LISA S. MYERS, Appellant, *v.* CALEB OBADIAH HASKINS, Respondent.

No. 83576-COA

June 30, 2022 513 P.3d 527

Appeal from a district court order denying a motion to modify custody of a minor child. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Reversed and remanded with instructions.

Patricia A. Marr, Ltd., and *Patricia A. Marr*, Henderson, for Appellant.

Caleb Obadiah Haskins, Philomath, Oregon, Pro Se.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

OPINION

By the Court, Gibbons, C.J.:

Nearly 30 years ago, the Nevada Supreme Court held that district courts may deny a motion to modify child custody without holding an evidentiary hearing if the movant fails to demonstrate a prima facie case for modification. *Rooney v. Rooney*, 109 Nev. 540, 542-43, 853 P.2d 123, 124-25 (1993). Since that decision, district courts have struggled with an unanswered question: what sources may a district court consider in determining whether a movant has demonstrated a prima facie case for modification? Today, we answer this question. We hold that when a district court seeks to determine if the movant has demonstrated a prima facie case for modification under *Rooney*, it must generally consider only the properly alleged facts in the movant's verified pleadings, affidavits, or declarations. It must not consider the alleged facts or offers of proof the nonmovant provides.

Despite this general rule, we also announce an exception. We hold that a district court may look to the nonmovant's evidentiary support when it "conclusively establishes" the falsity of the movant's allegations. The rules we announce today will help align current practice with *Rooney*'s central purposes: discouraging challenges to temporary custody orders and preventing repeated and insubstantial motions to modify custody. *See id.* at 543 n.4, 853 P.2d at 125 n.4. While Nevada courts generally adhere to the policy of deciding a case fully upon its merits, especially in child custody cases, *see Dagher v. Dagher*, 103 Nev. 26, 28, 731 P.2d 1329, 1330

(1987), this opinion reiterates that a movant must first show the district court—using specific, properly alleged facts—that his or her motion is potentially meritorious on its face.

FACTS AND PROCEDURAL HISTORY

Caleb Obadiah Haskins and Lisa S. Myers married in 2009 and divorced in 2012. They have one minor child together: S.H. (now 12 years old). Under the current custody order,[1] they share joint legal custody of S.H., except Caleb has sole legal custody for medical decisions. Caleb has primary physical custody of S.H. Because Caleb lives in Oregon and Lisa lives in Nevada, Lisa is allotted, at a minimum, spring break and summer break for parenting time.

In 2020, Lisa failed to return S.H. to Caleb after summer break. According to Lisa, she purchased S.H.'s plane ticket and took her to the airport. But upon arrival, S.H. expressed fear about returning to Caleb, had a panic attack, vomited twice in the restroom, and refused to board the plane. Lisa alleged that she tried later that same day to get S.H. to board the plane, but S.H. "began crying, stated her stomach was still ill, and she again, refused to go." Lisa then notified Caleb that she would not return S.H.

Caleb consequently filed a motion requesting that the court enforce the custody order by ordering Lisa to return S.H., modify the form of Lisa's parenting time to virtual, and issue a standard behavior order. Lisa in turn opposed Caleb's motion and filed a countermotion to modify physical custody. In that opposition and countermotion, Lisa alleged generally, and with specific examples, that Caleb medically, physically, and educationally neglected S.H.; verbally and emotionally abused S.H.; made S.H. sleep in a nonbedroom on a foam mattress on the floor because of an overcrowded house; and denied Lisa parenting time and substantially interfered with it when it did occur. Lisa supported her opposition and countermotion with a declaration. *See* NRS 53.045 (permitting an unsworn declaration signed by the declarant under penalty of perjury in lieu of an affidavit). Caleb responded, denied the allegations, and provided documents and reports in support of his position.

The district court then held a nonevidentiary hearing on Caleb's motion, which it granted. However, the court also found sua sponte that Lisa had demonstrated adequate cause to reopen discovery and provided her the opportunity to gather sufficient proof of her claims

[1]Between 2010 (when the parties filed for divorce) and 2014 (when Caleb petitioned for and was granted permission to relocate to Oregon with S.H.), Lisa filed ten different appeals—all of which the supreme court dismissed on procedural grounds. Lisa more recently filed an unsuccessful motion to modify physical custody in 2018. The record does not reveal the extent to which modifications of custody have been sought between 2014 and 2018.

in her countermotion to modify physical custody.[2] It then granted the parties 90 days to conduct discovery.

At the end of the discovery period, Lisa submitted informal[3] offers of proof she claimed supported her allegations. Caleb likewise offered documents that he claimed contradicted Lisa's allegations. At the subsequent nonevidentiary hearing, the district court stated that it was a "close call" as to whether Lisa had demonstrated adequate cause for an evidentiary hearing because of the documents Caleb provided and the statements he made in his supporting declaration. But the court was concerned that Lisa did not have a full opportunity to respond to Caleb's documents and allegations,[4] so it allowed Lisa time to submit a responsive declaration herself. Lisa did so, largely contesting Caleb's allegations, explaining some of the documents he provided and arguing some of those documents even supported her claims.

After Lisa filed her responsive declaration, the district court denied Lisa's countermotion to modify physical custody, without holding an evidentiary hearing. In denying the countermotion, the court summarily concluded that

> the countermotion filed by Lisa Myers and her supporting filings do not state facts that would support a substantial change in circumstances affecting the welfare of the child, and that the child's best interest is served by the modification. The countermotion lacks merit and should be denied.

This appeal followed.

ANALYSIS

Now on appeal, Lisa argues that the district court abused its discretion in denying her countermotion to modify physical custody

[2]NRCP 16.21(a) generally prohibits post-judgment discovery in family law matters. NRCP 16 does, however, allow a court to order post-judgment discovery in family law matters in two situations: (1) if a court has ordered an evidentiary hearing in a post-judgment child custody matter, or (2) if a court finds "good cause" for the discovery. NRCP 16.21(b). In this case, the district court apparently ordered the discovery under the second exception rather than the first; however, it labeled it as "adequate cause."

[3]Lisa did not provide any affidavits or declarations from the witnesses she planned to call at an evidentiary hearing. Rather, she noted the substance of specific individuals' anticipated testimony. The individuals included both a police officer and a school counselor from Oregon, Caleb's former spouse, and S.H.'s maternal grandmother. Lisa's original allegations were supported by a declaration, as was her reply to Caleb's "discovery." However, Caleb did not object to these offers of proof under any of the grounds listed in *Rooney*. *See* 109 Nev. at 543, 853 P.2d at 125.

[4]Caleb provided his disclosures, which were lengthy, just days prior to the nonevidentiary hearing.

without first holding an evidentiary hearing. She claims that she presented a prima facie case for modification because she provided declarations and informal offers of proof in the form of summaries of anticipated witness testimony, documents, and video. Caleb, however, argues the court did not abuse its discretion in denying Lisa's countermotion without holding an evidentiary hearing. He claims instead that Lisa failed to demonstrate a prima facie case for modification because his "discovery responses addressed and disapproved [sic] all [of Lisa's] allegations."[5]

We review a district court's decision to deny a motion to modify physical custody without holding an evidentiary hearing for an abuse of discretion. *See Bautista v. Picone*, 134 Nev. 334, 338, 419 P.3d 157, 160 (2018). A district court abuses its discretion only when "no reasonable judge could reach a similar conclusion under the same circumstances." *In re Guardianship of Rubin*, 137 Nev. 288, 294, 491 P.3d 1, 6 (2021) (internal quotations omitted) (quoting *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014)). But "deference is not owed to legal error, or to findings so conclusory they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (internal citations omitted). We "must be satisfied that the court's determination was made for the appropriate reasons." *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

Generally, "[l]itigants in a custody battle have the right to a full and fair hearing concerning the ultimate disposition of a child." *Moser v. Moser*, 108 Nev. 572, 576, 836 P.2d 63, 66 (1992). But when a movant seeks to modify physical custody, a district court only needs to hold an evidentiary hearing if the movant demonstrates "adequate cause" for one. *Rooney*, 109 Nev. at 542, 853 P.2d at 124. "Adequate cause" arises if the movant demonstrates a prima facie case for modification. *Id.* at 543, 853 P.2d at 125. And to modify physical custody in Nevada, the movant must show that "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Romano v. Romano*, 138 Nev. 1, 3, 501 P.3d 980, 983 (2022) (quoting *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007)).

This case asks us to address what evidence and allegations the district court may consider in determining whether the movant has demonstrated a prima facie case for modification. In determining whether a movant has demonstrated a prima facie case for mod-

[5]Caleb primarily relies on an Oregon Child Protective Services (CPS) report he submitted to the district court, which determined the claims made against him were unsubstantiated. Apparently, after Lisa returned S.H. pursuant to the district court's order, she requested a welfare check for S.H., which resulted in a CPS investigation. Caleb claims that this CPS report addresses the "bulk of [Lisa's] allegations [from her offers of proof]."

ification of physical custody, the court must accept the movant's specific allegations as true. *See Geibe v. Geibe*, 571 N.W.2d 774, 777 (Minn. Ct. App. 1997) (providing that, in evaluating whether the movant established a prima facie case for custody modification, district courts must accept the movant's allegations as true); *Volz v. Peterson*, 667 N.W.2d 637, 641 (N.D. 2003) (same);[6] *cf. Barelli v. Barelli*, 113 Nev. 873, 879-80, 944 P.2d 246, 249-50 (1997) (requiring district courts to accept a movant's allegations as true in considering whether the movant demonstrated a prima facie case under NRCP 41(b)); *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("[W]here . . . something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting . . . an evidentiary hearing . . . ." (quoting *Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974))). Thus, the district court should not require that the movant prove his or her allegations before holding an evidentiary hearing. *See Betzer v. Betzer*, 749 S.W.2d 694, 695 (Ky. Ct. App. 1988) (holding affidavits alone may be considered in determining adequate cause for a hearing); *Geibe*, 571 N.W.2d at 777; *cf.* DCR 13(6) ("Factual contentions involved in any pre-trial or post-trial motion shall be initially presented and heard upon affidavits."); *Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25 (permitting a court to deny a motion to modify physical custody based solely on affidavits and points and authorities—both of which are not evidence).[7]

Furthermore, a district court should not weigh the evidence or make credibility determinations before holding an evidentiary hearing. *Cf. Barelli*, 113 Nev. at 879-80, 944 P.2d at 249-50 (holding that, in evaluating whether the movant has demonstrated a prima facie

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[6]In *Rooney*, the supreme court patterned the adequate cause standard after custody modification standards used in other states. 109 Nev. at 542-43, 853 P.2d at 124-25. The supreme court also stated that the *Rooney* standard "comports with section 410 of the Uniform Marriage and Divorce Act [(UMDA)]." *Id.* at 543 n.4, 853 P.2d at 125 n.4. We therefore look to section 410 of the UMDA, the cases interpreting it, and the authority the supreme court relied on in adopting the *Rooney* standard for instruction in interpreting *Rooney*. *Cf. Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 341, 325 P.3d 1259, 1264 (2014) (finding federal court interpretations of FRE 612 "instructive" in interpreting NRS 50.125—Nevada's parallel provision to FRE 612); *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 583, 97 P.3d 1132, 1137 (2004) (holding that because NRS 78.585 "was patterned after Section 105 of the 1969 Model Act, we may look to the . . . case law interpreting provisions based on" that act).

[7]Section 410 of the UMDA references only affidavits as the evidentiary mechanism through which a movant establishes adequate cause for a hearing. *Unif. Marriage & Divorce Act* § 410 (1973), 9A U.L.A. 538 (1998); *see also Rooney*, 109 Nev. at 543 n.4, 853 P.2d at 125 n.4. This is why Kentucky, which also adopted section 410, relies solely upon affidavits in determining whether a movant has demonstrated adequate cause for a hearing. *Betzer*, 749 S.W.2d at 695.

case for the purposes of NRCP 41, a court must neither "pass upon the credibility of the witnesses nor weigh the evidence" and will "disregard any contradictory evidence presented by the defense" (internal quotations omitted)); *Fernandez v. Admirand*, 108 Nev. 963, 968, 843 P.2d 354, 358 (1992) ("The credibility of the witnesses and the weight of the evidence are immaterial to the presentation of a prima facie case."). Notably, the supreme court has implicitly held that, under *Rooney*, the place to present evidence for a district court to weigh is at an evidentiary hearing. *See Arcella v. Arcella*, 133 Nev. 868, 872, 407 P.3d 341, 346 (2017) (noting that, in the *Rooney* context, a district court may not decide a motion to modify custody "upon contradictory sworn pleadings [and] arguments of counsel" (alteration in original) (quoting *Mizrachi v. Mizrachi*, 132 Nev. 666, 678, 385 P.3d 982, 990 (Ct. App. 2016))).[8] Indeed, evidentiary hearings are designed with this purpose in mind: to resolve disputed questions of fact. *See* DCR 13(6) (recognizing that disputed factual points may be resolved at evidentiary hearings); EDCR 5.205(g)[9] (providing that exhibits attached to motions do not constitute substantive evidence unless admitted); *cf. Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 644-45, 837 P.2d 1354, 1359 (1992) (recognizing that conducting an evidentiary hearing is the only way to properly resolve questions of fact concerning whether to dismiss a party's suit as a discovery sanction).

