunity to receive a free uniform basic education, and the school choice program "merely reflects a legislative desire to do more than that which is constitutionally mandated").

age education through all suitable means (Section 1) and the other to provide for a uniform system of common schools (Section 2). We conclude that as long as the Legislature maintains a uniform public school system, open and available to all students, the constitutional mandate of Section 2 is satisfied, and the Legislature may encourage other suitable educational measures under Section 1. The legislative duty to maintain a uniform public school system is "not a ceiling but a floor upon which the legislature can build additional opportunities for school children." *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998). For these reasons, we conclude that the plaintiffs have not established that the creation of an ESA program violates Section 2.[7]

VI.

[Headnote 15]

The *Duncan* plaintiffs argue that the ESA program violates Section 10 of Article 11 in the Nevada Constitution by allowing public funds to be used for tuition at religious schools. Article 11, Section 10 of the Nevada Constitution states: "No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose." Nev. Const. art. 11, § 10.

A.

As detailed above, the ESA program established by SB 302 allows for public funds to be deposited by the State Treasurer into an account set up by a parent on behalf of a child so that the parents may use the funds to pay for the child's educational expenses. It is undisputed that the ESA program has a secular purpose—that of education—and that the public funds which the State Treasurer deposits into the education savings accounts are intended to be used for educational, or non-sectarian, purposes. Thus, in depositing public funds into an education savings account, the State is not using the funds for a "sectarian purpose." The plaintiffs do not disagree on this point. Instead, they point to the fact that the ESA program permits parents to use the funds at religious schools, and they argue that this would constitute a use of public funds for a sectarian purpose, in violation of Section 10. We disagree. Once the public funds are deposited into an education savings account, the funds are no longer "public funds" but are instead the private funds of the individual parent who established the account. The parent decides where to spend that money for the child's education and may choose from a variety of participating entities, including religious and non-religious schools. Any decision by the parent to use the funds in his

[7]As for the plaintiffs' argument that SB 302's diversion of public school funding undermines the public school system in violation of Section 2, we address that issue under Section VII of this opinion.

or her account to pay tuition at a religious school does not involve the use of "public funds" and thus does not implicate Section 10.

The plaintiffs contend that the mere placement of public funds into an account held in the name of a private individual does not alter the public nature of the funds. As support, the plaintiffs point to regulatory aspects of the ESA program that they claim demonstrate that the funds in the education savings accounts remain public funds under State control. For example, the accounts must be established through a financial management firm chosen by the State Treasurer, the State Treasurer may audit the accounts and freeze or dissolve them if any funds are misused, and the funds revert back to the State if the child no longer participates in the ESA program or graduates from high school. NRS 353B.850(2); NRS 353B.860(6)(b); NRS 353B.880(2), (3). We recognize the ESA program imposes conditions on the parents' use of the funds in their account and also provides State oversight of the education savings accounts to ensure those conditions are met. But, as we explained earlier, the Legislature may use suitable means to encourage and promote education, *see* Nev. Const. art. 11, § 1, and all of the conditions imposed on the ESA funds are consistent with the Legislature's non-sectarian purpose of promoting education.[8] That the funds may be used by the parents only for authorized educational expenses does not alter the fact that the funds belong to the parents. And, though the funds may revert back to the State under certain circumstances, we nonetheless conclude that, during the time the funds are in the education savings accounts, they belong to the parents and are not "public funds" subject to Article 11, Section 10.

B.

The plaintiffs contend that *State v. Hallock*, 16 Nev. 373 (1882)—the only case in which this court has addressed the meaning of Section 10—prohibits any public funds from ending up in the coffers of a religious institution or school. We disagree with the plaintiffs' reading of *Hallock*. The *Hallock* decision concerned an appropriation of public funds from the State treasury *directly* to a *sectarian institution* and held that such a payment was prohibited by Section 10. The ESA program, however, provides for public funds to be deposited *directly* into an account belonging to a *private individual*, not to a sectarian institution. No public funds are paid directly to a sectarian school or institution under the ESA program. Rather, public funds

[8]For example, parents are restricted to using funds only on authorized educational expenses, such as tuition, fees, textbooks, curriculum, and tutoring. NRS 353B.870(1). And they must use those funds to receive instruction from "participating entities," which include private schools, public universities or community colleges, distance education providers, accredited tutoring providers, and parents that have applied for such status and met all of the requirements set forth in NRS 353B.900. NRS 353B.750; NRS 353B.850(1)(a).

are deposited into an account established by a parent, who may then choose to spend the money at a religious school or one of the other participating entities. Those funds, once deposited into the account, are no longer public funds, and this ends the inquiry for Section 10 purposes. Our holding in *Hallock* does not require a different conclusion.[9] Accordingly, we conclude that the ESA program does not result in any public funds being used for sectarian purpose and thus does not violate Article 11, Section 10 of the Nevada Constitution.

VII.

Both the *Lopez* and *Duncan* plaintiffs contend that SB 302 violates Section 2 of Article 11 of the Nevada Constitution, and the *Lopez* plaintiffs assert that SB 302 violates Section 6 of Article 11 of the Nevada Constitution, which requires the Legislature to appropriate money in an amount the Legislature deems sufficient to pay for the operation of the public schools before the Legislature enacts any other appropriation for the biennium. Nev. Const. art. 11, §§ 2, 6. The plaintiffs argue that SB 302 undermines the funding of the public school system by diverting funds appropriated for public schools to the education savings accounts for private expenditures in violation of these constitutional provisions. The State Treasurer argues that Article 11, Section 2 and Section 6 impose only three requirements on the Legislature: (1) fund the public schools from the general fund; (2) appropriate funds for the public schools before any other appropriation; and (3) appropriate funds it deems to be sufficient for public schools. According to the State Treasurer, the Legislature satisfied these requirements when it passed the appropriation in SB 515 that funded the DSA, and SB 302's movement of funds from the DSA into the education savings accounts does not contravene any of these requirements.

A.