Despite this holding, section 410 of the UMDA and persuasive authority from other states contemplate that a nonmovant may file an opposing affidavit. *See, e.g.*, *Unif. Marriage & Divorce Act* § 410 (1973), 9A U.L.A. 538 (1998); *Boland*, 800 N.W.2d at 183; *Mock v. Mock*, 673 N.W.2d 635, 637-38 (N.D. 2004); *In re Parentage of Jannot*, 37 P.3d 1265, 1268 (Wash. Ct. App. 2002). We consequently recognize that nonmovants may allege facts and provide offers of proof that may address the allegations the movant has presented. And while district courts may only weigh credibility and evidence at an evidentiary hearing, they nonetheless need not blind themselves to evidence a nonmovant presents if it "conclu-

[8]*See also Pridgeon v. Superior Court*, 655 P.2d 1, 5 (Ariz. 1982) (holding that a court cannot conduct a "trial by affidavit" and attempt to "weigh the credibility of the opposing statements" in determining adequate cause for a hearing); *Boland v. Murtha*, 800 N.W.2d 179, 183 (Minn. Ct. App. 2011) (holding that district courts must "disregard the contrary allegations in the nonmoving party's affidavits" when determining if the movant demonstrates a prima facie case for modification sufficient to hold an evidentiary hearing); *O'Neill v. O'Neill*, 619 N.W.2d 855, 858 (N.D. 2000) (holding that the district court abused its discretion by weighing conflicting testimony in determining if the movant presented a prima facie case warranting an evidentiary hearing).

[9]The EDCR has been amended while this case has been pending on appeal, but the rule changes do not affect this rule. We cite to the rules in effect while this litigation was taking place in the district court.

sively establish[es]" the movant's claims are false. *See Mock*, 673 N.W.2d at 637-38 (internal quotations omitted). Adopting this limited exception serves the purposes for which *Rooney* was adopted in the first place: "(1) discourag[ing] contests over temporary custody; and (2) prevent[ing] repeated or insubstantial motions for modification." *See Rooney*, 109 Nev. at 543 n.4, 853 P.2d at 125 n.4 (alterations in original) (internal quotations omitted).

Additionally, in determining whether the movant has demonstrated a prima facie case for modification, district courts need not consider facts that are irrelevant to the grounds for modification,[10] that are cumulative,[11] or that are impeaching. *Rooney*, 109 Nev. at 543, 853 P.2d at 125. Nor need courts consider allegations which, even if proven, would only "permit inferences sufficient to establish grounds for a custody change." *Id.* Additionally, courts are not required to consider a movant's general, vague, broad, or conclusory allegations. *See, e.g.*, DCR 13(5) ("Affidavits shall contain only factual, evidentiary matter, shall conform with the requirements of NRCP 56(e), and shall avoid mere general conclusions or argument. Affidavits substantially defective in these respects may be stricken, wholly or in part."); *see also, e.g.*, *Pridgeon*, 655 P.2d at 5; *Betzer*, 749 S.W.2d at 695; *Madgett v. Madgett*, 360 N.W.2d 411, 413 (Minn. Ct. App. 1985); *Schumacker v. Schumacker*, 796 N.W.2d 636, 640 (N.D. 2011); *In re Marriage of MacLaren*, 440 P.3d 1055, 1067 (Wash. Ct. App. 2019).

Finally, the district court need not consider facts alleged or exhibits filed that are not supported by verified pleadings, declarations, or affidavits. *Rooney*, 109 Nev. at 543 & n.4, 853 P.2d at 125 & n.4

[10]In demonstrating a substantial change in circumstances, the movant must allege facts that have occurred "since the last custody determination." *Ellis*, 123 Nev. at 151, 161 P.3d at 243. This prong of the test for modifying custody "prevents persons dissatisfied with custody decrees [from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." *Id.* (alteration in original) (quoting *Castle v. Simmons*, 120 Nev. 98, 103-04, 86 P.3d 1042, 1046 (2004) (internal quotations omitted)).

While district courts are barred from considering facts that preexisted the current custody order in considering whether a substantial change in circumstances has occurred, *see id.*, courts are not barred from looking at that evidence to determine whether modification is in the child's best interest. *See Nance v. Ferraro*, 134 Nev. 152, 163, 418 P.3d 679, 688 (Ct. App. 2018) ("[Prior orders] do not, however, bar district courts from reviewing the facts and evidence underpinning their prior rulings in deciding whether the modification of a prior custody order is in the child's best interest."). This is because "Nevada law is clear: the district court *must* consider all the best interest factors in . . . deciding whether to modify custody," and a court's decision to bar evidence simply because it preexisted the custody order amounts to an abuse of discretion. *Id.* at 161-62, 418 P.3d at 686-87.

[11]Cumulative evidence has been defined as "tending to prove the same thing." *Cumulative*, *Black's Law Dictionary* (11th ed. 2019).

(alluding only to facts established in affidavits and citing section 410 of the UMDA, which requires establishing adequate cause via affidavits alone); *see also* NRS 15.010 (permitting verification of pleadings via affidavit); NRS 53.045 (permitting an unsworn declaration signed by the declarant under penalty of perjury in lieu of an affidavit); EDCR 5.102 ("Unless the context indicates otherwise, 'affidavit' includes an affidavit, a sworn declaration, and an unsworn declaration under penalty of perjury."); DCR 13(6) (requiring factual contentions first be presented upon affidavits). For these reasons, demonstrating a prima facie case for modification is a "*heavy burden* on a petitioner which must be satisfied before a hearing is convened." *Roorda v. Roorda*, 611 P.2d 794, 796 (Wash. Ct. App. 1980) (emphasis added), *overruled on other grounds by In re Parentage of Jannot*, 65 P.3d 664, 666 (Wash. 2003).

Here, Lisa alleged facts that, if proven at an evidentiary hearing, could constitute a substantial change in circumstances affecting the welfare of S.H. and establish that it is in S.H.'s best interest to modify custody. Specifically, Lisa alleged that Caleb, Valeri (Caleb's current wife), and Valeri's sons (all of whom live in the home) have threatened harm to S.H., and that Valeri struck a child living with S.H. in front of S.H. *See* NRS 125C.0035(4)(k) (specifying that a child's best interest includes a determination whether a parent has engaged in an act of domestic violence against the child or a person residing with the child); NRS 125C.0035(5) (creating a rebuttable presumption that sole or primary physical custody by the perpetrator of domestic violence against the child or someone living with the child is not in the child's best interest); NRS 125C.0035(1)(b) (defining domestic violence as committing acts described in NRS 33.018(1)). Lisa also alleged that Caleb and Valeri use specific derogatory terms to demean S.H. in front of S.H. and directly to her. *See* NRS 125C.0035(4)(f)-(h) (collectively, the custody best interest factors related to the mental health of the parents; the physical, developmental, and emotional needs of the child; and the nature of the relationship of the child with each parent).

Lisa also alleged that S.H. has overcrowded teeth that cause her pain when eating certain foods and that Caleb will not remedy the situation or allow Lisa to remedy it for him. *See* NRS 125C.0035(4)(g), (j) (the parents' ability to cooperate to meet the needs of the child and parental neglect). Additionally, Lisa alleged that S.H. is often forced to clean up for the other children, care entirely for two minor children younger than S.H. on Wednesdays for Valeri, and care for Valeri's nonambulatory son by bringing him meals, and that Caleb and Valeri are not providing S.H. proper clothing—leaving her in ripped and dirty clothing. *See* NRS 125C.0035(4)(g), (h), (j). Not only did Lisa make these allegations, but she provided two declarations and informal offers of proof, summarizing proposed witness testimony for most of them.

Furthermore, Lisa has alleged that S.H. sleeps in a nonbedroom on a foam mattress in a house overcrowded with people and animals and that S.H. wants to live with her, not Caleb. *See* NRS 125C.0035(4)(a) (wishes of the child), (g), (h). Lisa has alleged that Caleb has both deprived her of parenting time and substantially interfered with any that did occur. *See* NRS 125C.0035(4)(c), (d), (e) (collectively, the custody best interest factors related to which parent is more likely to allow the child to have frequent associations and a continuing relationship with noncustodial parent; level of conflict between the parents; and the parents' ability to cooperate to meet the needs of the child); *Martin v. Martin*, 120 Nev. 342, 346, 90 P.3d 981, 983 (2004) (holding that a custodial parent's substantial or pervasive interference with a noncustodial parent's parenting time constitutes changed circumstances), *abrogated on other grounds by Ellis*, 123 Nev. 145, 161 P.3d 239. She has alleged that Caleb and Valeri do not help S.H. with her homework, do not review it, and do not check that it is done and that, as a result, S.H. has fallen behind in math. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (holding a four-month slide in academic performance constituted a substantial change in circumstances); *see also* NRS 125C.0035(4)(e), (g), (h).

However, rather than rely upon the allegations Lisa made in her pleadings, papers, and declarations, the district court instead relied upon Caleb's allegations and purported evidence in determining whether Lisa met her burden of demonstrating a prima facie case for modification. Indeed, at the second nonevidentiary hearing, the court noted that it was a "close call" precisely because Caleb had provided a CPS report investigating some of Lisa's claims, S.H.'s unauthenticated medical and dental records, *see* NRS 52.325(2), and Lisa's email allegedly waiving spring break parenting time. The court thus acknowledged that, before holding an evidentiary hearing, it weighed the allegations Lisa provided against the allegations and offers of proof that Caleb offered. The district court thus abused its discretion when it weighed the respective allegations and offers of proof without holding an evidentiary hearing and concluded that Lisa failed to demonstrate a prima facie case for modification.

Furthermore, the CPS report that Caleb provided the district court did not "conclusively establish" the falsity of Lisa's allegations, despite the similarity between the claims the CPS worker investigated and some of the allegations Lisa presented to the court. Generally, a CPS case worker not substantiating similar claims to the ones alleged will not conclusively establish the falsity of a movant's allegations.[12] Such a decision, as in this case, would

[12]Indeed, such reports are not automatically admissible and are subject to most of Nevada's typical evidence rules. *See In re Parental Rights as to J.D.N.*, 128 Nev. 462, 469-70, 283 P.3d 842, 847-48 (2012). The problem with relying on a nonmovant's documents to determine a movant has not demonstrated a prima facie case for modification is that it disposes of the movant's

require evaluating the credibility of the CPS worker's testimony and the quality of her investigation versus Lisa's sworn allegations. While in many cases an admissible CPS report can be helpful in resolving a case on the merits, making such determinations is best left to an evidentiary hearing so the parties can challenge or support the accuracy of the report and its conclusions, and so the court can review the thoroughness of the CPS investigation and make credibility determinations.[13] Thus, the district court abused its discretion in weighing the evidence and making credibility determinations resulting in a case-ending custody decision based upon conflicting evidence without holding an evidentiary hearing.

And here, even accepting the CPS report as admissible and accurate, Lisa made many other specific allegations that establish a prima facie case for modification. The district court therefore abused its discretion when it weighed Caleb's proposed evidence against Lisa's relevant allegations and determined that Lisa had not made a prima facie showing for modifying physical custody. The district court therefore should have found adequate cause to hold an evidentiary hearing based on Lisa's allegations.[14] The district court

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case upon conflicting evidence that might not even be admissible at an evidentiary hearing. Denial determinations under *Rooney* that effectively end a case for a litigant should not be made on conflicting and potentially inadmissible evidence.

[13]Finally, even with a reliable CPS report and credible testimony, the CPS report's recommendations may not be applicable because the conclusion from a child protection investigation has a different purpose than a motion to modify custody. *See, e.g.*, NRS 432B.180 (detailing the duties of the Division of Child and Family Services (DCFS)); NRS 432B.330 (describing when a child may need protection by DCFS); NRS 432B.340 (noting that a child not in imminent danger from abuse or neglect need not necessarily be placed in protective custody).

[14]To clarify, once a movant establishes a prima facie case for modification based upon his or her verified pleadings, declarations, or affidavits, the district court cannot deny the movant's motion to modify without first holding an evidentiary hearing. *Rooney*, 109 Nev. at 542, 853 P.2d at 124. It generally therefore does not matter if postjudgment discovery has occurred because courts are only concerned, as discussed above, with what the movant has alleged in his or her verified pleadings, declarations, and affidavits. For this reason, postjudgment discovery is generally not permitted in child custody cases without setting a subsequent evidentiary hearing because what is discovered should not be considered in the district court's *Rooney* analysis. *See supra* note 2. *But compare* NRCP 16.21(b)(2) (recognizing postjudgment discovery may be permitted for good cause), *with supra* discussion in text between notes 9 and 10 (adopting an exception wherein a district court may rely on evidence the nonmovant presents that "conclusively establish[es]" the falsity of the movant's allegations in determining if the movant presented a prima facie case for modification). Thus, under the ideal situation, the district court would have reviewed Lisa's motion, found that she had demonstrated a prima facie case for modification, ordered postjudgment discovery regarding Lisa's allegations, then set an evidentiary hearing for Lisa to prove those allegations.

consequently abused its discretion because no reasonable judge could have found that Lisa failed to demonstrate a prima facie case for modification had that judge accepted the allegations Lisa provided in her declarations as true.

From the record, it appears that Caleb argued, and the district court may have believed, that Lisa's declarations or offers of proof contained allegations that were either cumulative, impeaching, or inappropriate to consider in evaluating whether there had been a substantial change of circumstances. As discussed above, the court would not have needed to consider any insufficient allegations in determining whether Lisa demonstrated a prima facie case for modification. But in the order denying Lisa's motion to modify, the district court did not provide specific findings or adequately explain why Lisa failed to demonstrate a prima facie case for modification.

In modification of child custody cases, district courts must make specific findings and provide adequate explanation for their child custody determinations. *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015). The supreme court requires these findings, and especially the explanation, for two reasons: (1) to aid appellate review by ensuring the court made its determination for appropriate reasons, and (2) to help parents understand why the motion was decided the way that it was because it may affect future motions to modify custody.[15] *See id.* at 452, 352 P.3d at 1143-44. And without these findings and explanation,[16] appellate courts—and parents—are relegated to speculate about how and why the court ruled as it did, which we will not do. *Cf. Somee v. State*, 124 Nev. 434, 442, 187 P.3d 152, 158 (2008).

We now hold that the district court must provide an adequate explanation when it denies a motion to modify custody without

[15]Importantly, when a district court denies a motion to modify custody under *Rooney*, which is a threshold determination, it has the same practical effect as a denial on the merits: custody is not modified. *Davis*'s purposes in requiring findings and an adequate explanation are no less served in the *Rooney* context, because in either case parents will not understand what needs to happen before custody may be modified. Consequently, a district court's failure to follow *Davis* may encourage repetitive, insubstantial motions to modify custody, which is antithetical to *Rooney*'s stated purpose. *See Rooney*, 109 Nev. at 543 n.4, 853 P.2d at 125 n.4. Explaining to parents why their allegations are insufficient to modify custody is especially important given that many parents who seek to modify custody do so pro se. *Cf.* Stephan Landsman, *Pro Se Litigation*, 8 Ann. Rev. L. & Soc. Sci. 231, 239 (2012) (noting an increase in self-representation in the domestic relations context and a "clear trend" towards it).

[16]We recognize that findings or an adequate explanation in this *Rooney* context is different and will be limited to the sufficiency of the allegations contained in the verified pleadings, affidavits, declarations, and exhibits filed with the court because no evidence will have been admitted yet. *See, e.g.*, EDCR 5.205(g) ("Exhibits may be deemed offers of proof but shall not be considered substantive evidence unless admitted.").

holding an evidentiary hearing given that such a denial has the same practical implications for a movant as a denial on the merits. *See supra* note 16; *cf.* NRCP 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or . . . *on any other motion*. The court should, however, state on the record the reasons for granting or denying a motion." (emphasis added)). And when a district court fails to provide an adequate explanation for its denial, it makes it difficult for this court to review the district court's decision.[17] An explanation that follows the framework of *Davis* is certainly adequate, but the court gave no such explanation in this case—just a conclusory one that mirrored *Rooney*'s legal requirements.

Additionally, even though Lisa demonstrated a prima facie case requiring the court to hold an evidentiary hearing, we strongly reiterate that the *form* of that evidentiary hearing—both in this case and generally—is entirely within the district court's broad discretion. *Arcella*, 133 Nev. at 872, 407 P.3d at 346 ("While these circumstances obligated the district court to conduct an evidentiary hearing, the *form* of that hearing remains within the district court's discretion."). For example, a district court may dictate when the hearing takes place, the amount of discovery to take place before the hearing (if any), the time each party has to offer evidence, and the scope of the evidentiary hearing. *See, e.g.*, *id.* (noting that the court had discretion to interview the child if it found it appropriate under the circumstances); *see also* NRCP 16.215 (establishing procedures for child interviews and testimony). And these determinations will be overturned on appeal only if the district court clearly abuses its discretion. *Primm v. Lopes*, 109 Nev. 502, 504, 853 P.2d 103, 104 (1993).

CONCLUSION

District courts wield substantial discretion in child custody cases. *See* NRS 125C.0045(1). This includes the discretion to deny a motion to modify custody without holding an evidentiary hearing. *Rooney*, 109 Nev. at 542-43, 853 P.2d at 124-25. To exercise that discretion, however, the district court must first find that the movant has failed to demonstrate a prima facie case for modification. *See id.* And today, we further require that—subject to the exception announced—district courts must make that determination by looking solely to the movant's proper allegations, generally presented in the movant's verified pleadings, declarations, or affidavits. The dis-

[17]For example, we do not have on the record before us Lisa's previously filed motions that may bar under res judicata principles some of the claims she has presented in her most recent declarations. *Compare supra* note 10, *with Castle*, 120 Nev. at 104-05, 86 P.3d at 1047.

trict court in this case thus abused its discretion when it relied upon the nonmovant's allegations and offers of proof to find Lisa failed to demonstrate a prima facie case for modification. Because Lisa's declarations established a prima facie case for modification, the district court abused its discretion in denying her motion to modify custody without holding an evidentiary hearing. We consequently reverse and remand the district court order with instructions to hold an evidentiary hearing.

Tao and Bulla, JJ., concur.

JUSTIN CRAIG BLOUNT; AND STEPHANIE BLOUNT,
APPELLANTS, *v.* PAULA BLOUNT, RESPONDENT.

No. 82095

July 7, 2022 512 P.3d 1254

Appeal from a district court order confirming a foreign child custody determination. Eighth Judicial District Court, Family Division, Clark County; Rena G. Hughes, Judge.

Affirmed.

Justin Craig Blount, Las Vegas, in Pro Se.

Stephanie Blount, Las Vegas, in Pro Se.

Willick Law Group and *Marshal S. Willick* and *Trevor M. Creel*, Las Vegas, for Respondent.

Before the Supreme Court, HARDESTY, STIGLICH, and HERNDON, JJ.

OPINION

By the Court, STIGLICH, J.:

This appeal raises an issue of first impression regarding the registration of foreign child custody orders under NRS 125A.465, part of Nevada's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In particular, we must interpret the portion of the statute that precludes a party from challenging the registration if the party fails to do so within 20 days of receiving notice of the request to register and those challenges that "could have been asserted at the time of registration." NRS 125A.465(6), (8). In light of the statute's plain language, the decisions of other jurisdictions, and the commentary to the UCCJEA and another similar act, we conclude that the statute is unambiguous and apply its plain language, which accords with the other authorities. Accordingly, because no party timely challenged the foreign order's registration, we affirm the district court's order confirming the foreign custody order at issue in this case.

FACTS AND PROCEDURAL HISTORY

Appellant Justin Craig Blount is the father to the two minor children whose custody is at issue in this case. Respondent Paula Blount is their paternal grandmother. When Justin and the children's biological mother, a member of the Hualapai Tribe, were going through a divorce, the Tribal Court of the Hualapai Tribe in Peach Springs,

Arizona, awarded temporary custody of the children to the mother. When the mother passed away, the Tribal Court restored custody to Justin, and the children went to live with him and appellant Stephanie Blount, now his wife, in Nevada in 2017. In July 2019, a Nevada district court entered a decree of adoption declaring Justin and Stephanie the children's legal parents.[1] We later affirmed the district court's order rejecting Paula's separate petition for grandparent visitation because the Tribal Court still had jurisdiction over such issues. *In re Visitation of J.C.B.*, No. 76831, 2019 WL 4447341, *3 (Nev., Sept. 16, 2019) (Order of Affirmance).

After this court's decision, in December 2019, Paula petitioned the Tribal Court for grandparent visitation, asserting that the children lived with her for a significant amount of time before moving to Nevada and that Justin had not let her see or talk to the children since they moved. The Tribal Court sent notice of the hearing and motion to Justin's counsel, although the notice named the counsel as the plaintiff rather than Justin. Neither Justin nor his counsel responded to the notice or appeared at the hearing, and the Tribal Court entered an order granting joint custody to Paula and Justin in January 2020.[2]

Paula then sought to register the Tribal Court custody order in Nevada and gave notice to Justin as required by statute. Justin's counsel accepted service of the notice on April 6, 2020. On April 30, 24 days later, Justin filed a challenge to Paula's attempt to register, arguing that Stephanie was entitled to, but did not receive, notice of the Tribal Court custody hearing; that the Tribal Court lacked jurisdiction to issue the custody order under the UCCJEA; and that the Tribal Court had entered a superseding custody order granting joint custody to the children's maternal grandparents as well. Stephanie, although not named as a party in the proceeding or given notice of the request to register, also filed a pro se opposition in August 2020. After a hearing—relying on *In re Visitation of J.C.B.*, No. 76831, and the UCCJEA—the district court concluded that the Tribal Court had continuing, exclusive jurisdiction over all custody issues regarding Justin's children, despite the intervening adoption proceedings. The court did not address Justin's and Stephanie's challenges to the propriety of the Tribal Court's order, instead stating that "those [purported] defects are not for this court to weigh in on and the father may consider appealing the Court's decision."

[1]Although Paula asked the Tribe to oppose the adoption, and it initially did so, the Tribe later concluded that it could not "intervene in a case filed in another court's jurisdiction," advised Paula to seek other counsel to challenge the adoption, and withdrew its motion to intervene in the adoption proceedings.

[2]The Tribal Court's order noted the issues with the notice to Justin but did not conclude those issues made the notice defective. It is also unclear why the Tribal Court awarded Paula joint custody when she initially sought visitation.

The court therefore gave "full faith and credit" to the Tribal Court custody order. Justin and Stephanie now appeal.

DISCUSSION

Below and on appeal, Paula argued that because Justin's and Stephanie's challenges were raised more than 20 days after Justin's counsel accepted service of the notice of the registration request, they were untimely and waived under the UCCJEA. And because the arguments were not timely raised, she asserts that the UCCJEA required the district court to register the Tribal Court custody order as a matter of law. Although we could consider Justin and Stephanie's failure to respond to this argument on appeal as a confession of error, *see Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious), we choose to address the issue on the merits, *see Huckabay Props., Inc. v. NC Auto Parts, LLC*, 130 Nev. 196, 202, 322 P.3d 429, 433 (2014) (noting the court's "policy preference for merits-based dispositions").

The UCCJEA is codified at NRS Chapter 125A. NRS 125A.465(1) provides that "[a] child custody determination issued by a court of another state may be registered in this state" by complying with certain requirements.[3] One requirement is that notice of the registration request be served on "any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered." NRS 125A.465(1)(c); *see also* NRS 125A.465(4) (providing that "[t]he person seeking registration of a child custody determination pursuant to subsection 1 shall serve notice . . . upon each parent or person who has been awarded custody or visitation identified pursuant to paragraph (c) of subsection 1"). The notice must inform the recipient that a registered order is enforceable in Nevada, that the recipient has 20 days to request a hearing contesting the validity of the registration, and that the "[f]ailure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted." NRS 125A.465(5).

Echoing the notice requirements, NRS 125A.465(6) explicitly provides that "[a] person seeking to contest the validity of a registered order must request a hearing within 20 days after service of

[3]The UCCJEA applies to tribes. NRS 125A.215(2) ("A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying [the relevant statutes]."); NRS 125A.215(3) ("A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the provisions of this chapter must be recognized and enforced pursuant to NRS 125A.405 to 125A.585, inclusive.").

the notice." If a party does not timely request such a hearing, "the registration is confirmed as a matter of law." NRS 125A.465(7). A district court's confirmation of the registration "precludes further contest of the order with respect to any matter that could have been asserted at the time of registration." NRS 125A.465(8).

Here, neither Justin nor Stephanie filed their challenges to Paula's request to register the Tribal Court custody order by the deadline provided in NRS 125A.465(6), but they still argue on appeal that the Tribal Court custody order should not be registered for a variety of reasons. We thus take this opportunity to discuss the implications of failing to timely challenge a request to register under the UCCJEA. The statute's language is necessarily our starting point. There can be no disagreement that it provides that the failure to challenge a properly noticed request to register a foreign custody order within 20 days results in the order being registered "as a matter of law" and "precludes" challenges that could have been raised within the 20-day window. NRS 125A.465(7), (8). The language is plain and unambiguous, and the statute provides no exception to its application. *See Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006) (providing that a statute's meaning is plain when it is not susceptible to more than one interpretation).

The only UCCJEA comment to the registration provision shows that the drafters intended for registration of foreign custody orders to be a straightforward process, stating that the rule "authorizes a simple registration procedure that can be used to predetermine the enforceability of a custody determination." UCCJEA § 305 cmt., 9 pt. IA U.L.A. 550 (2019). The comment also cross-references a similar provision for registering foreign support orders under the Uniform Interstate Family Support Act (UIFSA), stating that the UCCJEA registration procedure "parallels" that of the UIFSA.[4] *Id.* Commentary to the UIFSA registration provision relates that "[t]he rationale for this relatively short period was that the matter had already been litigated, and the obligor had already had the requisite 'day in court.'" UIFSA § 605 cmt., 9 pt. IB U.L.A. 347.

The statute's plain language in conjunction with the clear evidence of the drafters' intent requires us to apply the statute as written. *See Stockmeier v. Psychological Review Panel*, 122 Nev.

[4]The UIFSA provides that a challenge to the registration of a foreign child support order must be made "within 20 days after the notice" of the request to register, NRS 130.605(2)(b); *see also* UIFSA § 605(b)(2), 9 pt. IB U.L.A. 461 (2019), or it is "confirmed by operation of law," NRS 130.606(2); *see also* UIFSA § 606(b), 9 pt. IB U.L.A. 462. "[F]ailure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order . . . and precludes further contest of that order with respect to any matter that could have been asserted." NRS 130.605(2)(c); *see also* UIFSA § 605(b)(3), 9 pt. IB U.L.A. 346.

534, 539, 135 P.3d 807, 810 (2006) ("If [a statute's] language is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent from the words used, unless that meaning was clearly not intended."). And while not many jurisdictions have addressed the 20-day timeline under the UCCJEA, those that have appear to have strictly applied it.[5] *See, e.g.*, *In re T.C. v. A.C.*, No. CN05-03786, 2013 WL 8290632, at *7 (Del. Fam. Ct. Dec. 18, 2013) (concluding that the mother's failure to contest the registration of a foreign custody order within 20 days waived later challenges to the order's registration and the order was "valid as a matter of law"); *Shue v. McAuley*, No. 1649, 2017 WL 4117882, at *4 (Md. Ct. Spec. App. Sept. 15, 2017) (holding that the father waived his challenges to registration of a foreign custody order under Maryland's equivalent to NRS 125A.465 by withdrawing his timely challenge and not reasserting it until approximately a year later); *Cook v. Arimitsu*, 907 N.W.2d 233, 241 (Minn. Ct. App. 2018) (noting that no objection to the request to register a child custody order was made under Minnesota's equivalent to NRS 125A.465 and, therefore, the court would not grant any relief regarding the registration).