[Headnotes 16-19]

Nevada Constitution Article 4, Section 19 states that "[n]o money shall be drawn from the treasury but in consequence of appropria-

[9]In support of their contention that Section 10 prohibits ESA funds from being paid to religious schools, the plaintiffs rely on a statement in *Hallock* that "public funds should not be used, directly or *indirectly*, for the building up of any sect." 16 Nev. at 387 (emphasis added). The plaintiffs read this as prohibiting any public funds from going to religious schools, whether paid directly by the State or indirectly by way of the parents. The more likely meaning of this statement was to address concern that, while public funds given to a "sectarian institution" such as the one in *Hallock*—a Catholic-run orphanage and school—may be used by that institution only to pay for the physical needs of the orphans, those funds nevertheless have the indirect effect of "building up a sect" through the instruction and indoctrination of those children in a particular sect. Regardless, the issue in *Hallock* concerned only the direct payment of public funds to a sectarian institution, and thus any statement about an indirect payment of public funds would be dictum.

tions made by law." An "appropriation" is " 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.' " *Rogers v. Heller*, 117 Nev. 169, 173 n.8, 18 P.3d 1034, 1036 n.8 (2001) (quoting *Hunt v. Callaghan*, 257 P. 648, 649 (Ariz. 1927)). General legislation may contain an appropriation to fund its operation. *See State v. Eggers*, 29 Nev. 469, 475, 91 P. 819, 820 (1907). No technical words are necessary to constitute an appropriation if there is a clear legislative intent authorizing the expenditure and a maximum amount set aside for the payment of claims or at least a formula by which the amount can be determined. *See id*. at 475, 484-85, 91 P. at 820, 824; *Norcross v. Cole*, 44 Nev. 88, 93, 189 P. 877, 878 (1920). While this court has not required any particular wording to find an appropriation, there must be language manifesting a clear intent to appropriate. *See State v. Eggers*, 35 Nev. 250, 258, 128 P. 986, 988 (1913) (interpreting an appropriation act by its terms and declining to infer an expenditure when the language did not manifest such an intent).

[Headnote 20]

Applying these principles, one could argue that SB 302 impliedly appropriates funds for education savings accounts because it authorizes the Treasurer to issue a grant of money for each education savings account in an amount based on a percentage of the statewide average basic support per pupil.[10] There are two problems with that argument.

First, SB 302 contains no limit on the number of education savings accounts that can be created or the maximum sum of money that can be utilized to fund the accounts for the biennium. These omissions suggest that SB 302 does not contain an appropriation. Because of the "hold-harmless" provision under NRS 387.1223(3), which allows a school district's DSA funding to be based on enrollment from the prior year if enrollment in that particular district decreases by five percent or more from one year to the next, if all

[10]This court may raise sua sponte a constitutional issue not asserted in the district court. *See, e.g.*, *Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 644, 600 P.2d 1189, 1191 (1979) ("[S]ince the statutes were assailed on constitutional grounds, it would be paradoxical for us to uphold the statutes on the grounds raised by the parties, yet ignore a clear violation of the separation of powers doctrine."). Although the plaintiffs did not challenge the ESA program under Article 4, Section 19, they did challenge the constitutionality of SB 302's diversion to the education savings accounts of funds appropriated for the public schools in SB 515. Like in *Desert Chrysler-Plymouth*, it would be paradoxical for us to decide whether SB 302 diverts funds from the public school appropriation in SB 515, without addressing whether the education savings account funds were, in fact, appropriated in either SB 302 or SB 515. Furthermore, based on the State Treasurer's concession that SB 302 is not an appropriation, we find no need for further briefing on this issue.

students left the public school system, the State must still fund *both* the school districts' per pupil amount based on 95 percent of the prior year's enrollment *and* the education savings accounts for all students, an amount potentially double the $2 billion appropriated in SB 515 for just the public schools. Given that scenario, surely the Legislature would have specified the number of education savings accounts or set a maximum sum of money to fund those accounts if the Legislature had intended SB 302 to include an appropriation.

Second, the Legislature passed SB 302 on May 29, 2015, but it did not enact SB 515, appropriating the money to fund the public schools, until June 1, 2015. Section 6(2) of Article 11 of the Nevada Constitution directs that, "before any other appropriation is enacted to fund a portion of the state budget . . . the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient . . . to fund the operation of the public schools in the State for kindergarten through grade 12," while section 6(5) provides, "[a]ny appropriation of money enacted in violation of [section 6(2)] is void." If SB 302 contained an appropriation to fund the education savings accounts, it would violate Nevada Constitution Article 11, Section 6(2), requiring that before any other appropriation is enacted the Legislature shall appropriate the money to fund the operation of the public schools. Such an appropriation would be void. *See* Nev. Const. art. 11, § 6(5). For these two reasons, we necessarily conclude that SB 302 does not contain an appropriation to fund its operation. *See* Nev. Const. art. 4, § 19.

B.

[Headnote 21]

The State Treasurer therefore concedes, as he must, that SB 302 did not appropriate funds for the education savings accounts. Instead, the State Treasurer asserts that the $2 billion lump sum appropriation to the DSA in SB 515 is the total amount the Legislature deemed sufficient to fund *both* public schools and the education savings accounts. This argument fails, however, because SB 515 does not mention, let alone appropriate, any funds for the education savings accounts. The title of SB 515 states that it is an act "ensuring sufficient funding for K-12 *public education* for the 2015-2017 biennium." 2015 Nev. Stat., ch. 537, at 3736 (emphasis added). Consistent with the title's focus on public education, and the mandate in Article 11, Section 2 and Section 6, the text of SB 515 sets forth the basic support guarantee for each school district and appropriates just over $2 billion to the DSA for payment of those expenditures. The text of SB 515 does not address the ESA program or appropriate any money to fund it. The legislative history of SB 515 contains no discussion of the education savings accounts or their fiscal impact on the amount appropriated for public schools. Moreover, the DSA

Summary for the 2015-17 biennium contains a list of amounts for the basic support guarantee funding and other categorical funding components of public education, but there is no line item for funding the education savings accounts. Thus, the record is devoid of any evidence that the Legislature included an appropriation to fund the education savings accounts in the amount the Legislature itself deemed sufficient to fund K-12 public education in SB 515.[11]

[Headnote 22]

The State Treasurer also argues that we must presume that the Legislature understood that SB 515 would fund both public education and the education savings accounts from the $2 billion because SB 302 had already been approved, *see City of Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985) (recognizing a presumption that when the Legislature enacts a statute it acts with full knowledge of existing statutes on same subject). We will not, however, infer an appropriation for a specific purpose when the legislative act does not expressly authorize the expenditure for that purpose. *See Eggers*, 35 Nev. at 258, 128 P. at 988. SB 515 does not, by its terms, set aside funds for the education savings accounts. Nor could we make such an inference. While SB 302 passed the Legislature on May 29, 2015, it was not signed into law by the governor until June 2, 2015, after the Legislature passed SB 515 on June 1, 2015. For these reasons, we reject the State Treasurer's argument that SB 515 appropriates funds for the education savings accounts created under SB 302.

C.

Having determined that SB 515 did not appropriate any funds for the education savings accounts, the use of any money appropriated in SB 515 for K-12 public education to instead fund the education savings accounts contravenes the requirements in Article 11, Section 2 and Section 6 and must be permanently enjoined. *See* 2015 Nev. Stat., ch. 332, § 16, at 1839-41 (amending NRS 387.124(1) to require that all funds deposited in the education savings accounts be

[11]The State Treasurer argues that the question of whether the Legislature appropriated funds "it deems sufficient" to fund public schools under Section 6(2) is nonjusticiable because that determination is a policy choice committed to the legislative branch. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Cty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) ("Under the political question doctrine, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." (internal quotation marks omitted)). We do not pass judgment on whether the amount appropriated is in fact sufficient to fund the public schools. Rather, the issue before us is whether the amount the Legislature *itself* deemed sufficient in SB 515 must be safeguarded for and used by public schools and cannot be diverted for other uses under our state constitution.

subtracted from the school districts' quarterly apportionments of the DSA). Additionally, because SB 302 does not provide an independent basis to appropriate money from the State General Fund and no other appropriation appears to exist, the education savings account program is without an appropriation to support its operation. *See* Nev. Const. art. 4, § 19. Given our conclusion, it is unnecessary to address any additional constitutional arguments under Section 6 of Article 11 of the Nevada Constitution.

VIII.

In *Duncan v. Nevada State Treasurer*, Docket No. 70648, we affirm in part and reverse in part the district court's order dismissing the complaint and remand the case to the district court to enter a final declaratory judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 absent appropriation therefor consistent with this opinion. In *Schwartz v. Lopez*, Docket No. 69611, we affirm in part and reverse in part the district court's order granting a preliminary injunction, and we remand the case to the district court to enter a final declaratory judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 consistent with this opinion.

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

DOUGLAS, J., with whom CHERRY, J., agrees, concurring in part and dissenting in part:

I concur in all but Part VI of the court's opinion. As to Part VI, I do not believe the court should reach the issue of whether SB 302 violates Article 11, Section 10 of the Nevada Constitution for two reasons.

First, our holding that the funding of the education savings accounts must be permanently enjoined as unconstitutional makes it unnecessary for us to consider whether certain portions of SB 302 also violate Section 10. *See Cortes v. State*, 127 Nev. 505, 516, 260 P.3d 184, 192 (2011) ("Constitutional questions should not be decided except when absolutely necessary to properly dispose of the particular case." (internal quotation marks omitted)). Second, the Section 10 challenge is not ripe for a decision on the merits. In reaching the merits of the Section 10 challenge, the court ignores that the *Duncan* complaint (which raised the Section 10 challenge) was dismissed by the district court for failure to state a claim under NRCP 12(b)(5). At that stage of the litigation, the only issue to be considered is whether, accepting all factual allegations as true, the complaint alleged a claim upon which relief may be granted. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). Because the *Duncan* plaintiffs stated a legally sufficient

claim when they alleged that the ESA program violates Article 11, Section 10 by allowing public funds to be used for sectarian purpose, the district court erred in dismissing the complaint as to this claim. The court appears to concede that the plaintiffs alleged a legally sufficient claim but nevertheless would affirm on the basis that no relief is warranted because the funds in the education savings accounts are not "public" and thus do not implicate Section 10. However, in my opinion, the issue as to whether the funds in the education savings accounts are private or public in nature involves factual determinations that were not made by the district court and should not be made by this court in the first instance. And, as the Section 10 claim is a matter of first impression and not as well-defined and easily resolved as my colleagues suggest, *see, e.g.*, *Moses v. Skandera*, 367 P.3d 838, 849 (N.M. 2015) (holding that state constitution prohibits public funds from being used to buy textbooks for students attending private schools), *petition for cert. filed*, 84 U.S.L.W. 3657 (U.S. May 16, 2016) (No. 15-1409); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015) (plurality) (holding that state constitution prohibits public funds from being given to students to use at religious schools), *petition for cert. filed*, 84 U.S.L.W. 3261 (U.S. Oct. 28, 2015) (No. 15-558), the proper action here, had a majority of this court not determined that SB 302's funding is unconstitutional, would be to remand this matter to the district court for further proceedings and factual development as to this claim. For these reasons, I respectfully dissent as to Part VI of the court's opinion.

FREDRICK LEWIS BOWMAN, AKA FREDERICK LEWIS BOWMAN, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 67656

October 27, 2016 387 P.3d 202

Petition for en banc reconsideration of a panel opinion in an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

On en banc reconsideration, the supreme court, GIBBONS, J., held that: (1) juror misconduct occurred when two jurors conducted independent experiments to test the theories of the case advanced at trial; (2) the juror misconduct was prejudicial and required new trial; (3) the district court's failure to give a jury instruction prohibiting jurors from conducting any independent research, investigations, or

experiments constituted error requiring reversal; and (4) no plain error occurred with regard to the content or conveyance of the statutory jury admonition.

Petition granted; reversed and remanded.

Ristenpart Law and *Theresa A. Ristenpart*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Respondent.