While some jurisdictions have found reasons to avoid applying the similar 20-day deadline under the UIFSA, the circumstances animating those cases are not present here. In one instance, a court concluded that a party could raise his challenge to the registration outside the 20-day window where the notice of the request to register did not include all the required information. *Washington v. Thompson*, 6 S.W.3d 82, 86-88 (Ark. 1999) (but recognizing that the timing provision was otherwise "mandatory"). Here, Justin and Stephanie do not allege that the notice lacked the information required by the UCCJEA. In another case, a court concluded that the district court had discretion to allow a party to contest registration of a child support order outside the UIFSA's 20-day window

[5]While this court, as well as other jurisdictions, has refused to recognize custody orders where the court entering the order lacked UCCJEA jurisdiction, we note that those cases either did not involve or did not address the relevant 20-day deadline. *See, e.g.*, *Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 852, 264 P.3d 1161, 1168 (2011) (holding that a court that lacks UCCJEA jurisdiction cannot gain it by consent of the parties, estoppel, or waiver, in a case that did not involve NRS 125A.465 registration); *Holly C. v. Tohono O'odham Nation*, 452 P.3d 725, 743 (Ariz. Ct. App. 2019) (stating that the court only has to enforce and recognize extrajurisdictional custody orders where the entering court had UCCJEA jurisdiction with no mention of Arizona's equivalent of NRS 125A.465); *Miller v. Mills*, 64 So. 3d 1023, 1026 (Miss. Ct. App. 2011) (refusing to enforce a Louisiana custody order after concluding that Louisiana lacked UCCJEA jurisdiction without discussing the 20-day deadline); *Blanchette v. Blanchette*, 476 S.W.3d 273, 278-79 (Mo. 2015) (acknowledging that a court's lack of jurisdiction under the UCCJEA would render its order void and be grounds to not register the order in another state but not discussing the timeliness of challenges to attempts to register).

under court rules that parallel NRCP 55 (regarding default judgments) and NRCP 60 (addressing relief from judgments and orders). *Largent v. Largent*, 192 P.3d 130, 134-35 (Wyo. 2008). But Justin and Stephanie did not seek relief under those rules before the district court, so those rules are not at issue in this appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that we do not consider arguments not raised in the district court). Moreover, it appears that the majority of jurisdictions that have considered the UIFSA's 20-day deadline have applied it strictly. *See, e.g.*, *In re Marriage of Sawyer*, 271 Cal. Rptr. 3d 627, 636 (Ct. App. 2020) (agreeing with the lower court that the amount of arrears reflected in a foreign custody order was confirmed by operation of law when the father could have, but did not, challenge the registration within 25 days, the time provided by California's version of the UIFSA); *Dep't of Human Res. v. Mitchell*, 12 A.3d 179, 188-89 (Md. Ct. Spec. App. 2011) (holding that the withdrawal of a timely challenge to the registration of a foreign support order constituted a failure to timely challenge the registration such that the registration was confirmed by operation of the law); *Tepper v. Hoch*, 536 S.E.2d 654, 658 (N.C. Ct. App. 2000) ("Defendant did not request a hearing within 20 days and was, therefore, not entitled to contest the validity or enforcement of the Order. It follows the Order was confirmed by operation of law."); *Smith v. Hall*, 707 N.W.2d 247, 250-51 (N.D. 2005) (holding that the father-obligor was precluded from contesting the registration of a Tribal Court's child support order because the time to do so had expired).

Applying the plain language of NRS 125A.465 here requires us to affirm the district court's order.[6] Neither Justin nor Stephanie filed a challenge to the request to register within 20 days of its service, and the Tribal Court custody order is therefore confirmed as a matter of law pursuant to NRS 125A.465(7). And confirmation of the registered order prevents us from considering Justin's and Stephanie's appellate arguments, as they "could have been asserted at the time of registration."[7] NRS 125A.465(8). Indeed, their main arguments

[6]We note that the adoption decree declaring Stephanie and Justin as the children's legal parents does not factor into our decision. That order is not before us in this appeal, and the UCCJEA, which governs this case, explicitly does "not govern adoption proceedings." NRS 125A.205. And while we recognize that NRS 127.160 (discussing rights and duties of adopted children and adoptive parents) and NRS 127.171 (discussing rights to visitation by relatives following a child's adoption) could be read to conflict with NRS 125A.465, the parties have not raised these statutes, and we therefore express no opinion on the issue.

[7]Although Stephanie appears to argue that she did not receive notice of the request to register, we note that she was not entitled to notice. NRS 125A.465(1)(c) and (4), read together, require notice to be given to "any parent or person acting as a parent *who has been awarded custody or visitation in the child custody determination sought to be registered*." (Emphasis added.) The Tribal Court has never awarded Stephanie custody or visitation, and the

on appeal—that the Tribal Court lacked UCCJEA jurisdiction to enter the custody order, that there was a superseding custody order, and that the Tribal Court failed to give proper notice of the custody hearing to Justin and Stephanie—are arguments that could have been brought within the 20-day window. *See* NRS 125A.465(6) (providing three grounds to challenge the registration of a foreign custody order: lack of jurisdiction by the issuing court; modification of the order sought to be registered; and lack of proper notice of the custody hearing in the issuing state to the person challenging registration).

CONCLUSION

NRS 125A.465's language is plain and unambiguous, and we must therefore apply its 20-day deadline to preclude untimely challenges to the registration of a foreign custody order, such as Justin's and Stephanie's challenges to the Tribal Court custody order at issue here. Thus, we affirm the district court's order registering the Tribal Court custody order, albeit for different reasons than those on which the district court relied. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

Hardesty and Herndon, JJ., concur.

UCCJEA therefore did not require Paula to give Stephanie notice of the request to register the Tribal Court's order. *See* Russell M. Coombs, *Child Custody and Visitation by Non-Parents Under the New Uniform and Child Custody Jurisdiction and Enforcement Act: A Rerun of Seize and Run*, 16 J. Am. Acad. Matrim. Law. 1, 76-77 (1999) (discussing the registration of foreign custody orders under the UCCJEA and the parties who are entitled to notice of requests to register).

ARTMOR INVESTMENTS, LLC, A SERIES OF MM HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* NYE COUNTY, A GOVERNMENTAL ENTITY; AND PAUL W. PRUDHONT, IN HIS CAPACITY AS TREASURER FOR NYE COUNTY, RESPONDENTS.

No. 82742

July 7, 2022 512 P.3d 1249

Appeal from a district court order denying a petition for a writ of mandamus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Affirmed.

The Wright Law Group and *John Henry Wright*, Las Vegas, for Appellant.

Christopher R. Arabia, District Attorney, and *Marla Zlotek*, Chief Deputy District Attorney-Civil, Nye County, for Respondents.

Before the Supreme Court, SILVER, CADISH, and PICKERING, JJ.

OPINION

By the Court, SILVER, J.:

Under NRS 361.610, claims for a tax sale's excess proceeds must be made within one year. In this opinion, we interpret NRS 361.610 for the first time and determine whether it allows a former property owner to file a claim for excess proceeds outside of the one-year deadline where a tenant in common has filed a timely claim. After examining NRS 361.610 as a whole and reviewing its legislative history, we conclude that NRS 361.610 requires each claimant to timely file a claim to receive its share of excess proceeds. Because appellant did not timely file its claim, we affirm the district court's decision to deny appellant's petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

AU Golds, Inc., 6600 West Charleston, LLC, and appellant Artmor Investments, LLC, purchased 17 lots in and around Pahrump, Nye County, as tenants in common (the owners). After the owners failed to pay property taxes, respondent Nye County sold the lots at public auction, resulting in excess proceeds of $177,868.24. Quit claim deeds on the tax sale properties were recorded on June 8, 2019.

Under NRS 361.610(4), the owners had one year from when the deed was recorded to file a claim for the excess proceeds. Both AU Golds and 6600 West Charleston timely filed claims, and Nye

County issued payments of $59,289.55 to each of them.[1] Artmor learned of the excess proceeds in June 2020 and went to Nye County in July to claim its one-third portion. But Nye County informed Artmor that it would not issue that share of the excess proceeds because more than one year had passed since the deeds were recorded. Artmor petitioned the district court for a writ of mandamus directing the Nye County treasurer to issue Artmor a check for $59,289.49. Artmor argued that NRS 361.610 is satisfied where at least one claim is filed within the one-year deadline, and therefore, because the other owners timely filed their claims, the statute was satisfied and the one-year limitation no longer applied. The district court conducted a hearing and denied Artmor's petition. Artmor appeals.[2]

DISCUSSION

Artmor argues the district court erred because NRS 361.610 was satisfied by the timely filing of the other claims, which preserved Artmor's right to its share of the excess proceeds. We disagree.

Under NRS 34.160, "[a] writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). We review a district court's decision to grant or deny a writ petition under an abuse of discretion standard. *DR Partners v. Bd. of Cty. Comm'rs of Clark Cty.*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). However, we review statutory interpretation de novo, even in the context of a writ petition. *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. We interpret a statute by giving "its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation marks omitted). We interpret statutory provisions to avoid unreasonable or absurd results. *Id*. When the statute's language lends itself to two or more reasonable interpretations, the statute is ambiguous, and we can look to the legislative history to construe the statute in a manner consistent with reason and public policy. *See Matter of Estate of Scheide*, 136 Nev. 715, 719-20, 478 P.3d 851, 855 (2020).

[1]Another company who claimed to have power of attorney over Artmor filed a claim for the excess proceeds in early 2020. Although Nye County initially issued a check for the full amount to that company, Nye County later canceled or reversed that payment. Because the other joint tenants timely filed their two claims, we need not weigh this third claim in addressing the question on appeal and therefore do not consider it further.

[2]No party challenged the propriety of proceeding by writ petition in this case.

NRS 361.610 governs the disposition of amounts received from a tax sale, including excess proceeds. NRS 361.610(4) provides the following, in pertinent part:

> The [excess proceeds] must be deposited in an interest-bearing account maintained for the purpose of holding excess proceeds separate from other money of the county. *If no claim is made for the excess proceeds within 1 year* after the deed given by the county treasurer is recorded, the county treasurer shall pay the money into the general fund of the county, *and it must not thereafter be refunded to the former property owner* or his or her successors in interest.

(Emphases added.) NRS 361.610(6) lists the order of priority for paying out excess proceeds and includes the owner in that list. *See* NRS 361.610(6)(b); NRS 361.585(4)(a). NRS 361.610(5) provides that

> *If a person* listed in subsection 6 *makes a claim* in writing for the excess proceeds within 1 year after the deed is recorded, *the county treasurer shall pay* the claim or *the proper portion of the claim over to the person* if the county treasurer is satisfied that the person is entitled to it.

(Emphases added.)

NRS 361.610(4)'s "[i]f no claim is made" language would be ambiguous, if read in isolation, because it could be interpreted to require all parties claiming excess proceeds to do so within one year of the deed's recording or to require only that at least one claim be filed within that year. However, NRS 361.610(4) must be read in concert with its remaining language and the other subsections. *See Cromer v. Wilson*, 126 Nev. 106, 110, 225 P.3d 788, 790 (2010) ("[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized."); *Cable v. State ex rel. its Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006) ("[S]ubsections of a statute will be read together to determine the meaning of that statute."). Notably, NRS 361.610(4) states that after the one-year period expires, excess funds "shall" go into the county's general fund and that the county treasurer "must not thereafter . . . refund[ ]" excess proceeds to the former property owner. This indicates that *all* claimants must file a timely claim because whatever proceeds are unclaimed at the end of the year period will go into the county fund and cannot thereafter be refunded. In this same vein, NRS 361.610(5) states that the county treasurer will pay the claim if "a person" entitled to excess proceeds under this statute files their claim within the one-year deadline, acknowledging that only a portion of the proceeds may be paid to that claimant if more is not otherwise owed. Furthermore, subsection 7 requires the

county treasurer to determine a claim within 30 days after subsection 4's one-year period expires. These subsections further support that a timely filed claim does not somehow toll or extinguish the one-year deadline, which remains in force as to each claimant and sets an outer limit on when the county treasurer must approve or deny all claims so that unclaimed excess proceeds can be deposited into the county fund. Thus, from NRS 361.610's language as a whole, it follows that the one-year deadline applies to all claimants regardless of whether other claims have been timely filed.

Legislative history supports this interpretation. Prior to 1979, NRS 361.610(4) required excess proceeds to be paid into the general fund, and it furnished no method for property owners to obtain excess proceeds. Hearing on S.B. 163 Before the S. Comm. on Taxation, 60th Leg., at 621 (Nev., Mar. 6, 1979); 1979 Nev. Stat., ch. 429, § 2, at 771-72. However, in 1979, the Legislature expressed an interest in ensuring the property owner receive any excess proceeds, especially where the property owner had requested them, but also expressed concern that keeping the money outside of the counties' general funds for a time "would be a large revenue loss to the counties." *See* Hearing on S.B. 163 Before the S. Comm. on Taxation, 60th Leg., at 622 (Nev., Mar. 6, 1979). The statute was amended to place excess proceeds in an account after the tax sale and to impose a deadline on filing a claim, after which any remaining excess proceeds would go into the county's general fund. 1979 Nev. Stat., ch. 429, § 2, at 771-72. This shows the Legislature intended to put a filing deadline on all claims, so as not to deprive the county of unclaimed funds. Subsequent legislative history demonstrates that the Legislature continues to view NRS 361.610 as providing a deadline by which a claimant must file a claim. *See* Hearing on A.B. 371, Before the Assemb. Comm. on Gov't Affairs, 73d Leg., at 44 (Nev., Apr. 8, 2005) (describing these same sections as allowing a former property owner to claim the money if he or she files the claim within the time period); Hearing on A.B. 585, Before the Assemb. Comm. on Taxation, 74th Leg., at 19 (Nev., Apr. 12, 2007) (discussing the process of notifying a former property owner of excess proceeds but not wanting the county to be held liable if someone is not properly notified).