1. Criminal Law.
   Denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court.
2. Criminal Law.
   Absent clear error, the district court's findings of fact will not be disturbed.
3. Criminal Law.
   When juror misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a district court's conclusions regarding the prejudicial effect of any misconduct is appropriate. U.S. Const. amend. 6.
4. Criminal Law.
   To prevail on a motion for a new trial alleging juror misconduct, defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial.
5. Criminal Law.
   Even if the jurors' behavior was misconduct, not every incidence of juror misconduct requires a new trial; if it appears beyond a reasonable doubt that no prejudice occurred, a new trial is unnecessary.
6. Criminal Law.
   Juror misconduct is prejudicial, as required for new trial, whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.
7. Criminal Law.
   When determining if juror's exposure to extraneous information requires new trial, the district court is required to objectively evaluate the effect the extrinsic material had on the jury and determine whether it would have influenced the average, hypothetical juror.
8. Criminal Law.
   For a juror's exposure to extrinsic material to require a new trial, it is not necessary that the extrinsic material be disclosed to the jury; a single juror's exposure to extrinsic material may still influence the verdict because that juror may interject opinions during deliberations while under the influence of the extrinsic material.
9. Criminal Law.
   Juror misconduct occurred when two jurors conducted independent experiments to test the theories of the case advanced at trial, during prosecution for trafficking in a controlled substance, in which defense theory was that small package of drugs found at defendant's feet during intake search was carried to the search location because it was stuck to deputy's boot.

10. Criminal Law.
Under the two-part test for determining whether a new trial is warranted due to juror misconduct, the determination of juror misconduct is a factual inquiry, while the determination of prejudice from that misconduct is a legal inquiry.

11. Criminal Law.
Juror misconduct, whereby two jurors conducted independent experiments to test the two primary theories of the case advanced at trial, was prejudicial and required new trial, in prosecution for trafficking in controlled substance, in which defense theory was that small package of drugs found at defendant's feet during intake search was carried to the search location because it was stuck to deputy's boot; jurors who conducted independent experiments returned to participate in deliberations after being influenced by that extrinsic evidence, and those jurors later disclosed to counsel that they relied on those experiments, either swaying them to change their votes or reinforcing their previously held positions, before rendering a verdict.

12. Criminal Law.
Failure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial.

13. Criminal Law.
Challenges to unobjected-to jury instructions are reviewed for plain error.

14. Criminal Law.
Need for jury instruction must be analyzed in light of the circumstances of the case.

15. Criminal Law.
District courts must provide a clear instruction to jurors in all cases to not conduct any form of independent research, investigations, or experiments prior to or during jury deliberations.

16. Criminal Law.
The district court's failure to give a jury instruction prohibiting jurors from conducting any independent research, investigations, or experiments constituted error requiring reversal, in trial for trafficking in controlled substance, in which defense theory was that small package of drugs found at defendant's feet during intake search was carried to the search location because it was stuck to deputy's boot; parties advanced two primary theories of the case that could be easily tested or investigated by jurors, and results of such investigations or experiments had direct impact on the verdict and the defendant's right to a fair trial.

17. Criminal Law.
Given the ease with which jurors may conduct independent research, investigations, and experiments, failure to give an instruction prohibiting jurors from such conduct in any civil or criminal case constitutes error.

18. Criminal Law.
Appeal based on a district court's failure to provide instruction, prohibiting jurors from conducting independent research, investigations, and experiments, in a case where no juror misconduct occurred, will likely be considered harmless error.

19. Criminal Law.
No plain error occurred with regard to the content or conveyance of the statutory jury admonition regarding juror duties after an adjournment for the evening during deliberations, even though admonition did not include an admonishment against the jurors conducting independent research, in-

vestigations, or experiments; statutory jury admonition did not permit judicial discretion regarding its content. NRS 175.401.

20. Criminal Law.
Failure to object generally precludes appellate review, but the supreme court has discretion to review an unpreserved error if it is plain and affected the defendant's substantial rights.

21. Criminal Law.
In conducting plain error review, the supreme court must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights.

22. Criminal Law.
Unlike jury instructions, the statutory jury admonition at each adjournment of the court does not permit judicial discretion regarding its content, and it is given at the beginning of trial, without the same context and information available when the jury instructions are given. NRS 175.401.

Before the Court En Banc.[1]

OPINION

By the Court, Gibbons, J.:

We previously issued an opinion in this matter on April 28, 2016. After respondent petitioned for en banc reconsideration, we withdrew that opinion and granted the petition for en banc reconsideration. We now issue this opinion in place of our prior opinion. On en banc reconsideration, we reach the same conclusion as in our prior opinion.

This appeal concerns (1) whether it was error for the district court to deny appellant's motion for a new trial based on juror misconduct; (2) whether it was prejudicial for the district court to fail to give a jury instruction sua sponte prohibiting jurors from conducting independent research, investigations, or experiments; and (3) whether the stock jury admonition required pursuant to NRS 175.401 fails to protect the parties' right to a fair trial. We conclude that the juror misconduct here was sufficient to warrant a new trial and that failure to give a jury instruction prohibiting jurors from conducting independent investigations or experiments constitutes a reversible error. We reverse the district court's order denying appellant's motion for a new trial and remand this matter to the district court for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

A Washoe County Sheriff's deputy conducted an intake search of appellant Fredrick Bowman. While conducting the search, the deputy found a small white package containing methamphetamine

[1]The Honorable Nancy M. Saitta, Justice, having retired, this matter was decided by a six-justice court.

at Bowman's feet. The State charged Bowman with a single count of trafficking in a controlled substance.

At trial, the State advanced a theory that Bowman hid the package in his sock or on his person and it fell to the ground during the intake search. The defense's theory of the case was that the package was carried to that location because it was stuck to the deputy's boot. Neither Bowman nor the State requested an instruction prohibiting the jury from conducting independent research, investigations, or experiments, and the district court did not give such an instruction sua sponte.

The jury deliberated for roughly three hours and requested to be released for the evening to continue deliberations the following morning. The district court judge admonished the jury pursuant to NRS 175.401, which does not include an admonishment against conducting independent research, investigations, or experiments.

That evening, two jurors individually conducted experiments testing the parties' theories of the case. Both jurors returned the following morning and participated in deliberations. The jury returned a unanimous guilty verdict. Following trial, the jurors who conducted independent experiments revealed to counsel that they relied on their independent experiments in reaching a verdict.

Bowman moved the district court to declare a mistrial and order a new trial due to juror misconduct. The district court held a hearing and determined that the deputy district attorney would have an investigator contact the jurors who conducted the independent experiments for a future evidentiary hearing regarding the prejudicial effect of their independent experiments. Additionally, the deputy district attorney drafted questions, in the form of an affidavit, for those jurors.

Both jurors confirmed in their affidavits that they conducted independent experiments and disclosed their experiments to other jurors prior to the jury rendering a verdict. However, at the subsequent evidentiary hearing, both jurors testified, contrary to their sworn affidavits, that they only disclosed their experiments to one another during the short time period after the jury rendered a verdict but before the jury reentered the courtroom.[2]

Following the jurors' testimony, the district court denied Bowman's motion for a new trial, concluding that there was no reasonable probability that the verdict was affected by the independent experiments because the jurors who conducted the experiments did not change their votes after conducting the experiments and did not disclose them to other jurors until after a guilty verdict was

[2]When confronted with this inconsistency, one juror, after speaking with the deputy district attorney's investigator, realized that the information he provided in his affidavit was incorrect.

reached. In this appeal, Bowman argues that (1) the district court erred in denying his motion for a new trial because the independent experiments conducted by the jurors constitute juror misconduct, and (2) the statutory admonition required pursuant to NRS 175.401 does not adequately protect a party's right to a fair trial because it does not include a warning against conducting independent investigations and experiments.

DISCUSSION

The district court erred in denying Bowman's motion for a new trial

Bowman argues that the district court erred in denying his motion for a new trial because the independent experiments conducted by the jurors constituted prejudicial misconduct. We agree.

[Headnotes 1-3]

"A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court." *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) (citing *United States v. Saya*, 247 F.3d 929, 935 (9th Cir. 2001)). "Absent clear error, the district court's findings of fact will not be disturbed. However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause,[3] de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." *Id.* at 561-62, 80 P.3d at 453.

[Headnotes 4, 5]

To prevail on a motion for a new trial alleging juror misconduct, "the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Id*. at 563-64, 80 P.3d at 455. Thus, "[e]ven if the jurors' behavior was misconduct, not every incidence of juror misconduct requires a new trial. If it appears beyond a reasonable doubt that no prejudice occurred, a new trial is unnecessary." *Hernandez v. State*, 118 Nev. 513, 522, 50 P.3d 1100, 1107 (2002).

[Headnotes 6-8]

"Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Meyer*, 119 Nev. at 564, 80 P.3d at 455. We have concluded that:

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[3]For example, in *Zana v. State*, 125 Nev. 541, 547, 216 P.3d 244, 248 (2009), we concluded that a juror's independent Internet search that he later disclosed to other jurors constituted the use of extrinsic evidence in violation of the Confrontation Clause.

> [a juror's] exposure to extraneous information via independent research or improper experiment is . . . unlikely to raise a presumption of prejudice. In these cases, the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict.

Id. at 565, 80 P.3d at 456. *Meyer* provides several factors to guide our determination, including:

> how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.).

Id. at 566, 80 P.3d at 456. Thus, "the district court is required to objectively evaluate the effect [the extrinsic material] had on the jury and determine whether it would have influenced 'the average, hypothetical juror.' " *Zana*, 125 Nev. at 548, 216 P.3d at 248 (quoting *Meyer*, 119 Nev. at 566, 80 P.3d at 456). It is not necessary that the extrinsic material be disclosed to the jury; a single juror's exposure to extrinsic material may still influence the verdict because that juror may interject opinions during deliberations while under the influence of the extrinsic material. *See Tanksley v. State*, 113 Nev. 997, 1005, 946 P.2d 148, 152-53 (1997).

The occurrence of juror misconduct

[Headnotes 9, 10]

The determination of juror misconduct is a "factual inquiry." *Meyer*, 119 Nev. at 566, 80 P.3d at 456. Analyzing the facts here, it is uncontested that juror misconduct occurred. Both jurors stated in their sworn affidavits that they conducted independent experiments to test the theories of the case advanced at trial and later confirmed that they conducted the experiments prior to returning to jury deliberations. We therefore conclude that Bowman presented evidence sufficient to establish that misconduct occurred.

Juror misconduct was prejudicial

[Headnote 11]

The determination of prejudice is a legal inquiry. *See Meyer*, 119 Nev. at 564-65, 80 P.3d at 455-56 (indicating the court decides

whether there is a "reasonable probability or likelihood that the juror misconduct affected the verdict"). Applying the *Meyer* factors here, we further conclude that Bowman presented sufficient evidence to show that there is a reasonable probability that the independent experiments affected the jury's verdict and therefore fulfilled the second requirement to prevail on a motion for a new trial. Although there is some dispute as to whether and how the independent experiments were disclosed to fellow jurors, it is clear that two jurors conducted independent experiments testing two primary theories of the case and returned to participate in jury deliberations after being influenced by that extrinsic evidence. The jurors later disclosed to counsel that they relied on those experiments—either by swaying them to change their votes or by reinforcing their previously held positions before rendering a verdict. Additionally, the short length of trial, the timing of the experiments relative to the verdict, the specificity of the experiments, and the materiality of the experiments all weigh in favor of concluding that the extraneous information would have influenced the average, hypothetical juror. We therefore conclude that the misconduct here was prejudicial.

Given the totality of the circumstances here, with both the factual and legal inquiries weighing in favor of granting a new trial, we conclude the district court abused its discretion in denying Bowman's motion for a new trial.

The district court should have provided a jury instruction admonishing jurors against conducting independent research, investigations, and experiments

[Headnote 12]

"Failure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial." *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998). We conclude that the district court's failure to give a jury instruction admonishing jurors against conducting independent research, investigations, or experiments is prejudicial error requiring us to act.

[Headnotes 13, 14]

Challenges to unobjected-to jury instructions are reviewed for plain error. *See Berry v. State*, 125 Nev. 265, 282-83, 212 P.3d 1085, 1097 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). "The need for [an] instruction must be analyzed in light of the circumstances of the case." *Bonin v. Vasquez*, 807 F. Supp. 589, 617 (C.D. Cal. 1992) (citing *United States v. Martin*, 489 F.2d 674, 677 n.3 (9th Cir. 1973)) (concluding that a trial court's failure to give jury instructions sua sponte as to

unreliability of informant testimony is not necessarily plain error requiring reversal), *aff'd sub nom. Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995).