We are also unpersuaded by Artmor's argument that, pursuant to NRS 361.610(6), Nye County was prohibited from adjudicating the rights of the other owners without also adjudicating Artmor's rights and paying Artmor its share. NRS 361.610(6) establishes the priority of claimants in the event there are multiple claimants. Notably, nothing in subsection 6 establishes that paying out one claim to excess proceeds requires the county treasurer to pay excess proceeds to other equal-tiered or higher-tiered claimants who fail to timely file a claim. Further, the legislative history on that subsection indicates

it was created to specify the claim priority for "finder[s]," which are companies who locate people entitled to the money in return for a cut of the proceeds. *See* Hearing on A.B. 585, Before the Assemb. Comm. on Taxation, 74th Leg., at 19-20 (Nev., Apr. 12, 2007). This history suggests that reserving payouts for untimely claimants was not the Legislature's intention in promulgating NRS 361.610(6). It therefore follows from the statute as a whole, as well as from the collective legislative history, that subsection 6 does not operate to require the county to pay late-filed claims simply because the county pays another claim.

Therefore, we conclude that if a former property owner wants its share of the excess proceeds from a tax sale, the former property owner must file a claim for those excess proceeds within NRS 361.610's one-year deadline. Here, Artmor failed to file its claim to the excess proceeds within the deadline, and the other timely filed claims did not relieve Artmor of its burden to do so. Nor did Nye County's determination to pay the other two owners their shares of the excess proceeds require Nye County to also pay Artmor its share of the proceeds. Because Artmor failed to timely file a claim, the money is no longer accessible to Artmor under NRS 361.610, and the district court properly denied Artmor's petition for a writ of mandamus.

CONCLUSION

NRS 361.610 requires a former property owner to submit a timely claim in order to receive excess proceeds after a tax sale. Because Artmor did not file a timely claim for excess proceeds, it was not entitled to those proceeds, and the district court did not abuse its discretion in denying Artmor's writ petition. Therefore, we affirm the district court's order denying Artmor's writ petition.

Cadish and Pickering, JJ., concur.

IRVING TORREMORO; AND KEOLIS TRANSIT SERVICES, LLC, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ERIKA D. BALLOU, DISTRICT JUDGE, RESPONDENTS, AND LAMONT COMPTON, REAL PARTY IN INTEREST.

No. 83596

July 7, 2022 512 P.3d 765

Original petition for a writ of mandamus challenging a district court order allowing the substitution of an expert witness after discovery had closed.

Petition denied.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and *Michael P. Lowry*, Las Vegas, for Petitioners.

Maier Gutierrez & Associates and *Joseph A. Gutierrez* and *Stephen G. Clough*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, HARDESTY, STIGLICH, and HERNDON, JJ.

OPINION

By the Court, HERNDON, J.:

In this opinion, we address the standard for substituting an expert witness after the close of discovery. We clarify that NRCP 16(b)(4)'s good cause standard for modifying a scheduling order provides the proper standard for considering such motions and that the district court should also apply any relevant local discovery rules, such as EDCR 2.35(a) in this case, in its evaluation. Finally, we determine that the district court did not abuse its discretion in modifying the scheduling order, reopening discovery, and granting the motion to substitute.

FACTS AND PROCEDURAL HISTORY

Real party in interest Lamont Compton filed a complaint against petitioners Irving Torremoro and Keolis Transit Services, LLC (collectively, petitioners) for claims of negligence; respondeat superior; and negligent hiring, training, and/or supervision after Compton sustained significant injuries from a motor vehicle accident. Dr. Jeffrey Gross treated Compton for his injuries and was designated as his retained medical expert. The close of discovery, as stipulated by the parties, was scheduled for March 7, 2020, and the trial was scheduled to begin on September 7, 2021.

Prior to the filing of Compton's complaint, an indictment was filed under seal against Dr. Gross in the United States District Court for the Central District of California. Subsequently, the federal court entered an order unsealing the indictment on May 18, 2018. On March 6, 2020, before the close of discovery, Compton filed a motion in limine to exclude evidence of Dr. Gross' pending federal indictment from being introduced at trial. On August 5, 2020, the district court granted the motion in limine, finding that any testimony about Dr. Gross' pending federal case would be more prejudicial than probative.

Thereafter, Dr. Gross pleaded guilty to one felony count of conspiracy. The plea was entered under seal, however, and not revealed until over nine months later, on May 21, 2021, when the United States Attorney for the Central District of California issued a press release publicizing Dr. Gross' conviction. Dr. Gross was sentenced to 15 months in federal prison for accepting nearly $623,000 in bribes and kickbacks.

After learning of Dr. Gross' conviction and prison sentence, Compton, on June 29, 2021, filed a motion to substitute Dr. Raimundo Leon for Dr. Gross pursuant to NRCP 37(c) and NRCP 16(b)(4). The district court granted Compton's motion, finding that

> (1) the request to substitute Dr. Jeffrey Gross is substantially justified; (2) the harm to Plaintiff is outweighed by any harm to Defendants; (3) Plaintiff had no knowledge of the status of the criminal case as it was under seal until in or about April 2021; (4) discovery shall be reopened for the limited purpose of replacing Dr. Gross only; and (5) no other discovery is permitted.

The trial was rescheduled to September 6, 2022. Petitioners subsequently filed this petition for a writ of mandamus, requesting that this court direct the district court to vacate its order.

DISCUSSION

We exercise our discretion to entertain the petition

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). We generally do not consider a petition for writ relief to address decisions to admit or exclude evidence or expert testimony, unless (1) "an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction," (2) "the issue is one of first impression and of fundamental public importance," or (3) the resolution of the writ petition will resolve related or future litigation. *Williams v. Eighth Judicial Dist. Court*,

127 Nev. 518, 525, 262 P.3d 360, 365 (2011) (internal quotation marks omitted). Whether a petition for a writ of mandamus will be considered is within this court's sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

Petitioners raise an important and unsettled issue of law—under what circumstances is the substitution of an expert witness appropriate after discovery has closed. We therefore exercise our discretion to entertain the petition.

NRCP 16(b)(4)'s good cause standard, along with consideration of any relevant local rules, provides the framework for a district court's evaluation when a party seeks to substitute an expert witness after the close of discovery

In Compton's motion to substitute his expert witness, he argues that the substitution is appropriate under NRCP 16(b)(4) and NRCP 37(c)(1). Petitioners contend that the district court did not apply the correct legal standard and propose that the district court should have followed EDCR 2.35(a)'s "excusable neglect" standard.

NRCP 16(b)(4) provides that the district court may modify a scheduling order for good cause. NRCP 37(c)(1) provides that if a party fails to identify a witness, the party cannot use that witness, "unless the failure was substantially justified or is harmless." EDCR 2.35(a) provides that a request for additional time for discovery made later than 21 days from the close of discovery shall not be granted unless the moving party demonstrates that the failure to act was the result of excusable neglect.

Because we have not previously addressed the correct standard for considering motions to substitute an expert witness after the close of discovery, we look to federal courts for guidance. "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotation marks omitted). In *Fidelity National Financial, Inc. v. National Union Fire Insurance Co. of Pittsburgh*, 308 F.R.D. 649, 652 (S.D. Cal. 2015), the United States District Court for the Southern District of California determined that when reviewing such motions under FRCP 16(b) (amendment of a scheduling order) or FRCP 37(c) (untimely designation of expert witness and sanctions), the relevant factors were largely coextensive. *Id.* Similar to NRCP 16(b), which permits a modification to the schedule only for good cause, FRCP 16(b) also permits a modification only for good cause, and federal courts have interpreted that to mean that a district court is required "to evaluate (1) the moving party's diligence, and (2) prejudice." *Fidelity Nat'l*, 308 F.R.D. at 652. And under FRCP 37(c), a district court must "assess (1) whether

the moving party has shown substantial justification, and (2) harm." *Id*. (internal quotation marks omitted). However, because a request to substitute an expert witness after discovery has closed requires the district court to set a new date for the disclosure of expert and rebuttal reports and reopen limited expert discovery, federal courts have concluded that FRCP 16(b) is the more appropriate standard. *Id.* We agree.

The district court's consideration extends beyond simply deciding if the substitute expert witness would be appropriate and includes evaluating how the whole case would be affected with the new discovery deadlines. Thus, evaluation under NRCP 16(b)(4) is the more appropriate mechanism of review as it is more extensive than a review under NRCP 37(c)(1). *See, e.g.*, *Johnson v. Mammoth Recreations, Inc*., 975 F.2d 604, 608-09 (9th Cir. 1992) (treating a motion to amend the complaint after the scheduling order deadline as a motion to modify the scheduling order rather than a motion to amend the complaint).[1] Furthermore, some federal courts have also required consideration of local rules in combination with the consideration under FRCP 16(b), as the local rules affect how a trial proceeds through that jurisdiction. *See, e.g.*, *Johnson*, 975 F.2d at 608 & n.4 (recognizing that Local Rule 240(c) of the Eastern District of California contains local exceptions to FRCP 16(b)'s mandatory scheduling deadlines); *see also* NRCP 16(e) (final pretrial conference).

Accordingly, we clarify that when a party seeks to substitute an expert witness after the close of discovery, a district court should consider the motion pursuant to NRCP 16(b)(4)'s good cause standard and in combination with any applicable local rules, like EDCR 2.35(a) here. Thus, in totality and applied here, the standard is good cause for the extension of discovery under NRCP 16(b)(4), along with a showing of excusable neglect under EDCR 2.35(a) because the motion to substitute was filed later than 21 days before the discovery cut-off deadline.

The district court's substitution of Dr. Gross was proper under NRCP 16(b)(4) and EDCR 2.35(a)

Discovery matters are within the district court's sound discretion, and its decision will not be disturbed unless the district court

[1]In *Johnson v. Mammoth Recreations*, 975 F.2d at 608-09, the circuit court considered FRCP 16(b) in the plaintiff's late amendment of complaint instead of FRCP 15(a) (amendment and supplemental pleadings). The court stated that FRCP 16(b) included the more appropriate standard, and the district court could summarily reject the plaintiff's motion to amend as untimely. *Id*. Importantly, the court pointed out that "[a] scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Id.* at 610 (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)).

clearly abused its discretion. *In re Adoption of a Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002); *Diversified Capital Corp. v. City of North Las Vegas*, 95 Nev. 15, 23, 590 P.2d 146, 151 (1979).

When considering whether there is good cause to modify a scheduling order, the district court must first consider the moving party's diligence. *See Fidelity Nat'l*, 308 F.R.D. at 652 (construing the identical federal rule); *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 286, 357 P.3d 966, 971 (Ct. App. 2015) (noting that good cause under NRCP 16(b) is analogous to the federal rule). The motion must be denied if the district court determines the moving party did not act diligently. *Fidelity Nat'l*, 308 F.R.D. at 652. If the party acted diligently, the district court will then consider whether the delay will prejudice the nonmoving party. *Id*. Because EDCR 2.35(a) is also relevant in the underlying situation, the court must also consider whether the moving party demonstrated that its failure to act was the result of excusable neglect. Excusable neglect is "not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance." *Excusable Neglect*, *Black's Law Dictionary* (11th ed. 2019).

The district court did not abuse its discretion in modifying the existing scheduling order, reopening discovery for a limited purpose, and allowing the substitution regarding Dr. Gross. The district court expressly considered substantial justification and the harm to the parties under NRCP 37(c), which we have recognized are factors coextensive with those under NRCP 16(b)(4). Further, the record supports the district court's findings and thus that there was good cause, diligence, lack of prejudice, and excusable neglect. Compton had successfully moved the court to exclude any testimony at trial relating to Dr. Gross' then-pending federal case. Dr. Gross' subsequent plea was made under seal, and the district court determined that Compton had no knowledge of the updated status of Dr. Gross' criminal case because of the sealing order until the public statement. When Dr. Gross was then sentenced to prison, Compton was left without his expert witness. As a result, the district court concluded that the harm to Compton occasioned by the prison sentence and resultant unavailability of Dr. Gross outweighed the harm to petitioners;[2] thus, there was good cause, and a lack of prejudice, to allow for the substitution regarding Dr. Gross. Moreover, Compton diligently moved to substitute for Dr. Gross within a reasonable amount of time after the sealing order was lifted and the subse-

[2]Implicit in the district court's ruling is a finding that the harm to Compton by virtue of being without an expert witness outweighed any harm to petitioners that would be occasioned by the requested substitution. However, the district court's written order appears to contain an error where it states that the harm to real party in interest "is outweighed by any" harm to petitioners.

quent sentencing decision was made public in May 2021.[3] Further, the district court determined that the harm to petitioners would be limited, as Dr. Leon would not exceed the scope of Dr. Gross' opinion, would not offer new or unrelated testimony or opinions, and would not increase damages. The district court specifically ordered discovery to be reopened, limited it to only the replacement of Dr. Gross, and clarified that no other discovery was permitted. Thus, the district court did not abuse its discretion in finding good cause and in granting a modification of the scheduling order.