[Headnotes 15, 16]

Although the jury instructions are not in the record on appeal, the State conceded at oral argument that the jury instructions did not include an instruction prohibiting jurors from conducting independent research, investigations, or experiments. It is of paramount importance that district courts provide a clear instruction to jurors in all cases to not conduct any form of independent research, investigations, or experiments prior to or during jury deliberations. Here, the parties advanced two primary theories of the case that could be easily tested or investigated by jurors. The results of such investigations or experiments, as demonstrated here, would have a direct impact on the verdict and the defendant's right to a fair trial. We therefore conclude that the district court's failure to give a jury instruction in this case prohibiting jurors from conducting any independent research, investigations, or experiments constituted error requiring reversal consistent with our analysis in *Meyer*. *See Meyer*, 119 Nev. at 564-66, 80 P.3d at 455-56.

[Headnote 17]

We further conclude that, given the ease with which jurors may conduct independent research, investigations, and experiments, failure to give an instruction prohibiting jurors from such conduct in any civil or criminal case constitutes error. The *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2010) advises district courts to include an instruction regarding the jurors' consideration of the evidence. Such an instruction should make clear that during deliberations jurors are not to: (1) communicate with anyone in any way regarding the case or its merits—either by phone, email, text, Internet, or other means; (2) read, watch, or listen to any news or media accounts or commentary about the case; (3) do any research, such as consulting dictionaries, using the Internet, or using reference materials; (4) make any investigation, test a theory of the case, re-create any aspect of the case, or in any other way investigate or learn about the case on their own. *Id*. at §§ 1.8, 2.1, 7.2.

[Headnote 18]

We note that an appeal based on a district court's failure to provide such an instruction in a case where no juror misconduct occurred would likely be considered harmless error. However, providing such an instruction in all cases will undoubtedly protect the parties' right to a fair trial and prevent jurors from unknowingly tainting the integrity of the deliberative process.

Bowman failed to object to the statutory jury admonition at trial

[Headnote 19]

Bowman argues that the statutory jury admonition required pursuant to NRS 175.401 is insufficient and does not adequately protect the parties' right to a fair trial. Bowman failed to object to the statutory jury admonition at trial. We conclude that it was not plain error for the district court to provide the statutory jury admonition required pursuant to NRS 175.401.

[Headnotes 20-22]

"Failure to object generally precludes appellate review." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011). However, this court has discretion to review an unpreserved error "if it [is] plain and affected the defendant's substantial rights." *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011); *see* NRS 178.602. "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted). Unlike jury instructions, the statutory jury admonition does not permit judicial discretion regarding its content, and it is given at the beginning of trial, without the same context and information available when the jury instructions are given. Therefore, we conclude that no plain error occurred with regard to the content or conveyance of the statutory jury admonition required by NRS 175.401, and we therefore decline to further address this issue.

CONCLUSION

We conclude that the district court erred in denying Bowman's motion for a new trial based on juror misconduct, which had resulted in prejudice to Bowman. Further, we conclude that where a district court's failure to provide a jury instruction prohibiting jurors from conducting independent research, investigations, or experiments of any kind results in prejudice, the failure may constitute reversible error. Therefore, we reverse and remand this case to the district court for further proceedings consistent with this opinion.

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

DEBORAH PERRY, AN INDIVIDUAL ON BEHALF OF HERSELF AND ALL SIMILARLY SITUATED INDIVIDUALS, APPELLANT, *v.* TERRIBLE HERBST, INC., A NEVADA CORPORATION, DBA TERRIBLE HERBST, RESPONDENT.

No. 68030

October 27, 2016 383 P.3d 257

Appeal from a district court order, certified as final under NRCP 54(b), granting a motion for judgment on the pleadings in a minimum wage matter. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Former employee filed action against employer for alleged violation of Minimum Wage Amendment to Nevada Constitution. The district court granted employer's motion for judgment on the pleadings. Former employee appealed. The supreme court, PICKERING, J., held that two-year limitations period applicable to an action by employee to recover difference between minimum wage and amount paid, as opposed to catch-all four-year limitations period, applied to former employee's action.

Affirmed.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, Daniel Bravo*, and *Don Springmeyer*, Las Vegas, for Appellant.

Littler Mendelson, P.C., and *Montgomery Y. Paek, Kathryn B. Blakey, Roger L. Grandgenett, II*, and *Rick D. Roskelley*, Las Vegas, for Respondent.

1. PLEADING.
   The district court may grant a motion for judgment on the pleadings when the material facts of the case are not in dispute and the movant is entitled to judgment as a matter of law. NRCP 12(c).
2. APPEAL AND ERROR.
   Whether employer was entitled to judgment as matter of law on limitations grounds against former employee who brought action for alleged violation of Minimum Wage Amendment to Nevada Constitution presented question of law that the supreme court would review de novo on former employee's appeal from judgment on the pleadings. Const. art. 15, § 16; NRCP 12(c).
3. LIMITATION OF ACTIONS.
   Statutes of limitation exist to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security.
4. LIMITATION OF ACTIONS.
   The nature of the claim, not its label, determines what statute of limitations applies.

5. Constitutional Law.
   A constitutional amendment impliedly repeals a statute where the two are irreconcilably repugnant, such that both cannot stand.
6. Limitation of Actions.
   When a right of action does not have an express limitations period, the supreme court applies the most closely analogous limitations period.
7. Labor and Employment.
   Two-year limitations period applicable to an action by employee to recover difference between minimum wage and amount paid, as opposed to catch-all four-year limitations period, applied to former employee's action against employer to recover back pay under the Minimum Wage Amendment to Nevada Constitution, which did not specify a statute of limitations for the right of action it established; statute relating to actions to recover difference between minimum wage and amount paid was the most closely analogous statute to the Minimum Wage Amendment. Const. art. 15, § 16; NRS 11.220, 608.260.

Before the Court En Banc.[1]

OPINION

By the Court, Pickering, J.:

The Minimum Wage Amendment (MWA) was added to the Nevada Constitution in 2006. Nev. Const. art. 15, § 16. The MWA guarantees employees payment of a specified minimum wage and gives an employee whose employer violates the MWA the right to "bring an action against his or her employer in the courts of this State . . . to remedy any violation." *Id.* § 16(B). Because the MWA does not specify a statute of limitations for the right of action it establishes, we are asked to determine whether the two-year statute of limitations in NRS 608.260 or the catch-all four-year statute of limitations in NRS 11.220 applies to claims asserted under the MWA. The district court held that MWA claims are closely analogous to those provided for in NRS Chapter 608 and, thus, that the two-year statute of limitations in NRS 608.260 controls. We affirm.

I.

Appellant Deborah Perry worked as a cashier at one of respondent Terrible Herbst, Inc.'s convenience and gas station stores in Clark County, Nevada, from May 2007 until March 2012. More than two years after she last worked for Terrible Herbst, in July of 2014, Perry filed a class action lawsuit, alleging that Terrible Herbst failed to pay her and other similarly situated employees the minimum wage required by the Minimum Wage Amendment to the Nevada

[1]The Honorable Nancy M. Saitta, Justice, having retired, this matter was decided by a six-justice court.

Constitution. The MWA guarantees two tiers of minimum wages and permits an employer to pay the lower-tier wage if the employer provides qualifying health benefits. Nev. Const. art. 15, § 16(A). As relevant here, the minimum wage in 2010-2014 for employers providing health benefits to their employees was $7.25 per hour, while employers not providing health benefits had to pay $8.25 per hour. In her complaint, Perry asserted that she was paid less than $8.25 an hour even though Terrible Herbst failed to provide her with a qualifying health insurance plan. The complaint was later amended to name other plaintiffs with similar claims against Terrible Herbst.

In response to Perry's complaint, Terrible Herbst filed a motion for judgment on the pleadings under NRCP 12(c). Citing the two-year statute of limitations in NRS 608.260, Terrible Herbst sought judgment in its favor on all claims for damages that were more than two years old in July 2014, when Perry filed suit. NRS 608.260 predates the MWA, and by its terms applies to suits for underpayment of the minimum wage prescribed by regulation of the Labor Commissioner. Because the MWA does not provide its own statute of limitations and the right of action it creates most closely resembles that afforded by NRS Chapter 608, the district court applied NRS 608.260 to Perry's MWA claims. This concluded Perry's claims, given that she stopped working for Terrible Herbst more than two years before she sued. Although other plaintiffs' claims for wages earned within the NRS 608.260 two-year period remain pending, the district court certified its judgment against Perry as final under NRCP 54(b), so Perry could immediately appeal.

II.

[Headnotes 1, 2]

The district court may grant a motion for judgment on the pleadings under NRCP 12(c) when the material facts of the case "are not in dispute and the movant is entitled to judgment as a matter of law." *Sadler v. PacifiCare of Nev., Inc.*, 130 Nev. 990, 993, 340 P.3d 1264, 1266 (2014) (internal quotation marks omitted). Whether Terrible Herbst was entitled to judgment as a matter of law against Perry based on the two-year limitations period in NRS 608.260 presents a question of law that we review de novo. *Id.*

A.

The MWA establishes a base minimum wage, explains how adjustments to the base minimum wage are to be calculated, and specifies that the right to a minimum wage cannot be waived contractually except in a bona fide collective bargaining agreement. Nev. Const. art. 15, § 16. Paragraph B of the MWA establishes the right of employees to sue their employer if the employer does not pay the constitutionally guaranteed wage:

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief.

Nev. Const. art. 15, § 16(B). The MWA sets no time frame within which an employee must bring such an action.

When the MWA was adopted in 2006, Nevada already had in place a statutory scheme providing for payment of minimum wages. *See* NRS Ch. 608. NRS 608.250 delegates to the Labor Commissioner the obligation to, "in accordance with federal law, establish by regulation the minimum wage [and to] prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest." NRS 608.260 gives employees the right to sue for back pay if their employers fail to pay the minimum wage rate established by Labor Commissioner regulation. Unlike the MWA, which is silent as to a statute of limitations period, NRS 608.260 imposes a two-year limitations period on statutory back-pay claims:

> If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage.

The district court applied the two-year limitation period in NRS 608.260 to Perry's back-pay claims. Perry argues that, because she bases her claims on the MWA, not NRS 608.260, the longer statute of limitations in NRS 11.220 should apply. NRS 11.220 provides a catch-all limitations period for any right of action not otherwise provided for by law: "An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

B.

[Headnotes 3, 4]

Statutes of limitation exist "to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 257, 277 P.3d 458, 465 (2012). The nature of the claim, not its label, determines what statute of limitations applies. *Stalk v. Mushkin*, 125 Nev. 21, 25, 199 P.3d 838, 841 (2009). Typically, "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period

is available either by statute or by case law." *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 518 (Tex. 1998); *see Bellemare v. Wachovia Mortg. Corp.*, 931 A.2d 916, 921 (Conn. 2007) ("[W]hen a statute includes no express statute of limitations, we should not simply assume that there is no limitation period. Instead, we borrow the most suitable statute of limitations on the basis of the nature of the cause of action or of the right sued upon."); *cf. In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (applying the three-year statute of limitations for fraud to an analogous claim for breach of fiduciary duty).

Here, Perry seeks damages from Terrible Herbst based on her allegation that it failed to pay her the MWA-required minimum wage. Though asserted directly under the MWA, Perry's claim for relief closely resembles, if it is not in fact, an action for back pay under NRS 608.260. Where NRS 608.260 authorizes suit by an employee to recover "the difference between the amount paid to the employee and the amount of the minimum wage [as] prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250," the MWA authorizes an employee whose employer fails to pay the MWA-required minimum wage to bring an action at "law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief." Nev. Const. art. 15, § 16(B). The method of calculating damages for an MWA claim derives directly from the Constitution rather than the Labor Commissioner's regulations, *but see* NAC 608.100(1) & (2) (Labor Commissioner regulation purporting to establish minimum wage rates by reference to both the MWA and federal law, as required by NRS 608.250), and the MWA affords a broader array of remedies than the back-pay claim NRS 608.260 allows. But these distinctions do not alter the fact that Perry's claim is that Terrible Herbst failed to pay the minimum wage required by Nevada law, specifically, the Nevada Constitution. *Cf. Whittington v. Dragon Grp., LLC*, 991 A.2d 1, 9 (Del. 2009) ("The general rule for determining which statute of limitations should apply by analogy to a suit in equity is that the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law.") (internal quotation omitted). Under both NRS Chapter 608 and the MWA, employees can bring a cause of action alleging that their employer did not pay them the required minimum wage as calculated within their respective provisions. NRS 608.260; Nev. Const. art. 15, § 16(B). The method for determining the minimum wage should not alter the applicable limitations period.