Additionally, the district court's findings support a conclusion of excusable neglect. Dr. Gross was appropriately qualified as the expert witness, and Compton had successfully moved the court to exclude any testimony related to his then-pending federal case. Thus, Dr. Gross would have been able to testify without issue had he not been convicted and sentenced to prison. As the district court determined, the "surprise" in this situation was the combination of a sealed record of the guilty plea until April 2021, a 15-month prison term imposed at sentencing, and the eventual unavailability of Dr. Gross. Dr. Gross' unavailability cannot be imputed to Compton as being a result of his carelessness, inattention, or willful disregard of his obligations but rather resulted from an unavoidable hindrance occasioned by Dr. Gross' guilty plea and prison sentence. Thus, the district court did not abuse its discretion in finding excusable neglect pursuant to the facts on record.

We conclude that petitioners did not show that the district court abused its discretion in modifying the scheduling order and reopening discovery, and thus writ relief is not warranted to control an arbitrary and capricious exercise of discretion or to require the district court to perform a legally required act. *See Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (explaining that "discovery matters are within the district court's sound discretion, and [this] court will not disturb factual findings if they are supported by the record"). Any lack of factual findings or conclusions of law in the order does not warrant extraordinary relief because the record supports the district court's order.

CONCLUSION

A motion to substitute an expert witness after close of discovery necessarily requires the district court to consider modifying the scheduling order and reopening discovery. We adopt the federal

[3]Petitioners' argument that knowledge of the indictment should be equated to knowledge of the eventual guilty plea, conviction, prison sentence, and unavailability lacks merit. The risk of proceeding with the expert witness was not determined at the time when Dr. Gross was designated as the retained expert simply because Compton had knowledge of possible criminal guilt.

approach and conclude that NRCP 16(b)(4)'s "good cause" test, in combination with any relevant local rules, provides the standard governing when a district court may modify a scheduling order. Therefore, we conclude that the district court properly granted the motion to substitute Compton's expert witness, and we deny the petition for a writ of mandamus.

HARDESTY and STIGLICH, JJ., concur.

R.J. REYNOLDS TOBACCO COMPANY, a Foreign Corporation, Individually and as Successor-by-Merger to LORILLARD TOBACCO COMPANY and as Successor-in-Interest to the United States Tobacco Business of BROWN & WILLIAMSON TOBACCO CORPORATION, Which Is the Successor-by-Merger to the AMERICAN TOBACCO COMPANY, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE NADIA KRALL, District Judge, Respondents, and SANDRA CAMACHO, Individually; ANTHONY CAMACHO, Individually; PHILIP MORRIS USA, INC., a Foreign Corporation; LIGGETT GROUP, LLC, a Foreign Corporation; and ASM NATIONWIDE CORPORATION, dba SILVERADO SMOKES & CIGARS, a Domestic Corporation, Real Parties in Interest.

No. 83724

July 28, 2022 514 P.3d 425

Original petition for a writ of mandamus challenging a district court order granting reconsideration of a prior order dismissing a party in a civil action.

Petition denied.

[Rehearing denied October 25, 2022]

[En banc reconsideration denied December 9, 2022]

Bailey Kennedy and *Dennis L. Kennedy, Joseph A. Liebman*, and *Rebecca L. Crooker*, Las Vegas; *King & Spalding LLP* and *Val Leppert*, Atlanta, Georgia; *King & Spalding LLP* and *Ursula Marie Henninger*, Charlotte, North Carolina, for Petitioner.

Claggett & Sykes Law Firm and *Sean K. Claggett, Matthew S. Granda*, and *Micah S. Echols*, Las Vegas; *Kelley Uustal* and *Kimberly L. Wald, Michael A. Hersh*, and *Fan Li*, Fort Lauderdale, Florida, for Real Parties in Interest Sandra Camacho and Anthony Camacho.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, J. Christopher Jorgensen*, and *Abraham G. Smith*, Las Vegas, for Real Party in Interest Liggett Group, LLC.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and *D. Lee Roberts, Jr.*, Las Vegas, for Real Parties in Interest Philip Morris USA, Inc., and ASM Nationwide Corporation.

Before the Supreme Court, Silver, Cadish, and Pickering, JJ.

OPINION

By the Court, Cadish, J.:

Petitioner challenges a district court order reinstating a deceptive trade practices complaint, arguing that real parties in interest/plaintiffs lack standing to bring that claim against petitioner because they never used petitioner's products and thus cannot show that they are victims of consumer fraud who sustained damages from petitioner's allegedly deceptive trade practices under NRS 41.600(1). As NRS 41.600 creates a cause of action for victims of consumer fraud, which includes deceptive trade practices under the Nevada Deceptive Trade Practices Act (NDTPA), and nothing in the NDTPA limits consumer fraud victims to only those who used a manufacturer's product, we conclude that the district court correctly granted reconsideration and reinstated the complaint, as its prior order granting petitioner's motion to dismiss rested on an overly narrow interpretation of NRS 41.600(1). We further conclude that plaintiffs pleaded sufficient facts, including that they were directly harmed by petitioner's false and misleading advertising, to bring an NDTPA claim against petitioner. Thus, mandamus relief is not warranted, and we deny the petition.

FACTS AND PROCEDURAL HISTORY

Real party in interest Sandra Camacho began smoking cigarettes in 1964 and continued to smoke until 2017. She smoked L&M cigarettes, which were manufactured by real party in interest Liggett Group, LLC, and Marlboro and Basic cigarettes, which were manufactured by real party in interest Philip Morris USA, Inc. Sandra concedes that she did not purchase or use any of petitioner R.J. Reynolds Tobacco Company's products. In March 2018, Sandra was diagnosed with laryngeal cancer caused by her cigarette use. Sandra and her husband, real party in interest Anthony Camacho, filed suit against Liggett, Philip Morris, and Reynolds. The Camachos raised several claims, including fraud and products-liability-based claims against Philip Morris and Liggett, and a civil conspiracy claim against all three cigarette manufacturers alleging that they "acted in concert to accomplish an unlawful objective for the purposes of harming . . . Sandra," namely by concealing, omitting, or otherwise misrepresenting the health hazards of cigarettes in various public statements and marketing materials. The Camachos also asserted a claim for violating the NDTPA, alleging that Reynolds and the other defendants knowingly made false representations in their advertisements.

Reynolds filed a motion to dismiss the two claims against it. It argued that although the Camachos labeled their claims as

a violation of the NDTPA and civil conspiracy, the claims were effectively products-liability claims. Reynolds asserted that those claims failed as a matter of law because product use "is a fundamental requirement" of a products-liability claim, and Sandra did not use a Reynolds product. Similarly, Reynolds contended that the Camachos' NDTPA claim failed, as there was "no connection between Reynolds' alleged deceptive trade practices as they relate to the health risk of its particular products and [Sandra's] alleged laryngeal cancer" because Sandra never used a Reynolds product.

The Camachos opposed the motion to dismiss, arguing that under Nevada law neither a civil conspiracy claim nor a deceptive trade-practice claim includes a product-use requirement. They contended that the cases Reynolds relied on in support of a product-use requirement involved claims for negligence, strict products liability, or fraud, as opposed to an NDTPA- or civil-conspiracy-based theory of liability. Regarding the NDTPA claim specifically, the Camachos asserted that they adequately pleaded causation, as they alleged that but for cigarette manufacturers engaging in "concerted actions" to misrepresent the health risks of smoking, Sandra would not have continued to smoke cigarettes. The district court granted Reynolds' motion to dismiss, concluding that Sandra was not a consumer fraud victim under NRS 41.600(1) because she did not use a Reynolds product.

The Camachos filed a motion for reconsideration, asserting that a deceptive trade practice under the NDTPA includes a business's knowingly false representation regarding the product for sale and that a sale under the NDTPA includes an attempt to sell. Because a sale includes an attempt to sell, and an attempt to sell implies a failure to sell, the Camachos argued that the district court clearly erred by reading a product-use requirement into the NDTPA. Because NRS 41.600(1) confers standing on victims of consumer fraud, which includes victims of deceptive trade practices as defined by the NDTPA, the Camachos asserted they pleaded viable claims against Reynolds, even though Sandra never used a Reynolds product.

The district court granted reconsideration over Reynolds' opposition, concluding that the earlier dismissal order was clearly erroneous because it added an atextual product-use requirement or legal-relationship requirement into the NDTPA. It also pointed to Nevada precedent stating "that an NDTPA claim is easier to establish than common law fraud." Because the court reinstated the NDTPA claim, it reinstated the derivative civil conspiracy claim. Reynolds now seeks mandamus relief directing the district court to vacate its order granting reconsideration and to reinstate the dismissal order.[1]

[1]Although labeled petition for writ of mandamus or prohibition, Reynolds' petition does not contain argument as to or actually seek a writ of prohibition.

DISCUSSION

"The decision to entertain a petition for a writ of mandamus is within our sole discretion." *Canarelli v. Eighth Judicial Dist. Court*, 138 Nev. 104, 106, 506 P.3d 334, 337 (2022). While we may issue mandamus "to compel an act that the law requires" or to correct a lower court's "'clear and indisputable' legal error," *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)), writ relief is not appropriate where there is a "plain, speedy, and adequate remedy in the ordinary course of law," NRS 34.170, such as the right to appeal from a final judgment, *Archon Corp.*, 133 Nev. at 820, 407 P.3d at 706. However, even if traditional mandamus is not appropriate, we may issue advisory mandamus "when the issue presented is novel, of great public importance, and likely to recur." *Archon Corp.*, 133 Nev. at 822, 407 P.3d at 708 (quoting *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994)). It should only issue where the legal question presented is "likely of significant repetition prior to effective review." *Id.* at 822-23, 407 P.3d at 708 (quoting *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989)).

Although traditional mandamus is inappropriate because, in granting reconsideration, the district court essentially denied Reynolds' NRCP 12(b)(5) motion to dismiss, and Reynolds can appeal from any adverse final trial decision, *see Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997) (observing that this court generally will not consider writ petitions challenging orders denying motions to dismiss), we exercise our discretion to entertain this petition because the issue of whether a nonuser of a product may qualify as a victim with standing to bring an NDTPA suit against a product manufacturer presents a novel legal question of statewide importance requiring clarification. Moreover, this issue in this matter implicates substantial public-policy concerns regarding the scope of liability for deceptive trade practices, and "[o]ur intervention is further warranted because district courts are reaching different conclusions on this very issue." *Lyft, Inc. v. Eighth Judicial Dist. Court*, 137 Nev. 832, 834, 501 P.3d 994, 998 (2021).

The district court did not manifestly abuse its discretion in granting the Camachos' motion for reconsideration

While we ordinarily review a district court's decision to grant or deny a motion for reconsideration for an abuse of discretion, *see AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010), we may only grant writ relief if the district court *manifestly* abused its discretion, *Round Hill Gen. Improv. Dist. v.*

Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). The district court "may reconsider a previously decided issue if . . . the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

As it did in district court, Reynolds contends that not only did the Camachos fail to show that the dismissal order was clearly erroneous, but also the dismissal order correctly applied the law.[2] It asserts that the Camachos are not victims under NRS 41.600(1) because Sandra did not use a Reynolds product and, thus, cannot show any direct harm from Reynolds' allegedly deceptive trade practices. Moreover, Reynolds argues that the Camachos' attempted sale argument "misses the mark" because the Camachos failed to show how a person can be a victim of deceptive trade practices if the defendant attempted, but ultimately failed, to sell the product to the person. Alternatively, Reynolds contends that even if an individual can be victimized by deceptive trade practices in ways other than buying or using the product, the individual must show that he or she was directly harmed, which the Camachos cannot do here. For the reasons discussed below, we disagree.

We review questions of statutory interpretation de novo, "even in the context of a writ petition." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). When interpreting a statute, we look to the statute's plain language. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). "If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction." *Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021).

Under NRS 41.600(1), "any person who is a victim of consumer fraud" may bring an action against the alleged perpetrator. Consumer fraud includes "[a] deceptive trade practice" as defined by the NDTPA. NRS 41.600(2)(e). As relevant here, a deceptive trade practice occurs when a business operator "[k]nowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services *for sale* or lease." NRS 598.0915(5) (emphasis added). "'Sale' includes any sale, offer for sale or *attempt to sell* any property for any consideration." NRS 598.094 (emphasis added).

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[2]Reynolds also argues that the Camachos' motion for reconsideration was untimely filed in violation of EDCR 2.24(b) (providing that a party seeking reconsideration "must file a motion for such relief within 14 days after service of written notice of the order or judgment"). However, EDCR 2.24(b) allows the district court to enlarge the time to file a motion for reconsideration. Here, the district court acknowledged Reynolds' timeliness argument but concluded that it nonetheless retained the authority to reconsider its prior decision under NRCP 54(b). Thus, we conclude that the district court's order implicitly enlarged the time to file a motion for reconsideration under EDCR 2.24.

The scope of the word "victim" under NRS 41.600(1) has been disputed in other contexts, with courts consistently concluding that "a 'victim of consumer fraud' need not be a 'consumer' of the defendant's goods or services." *See Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1152 (9th Cir. 2011). As the statute does not limit victims to consumers, a Nevada federal district court interpreting NRS 41.600(1) concluded that a business competitor may be a victim if it can show that it was "directly harmed" by the alleged consumer fraud. *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1099, 1100 (D. Nev. 2007); *see also Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1145 (D. Nev. 2019) ("[C]ourts have found standing under NRS 41.600 beyond just 'business competitors' of a defendant or 'consumers' of a defendant's goods or services.").

The Ninth Circuit Court of Appeals' decision in *Del Webb Communities, Inc.*, is instructive on the scope of victims protected by the NDTPA. There, defendant Mojave Construction inspected several homes in a Del Webb retirement community for purposes of construction-defect claims, despite lacking the proper license. 652 F.3d at 1147, 1149. It also misrepresented its relationship with Del Webb. *Id.* at 1148. Del Webb sued Mojave, alleging that its actions violated the NDTPA and harmed Del Webb's relationship with consumers and its reputation. *Id.* at 1149. The district court agreed and issued a permanent injunction prohibiting Mojave from soliciting and/or performing residential inspections for any Del Webb developments. *Id.* Mojave appealed, contending that Del Webb lacked standing under NRS 41.600(1) because it was neither a business competitor of Mojave nor a consumer of Mojave's services. *Id.* at 1152. The court of appeals affirmed on the standing issue, recognizing that the statute "allows 'any person' who is a 'victim of consumer fraud'" to sue, *id.* (quoting NRS 41.600(1)), and explaining that "[t]he word 'consumer' modifies 'fraud,' but does not limit 'any person' or 'victim,'" *id.* Thus, the court concluded that "[t]here is no basis in the text of NRS 41.600 [or caselaw interpreting it] to limit standing to a group broader than consumers but no broader than business competitors." *Id.* at 1153. Instead, the court held that standing depended on "whether Mojave's business practices 'directly harmed' Del Webb," and because the district court's findings on direct injury to Del Webb were uncontested, it correctly concluded that Del Webb had standing to sue for deceptive trade practices. *Id.*

We agree with *Del Webb Communities, Inc.*'s analysis of NRS 41.600(1) and conclude that the district court in this matter properly rejected Reynolds' narrow reading of the scope of plaintiffs who may qualify as consumer fraud victims under the NDTPA. In fact, to read "victim" to mean only a person who used the product would needlessly narrow the remedial reach of the NDTPA, *see Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 286-87, 449

P.3d 479, 485 (Ct. App. 2019) ("[T]he NDTPA is a remedial statutory scheme."), which is contrary to the liberal construction that applies to such statutes, *see Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972) (recognizing that a statute that is "remedial in nature . . . should be afforded liberal construction to accomplish its beneficial intent").

Turning to the case at hand, we further conclude that the plain language of the NDTPA contemplates situations in which liability may be found even when, like here, an individual did not actually purchase or use the product. Specifically, NRS 598.0915(5) provides that an individual is liable for consumer fraud if he or she "[k]nowingly makes a false representation" as to the product "for sale." As already noted, "sale" includes an "attempt to sell" the product or service. *See* NRS 598.094. An "attempt to sell" contemplates a failure to sell the product, and thus, individuals violate the NDTPA when they make a knowingly false representation regarding the product in an attempt to sell the product and the claimant suffered a direct harm from the attempted sale, regardless of whether the claimant purchased the at-issue product. *See S. Serv.*, 617 F. Supp. 2d at 1100; *see also Fairway Chevrolet Co. v. Kelley*, No. 72444, 2018 WL 5906906, at *1 (Nev. Nov. 9, 2018) (observing that the definition of "'victim' connotes some sort of harm being inflicted on the 'victim'"). Here, while Sandra did not use any Reynolds products, she pleaded that Reynolds violated the NDTPA by making "false and misleading statements" that denied cigarettes are addictive, claimed "it was not known whether cigarettes were harmful or caused disease," advertised various types of cigarettes as either safe, "low tar," or "low nicotine," and made several other knowingly false statements regarding the potential health risks of cigarettes. The Camachos also alleged that they were directly harmed because Sandra relied on those representations to smoke generally, even though she did not smoke Reynolds products, which resulted in her cancer. Thus, the district court did not manifestly abuse its discretion when it granted reconsideration of its order dismissing Reynolds, as the dismissal order was clearly erroneous in imposing a product-use requirement on NDTPA claims in contradiction to the plain language of NRS 41.600(1), NRS 598.0915(5), and NRS 598.094.[3]

[3]Our conclusion is consistent with our decision in *Leigh-Pink v. Rio Properties, LLC*, 138 Nev. 530, 512 P.3d 322 (2022). There, we concluded that individuals who "assert only economic injur[ies]" but "received the true value of their goods or services" cannot bring a claim for a violation of the NDTPA. *Id.* at 536, 512 P.3d at 327-28. Here, the crux of the Camachos' NDTPA claim is that the tobacco companies made several knowing misrepresentations regarding "the characteristics, ingredients, uses, benefits, alterations or quantities" of their tobacco products in violation of NRS 598.0915. Thus, Sandra did not receive the "true value" of the tobacco products she purchased because the

This interpretation of consumer fraud victim, while broader than Reynolds would prefer, is consistent with earlier Nevada decisions liberally construing claims brought under the NDTPA and refusing to "read in" requirements for suing under the NDTPA. *See, e.g.*, *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165-66, 232 P.3d 433, 435-36 (2010) (recognizing that while the NDTPA "sound[s] in fraud, which, under the common law, must be proven by clear and convincing evidence," we "cannot conclude that deceptive trade practices claims are subject to a higher burden of proof" because "[s]tatutory offenses that sound in fraud are separate and distinct from common law fraud" (citations omitted)); *Poole*, 135 Nev. at 284, 286-87, 449 P.3d at 483-85 (concluding that "knowingly" under the NDTPA means "that the defendant is aware that the facts exist that constitute the act or omission," not that "the defendant intend[ed] to deceive" the victim, because the former interpretation better serves the NDTPA's "remedial purpose" while the latter interpretation imposes a higher standard for proving an NDTPA violation and makes the NDTPA redundant with common law fraud). Such an interpretation is also consistent with how other states apply analogous consumer fraud protection and deceptive trade practices acts. For example, in rejecting a standing argument in a consumer protection action, the Washington Supreme Court reasoned that, "[a]lthough the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a [Consumer Protection Act] plaintiff be the consumer of goods or services."[4] *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1061 (Wash. 1993); *see also Maillet v. ATF-Davidson Co.*, 552 N.E.2d 95, 98-99 (Mass. 1990) (rejecting the defendant's argument that Massachusetts's consumer protection statute was limited to consumers in privity with the defendant because the statute provides a cause of action for

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tobacco companies misled her regarding the "true value" of those products. *See id.* (holding that the plaintiffs had not been injured for NDTPA purposes by the defendant's failure to inform the plaintiffs of the potential for exposure to Legionnaires' disease because they did not contract the disease and the *legionella* bacteria did not prevent the plaintiffs from using all of the defendant's amenities, and thus, the plaintiffs received the true value of the defendant's services as marketed).

[4]The Washington Consumer Protection Act (CPA) provides that "[a]ny person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action . . . to recover the actual damages sustained by him or her . . . ." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1060-61 (Wash. 1993) (emphasis omitted) (quoting Wash. Rev. Code § 19.86.090). Washington courts have defined the elements of a private CPA claim as: "(1) an unfair or deceptive act or practice; (2) which occurs in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) which injury is causally linked to the unfair or deceptive act." *Id.* at 1061.

"[a]ny person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful" (internal quotation marks omitted)).

Reynolds' contrary arguments are not persuasive. First, our conclusion does not "undermine" the Legislature's statutory scheme, as the interpretation merely gives the statutory scheme's plain language its natural meaning. *See Platte River Ins. Co. v. Jackson*, 137 Nev. 773, 778, 500 P.3d 1257, 1262 (2021) ("[W]e may not adopt an interpretation contrary to a statute's plain meaning merely because we 'disagree[ ] with the wisdom of' the Legislature's policy determinations." (second alteration in original) (quoting *Anthony v. State*, 94 Nev. 337, 341, 580 P.2d 939, 941 (1978))).

Second, the plain language of the pertinent statutes contemplates imposing liability even if a plaintiff did not use the manufacturer's product so long as the plaintiff can still show a direct harm arising from the manufacturer's deceptive trade practices. *See* NRS 598.094.[5] Moreover, contrary to Reynolds' assertion, the Camachos pleaded sufficient facts of a direct harm, as they contended that Sandra would not have smoked cigarettes and developed cancer but for all defendants'—including Reynolds'—deceptive trade practices. *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (explaining that dismissal of a complaint is proper only where "it appears beyond a doubt that [appellant] could prove no set of facts, which, if true, would entitle [appellant] to relief").

Third, Reynolds' claim that the Camachos are asserting a strict products-liability claim, which precludes liability for nonuse of a product, is unpersuasive. The Camachos asserted a strict products-liability claim against Philip Morris and Liggett, the parties who manufactured the tobacco products that Sandra used. But while the claims against Reynolds acknowledge the harm caused by smoking, those claims are based on Reynolds' alleged knowing misrepresentation of the dangers of smoking, which is distinct from a products-liability claim, despite relying on similar facts. *Compare* NRS 598.0915 (explaining that a deceptive trade practice occurs when a person engaged in the course of his or her business "knowingly" engages in several enumerated false advertising behaviors), *with Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d

[5]Reynolds also argues that this court should not consider NRS 598.094 because NRS 41.600(2)(e) references only NRS 598.0915 to 598.0925. While Reynolds is correct that NRS 41.600(2)(e) does not directly reference NRS 598.094, Reynolds ignores that NRS 598.094 defines "sale" as used in the NDTPA, including NRS 598.0915. *See* NRS 598.0903. Thus, it is appropriate to use NRS 598.094 to define "sale" under NRS 598.0915. *See S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (explaining that when "interpret[ing] provisions within a common statutory scheme," we must read them in harmony and in accordance with the overall purpose of the statutes).

570, 571 (1992) (explaining that a strict products-liability claim exists when the plaintiff alleges (1) "the product had a defect which rendered it unreasonably dangerous," (2) "the defect existed at the time the product left the manufacturer," and (3) "the defect caused the plaintiff's injury").

Fourth, the fact that the Camachos raised the attempted sale argument for the first time in their motion for reconsideration does not mean that they waived the argument. *See Masonry & Tile Contractors Ass'n of S. Nev.*, 113 Nev. at 741, 941 P.2d at 489 (providing that "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced *or* the decision is clearly erroneous" (emphasis added)). Rather, a party may assert new legal arguments in a motion for reconsideration, and this court will consider such arguments so long as (1) "the reconsideration motion and order are part of the record on appeal" and (2) the district court "entertained the [reconsideration] motion on its merits." *Cohen v. Padda*, 138 Nev. 149, 152, 507 P.3d 187, 190 (2022). Moreover, a court may grant reconsideration when the challenged decision is "clearly erroneous," regardless of whether new evidence exists. *See Masonry & Tile Contractors Ass'n of S. Nev.*, 113 Nev. at 741, 941 P.2d at 489. Finally, because the court correctly reinstated the NDTPA claim, it properly revived the civil conspiracy claim, as that claim is derivative of the NDTPA claim. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 219, 984 P.2d 164, 168 (1999) (affirming the dismissal of a civil conspiracy claim when the underlying cause of action was barred by the fair report privilege). Accordingly, we conclude that the district court did not manifestly abuse its discretion when it granted reconsideration of its order dismissing the claims against Reynolds.[6]

CONCLUSION

Under NRS 41.600(1), a "victim" is any person who can show he or she was directly harmed by consumer fraud. There is no product-use requirement—a "victim" can be a consumer, a business competitor, or as applicable here, "any person" who suffered

[6]To the extent Reynolds argues that the district court did not rely on the Camachos' attempted-sale argument in granting reconsideration, that argument is not persuasive. First, the district court implicitly relied on the attempted-sale argument when it concluded that the dismissal order "erroneously add[ed]" several atextual requirements into the NDTPA. Second, even if the order did not address the Camachos' statutory-interpretation argument, the Camachos raised it in their motion for reconsideration, and the Camachos "may defend the judgment in [their] favor with any argument that is supported by the record." *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 603, 879 P.2d 1180, 1194 (1994) (internal quotation marks omitted). Moreover, we "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

harm from the defendant's consumer fraud. While Sandra did not use Reynolds' product, she pleaded that she would not have smoked tobacco and, consequently, would not have suffered cancer, but for the deceptive trade practices engaged in by Reynolds and the other tobacco companies. Such an allegation is sufficient, at the motion to dismiss stage, for the Camachos to proceed on their claim against Reynolds under NRS 41.600(1) for an NDTPA violation, as they alleged a direct harm from Reynolds' allegedly deceptive trade practices. Accordingly, we deny Reynolds' petition for writ relief.

Silver, J., concurs.

Pickering, J., concurring in result only:

I agree that we should deny the petition. The district court's order granting reconsideration and denying Reynolds' motion to dismiss did not involve clear legal error; the right of appeal from any adverse final judgment affords Reynolds an adequate legal remedy; and this case does not present an important legal question dividing courts statewide that will evade review if not resolved via writ petition. This case thus does not qualify for extraordinary writ relief.