[Headnote 5]

In Perry's view, the MWA's detailed framework and silence as to any statute of limitations effect an implied repeal of NRS 608.260, making it appropriate to apply the catch-all four-year limitations pe-

riod in NRS 11.220. A constitutional amendment impliedly repeals a statute "where the two are irreconcilably repugnant, such that both cannot stand." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 521 (2014) (internal quotation omitted). But unlike the taxicab drivers in *Thomas*—to whom the MWA applied where NRS 608.250(2)(e) excepted them categorically—no direct conflict exists between the MWA's silence as to the appropriate statute of limitations to apply and the two-year statute of limitations provided in NRS 608.260. On the contrary, "we have two . . . provisions that are capable of coexistence" so long as the statute is understood, as it may reasonably be, to supplement gaps in the MWA's terms. *L.D.G. v. Holder*, 744 F.3d 1022, 1031 (7th Cir. 2014). In interpreting legal texts, "silence is a poor beacon to follow." *Zuber v. Allen*, 396 U.S. 168, 185 (1969). With no direct conflict between the MWA and NRS 608.260's two-year statute of limitations, the former cannot be said to have impliedly repealed the latter such that, by default, NRS 11.220 applies.[2]

In *White Pine Lumber Co. v. City of Reno*, 106 Nev. 778, 779, 801 P.2d 1370, 1371 (1990), this court considered whether NRS 11.220's catch-all statute of limitations applied to a governmental takings action. The district court applied NRS 11.220 but this court overruled the district court and held that the fifteen-year period found in NRS 40.090—the adverse possession statute—applied. *Id.* at 780, 801 P.2d at 1371-72. This court reasoned, in part, that the adverse possession statute applied when the "taker" of property is a private party and that "[t]he identity of the party doing the 'taking' should not change this analysis." *Id.* at 780, 801 P.2d at 1371. Similarly, here, if Perry had brought her claim under NRS 608.260, the statute of limitations contained therein would undeniably have applied. *White Pine* suggests that the fact that Perry's claim arises under the MWA instead of NRS 608.260 does not change the applicable limitations period.[3]

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[2]Our holding that Perry's MWA claim is most closely analogous to a claim under NRS 608.260 for purposes of applying the latter's two-year statute of limitations also makes unavailing Perry's alternative suggestion that we apply NRS 11.190(2)(c), which affords four years to sue "upon a contract, obligation or liability not founded upon an instrument in writing."

[3]Other courts have likewise opted not to apply their catch-all statute of limitations where there is a more closely analogous statute or where the state legislature has provided another more specific limitations period. *See Geneva Towers Ltd. P'ship v. City & Cty. of San Francisco*, 60 P.3d 692, 695 (Cal. 2003) (overturning the appellate court's decision to apply the catch-all provision because another more specific limitation period was applicable); *Adkins v. Burlington N. Santa Fe R.R. Co.*, 615 N.W.2d 469, 472-73 (Neb. 2000) (declining to apply the catch-all statute of limitations because the legislature indicated that a particular statute of limitations should apply to the claim); *Johnson & Higgins of Tex.*, 962 S.W.2d at 518 (overruling courts that applied the general statute of limitations for breach of written contracts to the Insurance Code and instead

Perry asserts that this court should not analogize her MWA claim to a claim under NRS 608.260 because NRS 11.220's catch-all limitations period exists for this exact situation, where there exist "claims that cannot be made under any other law, but for which no limitation is expressly provided." She cites to *Gabriel v. O'Hara*, 534 A.2d 488 (Pa. Super. Ct. 1987), for support.

In *Gabriel*, the Pennsylvania Superior Court attempted to determine the proper statute of limitations for private enforcement actions brought under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), which was silent on the matter. *Id.* at 489. The lower court had analogized the plaintiff's UTPCPL claim to one for fraud and deceit and applied the two-year statute of limitations for those claims. *Id.* at 493. In contrast, a federal district court had analogized a different plaintiff's UTPCPL claim to libel and applied the shorter, one-year statute of limitations for a libel cause of action. *Id.* at 493-94. The appellate court in *Gabriel* noted that the analysis used by the two separate trial courts both "involved application of the most closely analogous limitations period" based on the claims in each case. *Id.* at 494. The courts had reached inconsistent results, however, because the UTPCPL encompassed "an array of practices which might be analogized to passing off, misappropriation, trademark infringement, disparagement, false advertising, fraud, breach of contract, and breach of warranty." *Id.* (footnotes omitted). Thus, since applying the most analogous limitations period would result in the use of different statutes of limitations in every case brought under the UTPCPL, the court held that the six-year catch-all limitations period applied to such claims. *See id.*

In *Gabriel*, the multifarious claims authorized by statute made it impossible to analogize them to any other type of claim consistently, and since the UTPCPL was silent on the statute of limitations, the court applied the catch-all provision. Here, no such inconsistency appears: the MWA remains most closely analogous to one statute, NRS 608.260, which carries a two-year limitations period. In contrast to *Gabriel*, applying the two-year limitations period in NRS 608.260 to MWA claims promotes uniformity, not the reverse. *See Bellemare*, 931 A.2d at 922 (rejecting argument that "would lead to multiple statutes of limitation being applicable" to a duty created by law). As an example, NRS 608.115 requires employers to maintain an employee's record of wages for two years. If the four-year limitations period in NRS 11.220 applied to MWA claims, an employee could bring a claim after the employer is no longer legally obligated to keep the record of wages for the employee. Analogizing Perry's MWA claim to one under NRS 608.260 and applying

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applied the statute of limitations in the Deceptive Trade Practices-Consumer Protection Act (DTPA) to the Insurance Code as claims under the Insurance Code were more analogous to DTPA claims).

NRS 608.260's two-year limitations period avoids conflict between the MWA and existing law.

III.

[Headnotes 6, 7]

When a right of action does not have an express limitations period, we apply the most closely analogous limitations period. The MWA does not expressly indicate which limitations period applies and the most closely analogous statute to the MWA is NRS 608.260, as both permit an employee to sue his employer for failure to pay the minimum wage. Moreover, applying the NRS 608.260 limitations period is consistent with Nevada minimum wage law. Accordingly, we affirm the district court's order granting Terrible Herbst's motion for judgment on the pleadings and dismissing Perry's claim.

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