I would decide the writ on that basis, without deciding the motion to dismiss on the merits. Our caselaw strongly counsels against allowing mandamus to erode the final judgment rule by too readily giving merits-based writ review to orders denying motions to dismiss or for summary judgment. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 824, 407 P.3d 702, 709 (2017) (declining merits review of a mandamus petition contesting an order denying a motion to dismiss, noting how "disruptive" mandamus is in this context and that "[a] request for mandamus following the denial of a motion to dismiss presents many of the inefficiencies that adherence to the final judgment rule seeks to prevent—an increased [appellate] caseload, piecemeal litigation, needless delay, and confusing litigation over this court's jurisdiction"); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (stating that "because an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss"); *State, Dep't of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983) (stating general rule against granting merits review of writ petitions contesting orders denying motions to dismiss and for summary judgment because such petitions "have generally been quite disruptive to the orderly processing of civil cases in the district courts, and have been a constant source of unnecessary expense for litigants"). That counsel carries special force here, because the proceedings in district court have progressed well beyond the motion-to-dismiss

stage, and trial starts next month.[1] The legal issues the majority reaches out to resolve will be reviewable on direct appeal from the final judgment entered after trial, and we will have the benefit of a fully developed legal and factual record. While I join the judgment denying the writ, I do so solely on the basis the petition does not qualify for writ relief. I do not join and otherwise dissent from the majority's opinion affirming the denial of petitioner's NRCP 12(b)(5) motion to dismiss.

"[M]andamus is an extraordinary remedy, reserved for extraordinary causes." *Archon*, 133 Nev. at 819, 407 P.3d at 706. As petitioner, Reynolds bears the burden of showing it qualifies for extraordinary writ relief. *Id.* at 821, 407 P.3d at 707; *see Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (holding that, to obtain extraordinary writ relief, "the petitioner must satisfy the burden of showing that [its] right to issuance of the writ is clear and indisputable") (internal quotations omitted). Whether to grant extraordinary relief is entrusted to this court's discretion. *State, Dep't of Transp.*, 99 Nev. at 360 & n.2, 662 P.2d at 1339 & n.2. But that discretion is not untrammeled. Consistent with the goal of not allowing writs to subvert the final judgment rule, courts have developed guidelines for deciding writ petitions, which the Ninth Circuit synthesized in *Bauman v. United States District Court* as follows:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the [applicable court] rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

557 F.2d 650, 654-55 (1977) (citations omitted); *see* 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3933, at 638-39 (3d ed. 2012) (reprinting the *Bauman* guidelines and describing them as "[p]erhaps the most influential set of contemporary guidelines for exercising writ authority"); *Archon*, 133 Nev. at 824, 407 P.3d at 709 (citing *Bauman* with approval in denying writ review of an order denying a motion to dismiss). As *Bauman* recognizes, the guidelines are intended to be helpful, not to establish bright-line rules—"rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." 557 F.2d at 655.

[1]The reconsideration process delayed the filing of Reynolds' writ petition. The Camachos filed an earlier petition that they withdrew after the district court granted reconsideration.

Reynolds argues for both traditional and advisory mandamus. Taking traditional mandamus first, Nevada law requires the petitioner at minimum to meet the criteria stated in the first and third *Bauman* guidelines to qualify for such writ relief. NRS 34.160 (providing for mandamus to compel the performance of an act the law requires "as a duty resulting from an office, trust or station"); NRS 34.170 (providing for mandamus to issue in cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law"); *see Archon*, 133 Nev. at 819-20, 407 P.3d at 706 (discussing the requirements for traditional mandamus). As the majority correctly holds, Reynolds' petition fails to meet these threshold criteria for traditional mandamus.

The errors Reynolds asserts—the district judge's decisions, first, to reconsider her predecessor's dismissal order and, second, to deny the motion to dismiss—do not involve the kind of "clear and indisputable" legal error that mandamus protects against. *Archon*, 133 Nev. at 820, 407 P.3d at 706 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). Although district judges hesitate to reconsider prior interlocutory rulings in a case, especially by a predecessor judge, the rules limiting the practice do not forbid it outright, instead leaving it to the successor judge's discretion and the particular reasons shown. *See* John A. Glenn, *Propriety of Federal District Judge's Overruling or Reconsidering Decision or Order Previously Made in Same Case by Another District Judge*, 20 A.L.R. Fed. 13 § 5(c) (1974). Traditional mandamus does not lie to correct a claimed abuse of discretion; more must be shown. *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 680, 476 P.3d 1194, 1197 (2020) (holding that "traditional mandamus relief does not lie where a discretionary lower court decision 'result[s] from a mere error in judgment'; instead, mandamus is available only where 'the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will'") (alteration in original) (quoting *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011)). Nor did the district court commit clear error in denying the motion to dismiss. Whether the NDTPA affords the Camachos a right of action against Reynolds despite that Mrs. Camacho never bought or smoked a cigarette that Reynolds manufactured or sold presents a close, open, and to some extent fact-dependent question of Nevada law. With no binding precedent one way or the other, clear error does not appear. *See In re Van Dusen*, 654 F.3d 838, 845 (9th Cir. 2011) ("The absence of controlling precedent weighs strongly against a finding of clear error.").

Reynolds likewise fails to establish that it lacks other adequate means to attain the relief it seeks, or that it will be damaged or prejudiced in a way not correctable on appeal unless granted

extraordinary writ relief. Reynolds acknowledges that it can appeal any judgment entered against it and raise on appeal the issues its petition asks us to decide now. "[T]he right to appeal is generally an adequate legal remedy that precludes writ relief." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004); *accord Archon*, 133 Nev. at 820, 407 P.3d at 706. Not only does an eventual appeal afford adequate review, but the record developed en route to final judgment makes that review superior, since it affords this court "the advantage of having the whole case before us," with judicially determined facts and fully vetted law, before weighing in. *Walker*, 136 Nev. at 681, 476 P.3d at 1197 (internal quotations omitted). Reynolds complains that it will incur "significant expense in defending this lawsuit and going through a multi-week trial" if writ relief does not issue. But this occurs in every case a motion to dismiss or for summary judgment is denied and does not make direct appeal an inadequate legal remedy. For an appeal to be an inadequate remedy, "there must be some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable," *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 353 (5th Cir. 2017) (internal quotations omitted), which Reynolds has not shown.

In sum, this petition fails to meet *Bauman*'s first (appeal is an adequate legal remedy), second (prejudice not correctable on appeal), and third (clear legal error) guidelines. This defeats traditional mandamus. *See Walker*, 136 Nev. at 683, 476 P.3d at 1198. The fourth *Bauman* guideline—does the district court's order involve "an oft-repeated error, or manifest[ ] a persistent disregard of the [applicable court] rules," 557 F.2d at 655—is not argued by either side as applicable. This leaves the fifth *Bauman* guideline ("[t]he district court's order raises new and important problems, or issues of law of first impression," *id.*), which is more appropriately discussed in evaluating advisory mandamus.

The *Bauman* guidelines apply to advisory mandamus, much as they do to traditional mandamus, but with different priorities. *See* 16 Charles Alan Wright et al., *supra*, § 3934.1, at 679-83; *Archon*, 133 Nev. at 822-23, 407 P.3d at 708-09; *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 453-54, 215 P.3d 697, 700 (2009). The fifth *Bauman* guideline—the importance of the issue the petition presents—plays a greater role in advisory than traditional mandamus. Courts differ in their descriptions of how "important" an issue must be to qualify for advisory mandamus. *Compare United States v. Horn*, 29 F.3d 754, 770 (1st Cir. 1994) (explaining that "advisory mandamus is reserved for big game"), *and In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989) (questions warranting advisory mandamus are "hen's-teeth rare" and should be "blockbuster[s]"), *with In re Bendectin Prods. Liab. Litig.*, 749 F.2d

300, 307 (6th Cir. 1984) (finding an issue of first impression sufficiently important because "the sheer magnitude of the case makes the disposition of these issues crucial as several hundred litigants are waiting for a decision before proceeding with their cases"), *and Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559 (entertaining a petition for extraordinary writ relief that, despite not qualifying for traditional mandamus, "raises an important legal issue in need of clarification, involving public policy, of which this court's review would promote sound judicial economy and administration"). In general, for advisory mandamus to issue, the petition should present issues that are important, that are dividing the district courts, and that will evade review by other means. 16 Charles Alan Wright et al., *supra*, § 3934.1, at 681-82; (stating that, for advisory mandamus, the petition must present issues that are "new, important, and likely to evade review by other means"); *see Archon*, 133 Nev. at 822-23, 407 P.3d at 708; *Shoen v. State Bar of Nev.*, 136 Nev. 258, 260, 464 P.3d 402, 404 (2020). Nevada cases also consider whether granting the writ will promote "sound judicial economy and administration." *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559.

The NDTPA issue that Reynolds' writ petition presents does not qualify for advisory mandamus. As discussed above, the petition does not meet any of the first four *Bauman* guidelines, leaving only the fifth. The issue Reynolds raises is doubtless important to the parties. But the majority is incorrect and overstates matters considerably when it says that district courts across the state are "reaching different conclusions on [the] very issue" presented here. Majority op. at 588 (quoting *Lyft, Inc. v. Eighth Judicial Dist. Court*, 137 Nev. 832, 834, 501 P.3d 994, 998 (2021)). Not counting the district court case underlying this petition, the record supports that there are just three pending cases that present the NDTPA issue Reynolds raises. All are individual plaintiff cases filed by the same law firm in Clark County—*and in each, the district judge has denied the motion to dismiss filed by the Reynolds-counterpart defendant. Rowan v. Philip Morris USA, Inc.*, No. A-20-811091-C (Eighth Jud. Dist. Ct. Apr. 19, 2022) (Order Granting Reconsideration and Denying Motion to Dismiss);[2] *Speed v. Philip Morris USA, Inc.*, No. A-20-819040-C (Eighth Jud. Dist. Ct. Mar. 23, 2021) (Order Denying Motion to Dismiss); *Tully v. Philip Morris USA, Inc.*, No. A-19-807657-C (Eighth Jud. Dist. Ct. July 8, 2020) (Order Denying

[2]The Reynolds-counterpart defendant in *Rowan* has filed a petition challenging the order denying its motion to dismiss with this court. *Philip Morris USA Inc. v. Eighth Judicial Dist. Court (Rowan)*, No. 84805 (filed June 2, 2022). Reynolds references two other cases, also individual plaintiff cases filed in Clark County by the lawyers representing Camacho—*Estate of Cleveland Clark v. Philip Morris USA Inc.*, No. A-19-802987-C, and *Kelly v. Philip Morris USA, Inc.*, No. A-20-820112-C—raising the NDTPA issue, but the docket sheets in those cases show that they have settled.

Motion to Dismiss). The issue is not one dividing district courts across Nevada; it is limited to the parties in three cases besides this one, all venued in Clark County. That the issue only arises now, after the NDTPA has been on the books for nearly half a century, further undercuts its claimed pervasiveness.

Nor will the issue evade review if advisory mandamus does not issue. As noted, trial in this case starts next month. If Reynolds loses, it can directly appeal. This court will then have before it a fully developed legal and factual record on which to decide the issues involved. The district court docket sheets in the three other cases show that they, too, have progressed to the point of final pretrial proceedings, including substantive motion practice. Should summary judgment be granted to one of the Reynolds-counterpart defendants, NRCP 54(b) certification would afford the plaintiff the opportunity to seek and obtain immediate interlocutory review. *See State v. AAA Auto Leasing & Rental, Inc.*, 93 Nev. 483, 485, 487, 568 P.2d 1230, 1231, 1232 (1977) (affirming the dismissal of a claim under the NDTPA brought to this court on an interlocutory order certified as final under NRCP 54(b)). And in each case, including this one, the losing party will have a right of direct appeal, with the plenary review that an appeal from a final judgment affords. Unlike in *International Game Technology*, where we granted advisory mandamus review of an order denying a motion to dismiss because "an appeal [was] not an adequate and speedy legal remedy, given the early stages of [the] litigation," 124 Nev. at 198, 179 P.3d at 559, this case and its companions are sufficiently advanced that the advantages plenary review on direct appeal affords outweigh the need for immediate writ review.

Last, granting advisory mandamus to review the order denying the motion to dismiss on the merits does not promote and instead may disserve "sound judicial economy and administration." *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559. Having undertaken to decide the merits of the motion to dismiss, the majority holds that the NDTPA allows the Camachos' claim to proceed because NRS 598.094 defines "sale" to include "any sale, offer for sale or attempt to sell," Majority op. at 589, 591;[3] it further holds that because the NDTPA is "remedial," it should be "liberally construed," without reference to the common law, *id*. at 590-91, 592. These are close issues and could go either way. The NDTPA provides for both private damage actions, NRS 41.600, and civil and criminal enforce-

[3]The Camachos did not make this argument in their opposition to the original motion to dismiss, and the district court did not address it in either its original order granting the motion to dismiss or its reconsideration order, denying the motion to dismiss. This also militates against merits mandamus review. *See Archon*, 133 Nev. at 823, 407 P.3d at 708 (declining to grant advisory mandamus where the issue pressed in the petition was not raised and resolved in district court).

ment actions by the government, NRS 598.0963; NRS 598.0999. A reasonable argument can be made that NRS 598.094's "attempt to sell" reference applies to government enforcement actions, not private actions by victims seeking damages. Also reasonable is the argument that the NDTPA should be construed consistent with the common law because nothing in its text directs otherwise. *See* NRS 1.030 ("The common law of England, so far as it is not repugnant to or in conflict with the . . . laws of this State, shall be the rule of decision in all the courts of this State."); *Leigh-Pink v. Rio Props., LLC*, 138 Nev. 530, 536-37, 512 P.3d 322, 328 (2022) (construing the NDTPA consistently with the common law, following what the court deemed one of the "first principles of statutory construction"). The merits determination here is being made by a two-to-one vote of a three-justice panel. Should the issue come to the en banc court on appeal from an eventual final judgment, the full court could depart from or refine the panel's merits determination, creating confusion and inconsistency.

For these reasons, while I concur in the judgment denying the writ, I do so on the grounds this petition does not qualify for extraordinary writ review. I respectfully dissent from my colleagues' advisory mandamus and merits determinations.