TONY MATKULAK, Appellant, *v.* KOURTNEY L. DAVIS, Respondent.

No. 83173

September 1, 2022 516 P.3d 667

Appeal from a district court order establishing child custody, visitation, and child support. Second Judicial District Court, Family Division, Washoe County; Sandra A. Unsworth, Judge.

**Affirmed in part, reversed in part, and remanded.**

*Willick Law Group* and *Marshal S. Willick*, Las Vegas, for Appellant.

*Bader & Ryan* and *Kevin P. Ryan* and *Todd A. Bader*, Reno, for Respondent.

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

## OPINION

By the Court, Silver, J.:

Where separated parents cannot agree on child support, NAC 425.140 provides the framework for calculating the parents' base child support obligations. But a district court may, pursuant to NAC 425.150(1), deviate from that calculation and adjust a party's child support obligation as required to meet the child's specific needs and based on the parties' economic circumstances. Although a court may base a deviation on the relative income of the parties' households, under NAC 425.150(1)(f), the adjustment cannot exceed the other party's total obligation.

In this case, appellant is substantially wealthier than respondent and, based on this income disparity, the district court increased appellant's child support obligation by nearly $2,000 per month over NAC 425.140's base child support obligation. The district court also awarded respondent her attorney fees. Although an upward adjustment was allowed by NAC 425.150 and was supported by the district court's detailed findings on the relevant factors, we conclude the district court erred by exceeding the NAC 425.150(1)(f) cap. We therefore reverse and remand for the district court to reduce appellant's monthly child support obligation consistent with NAC 425.150(1)(f), but we affirm the award of attorney fees.

### *FACTUAL HISTORY*

Appellant Tony Matkulak and respondent Kourtney Davis have one child, B.M., born in May 2018. The parties were never married.

In April 2020, Davis petitioned to establish custody, visitation, and child support. The parties stipulated to share joint legal and physical custody, and Matkulak voluntarily agreed to pay Davis approximately $1,850 per month in child support. Davis supports herself and the record does not indicate she is struggling financially, but Matkulak's monthly income of approximately $38,000 far outstrips Davis's monthly income of approximately $5,000.[1] Thus, Davis sought an upward adjustment to Matkulak's child support obligation. Specifically, Davis argued that additional child support would allow her to move into a house with a larger yard and a security system, eat out more often, work less, increase her retirement savings and financial security, and reduce her stress levels—all things that would ultimately benefit B.M.

Pursuant to NAC 425.140, the district court calculated Davis's monthly obligation as $823.04 and Matkulak's monthly obligation as $2,415.70. The court offset Matkulak's monthly obligation by Davis's monthly obligation as required by NAC 425.115(3) because the parties share joint physical custody, finding that Matkulak accordingly owed Davis $1,592.56[2] per month. But applying NAC 425.150(1), the court concluded the monthly obligation was insufficient to meet B.M.'s specific needs arising from the parties' disparate economic circumstances. The court addressed each of the NAC 425.150(1) factors, finding that factors f, g, and h weighed in favor of an upward deviation. Specifically, the court concluded that under factor f Matkulak makes 7.46 times the amount per month that Davis makes from working two jobs; that under factor g B.M. has additional expenses for childcare, extracurricular activities, and health insurance; and that under factor h Matkulak has the ability to pay additional child support.

Accordingly, the district court ordered Matkulak to pay 100 percent of B.M.'s childcare and medical expenses, 75 percent of B.M.'s extracurricular expenses, and $3,500 per month in child support. The court additionally awarded Davis her attorney fees. Matkulak appeals.

## *DISCUSSION*

Matkulak argues the district court improperly increased his monthly child support obligation based solely on his greater income and further erred by awarding attorney fees to Davis.

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[1]Below, Davis indicated that B.M.'s basic needs were being met without an upward adjustment and that she had sufficient money to cover B.M.'s expenses and to save for her retirement.

[2]We note this number should be $1,592.66 per month.

*The upward adjustment to Matkulak's child support obligation*

We review the district court's decision regarding a child support obligation for an abuse of discretion. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004). But we review questions of statutory interpretation de novo. *Valdez v. Aguilar*, 132 Nev. 388, 390, 373 P.3d 84, 85 (2016). In interpreting a statute or regulation, we give effect to its plain meaning and, to the extent it is ambiguous, we interpret it consistent with reason and public policy. *Id*.; *see also Silver State Elec. Supply Co. v. State, Dep't of Taxation*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007) ("Statutory construction rules also apply to administrative regulations."). We consider provisions as a whole and will avoid interpretations that render phrases superfluous or nugatory. *Manuela v. Eighth Judicial Dist. Court*, 132 Nev. 1, 6-7, 365 P.3d 497, 501 (2016).

Pursuant to NRS 425.620, the Administrator of the Division of Welfare and Supportive Services of the Nevada Department of Health and Human Services has adopted various regulations in NAC Chapter 425 pertaining to the support of dependent children. NAC 425.140 sets forth a framework for calculating a base child support obligation. By regulation, it is presumed that this amount provides for the child's basic needs. NAC 425.100(2). A court may deviate from the NAC 425.140 framework if it calculates the base child support obligation and sets forth findings of fact supporting the deviation. NAC 425.100(3). NAC 425.150(1) additionally authorizes a court to adjust the base child support obligation "in accordance with the specific needs of the child and the economic circumstances of the parties" based on eight factors and specific findings of fact. Those factors are:

> (a) Any special educational needs of the child;
>
> (b) The legal responsibility of the parties for the support of others;
>
> (c) The value of services contributed by either party;
>
> (d) Any public assistance paid to support the child;
>
> (e) The cost of transportation of the child to and from visitation;
>
> (f) The relative income of both households, so long as the adjustment does not exceed the total obligation of the other party;
>
> (g) Any other necessary expenses for the benefit of the child; and
>
> (h) The obligor's ability to pay.

NAC 425.150(1)(a)-(h).

Matkulak contends that a precondition to applying any of the NAC 425.150(1) factors is that the adjustment must address a specific

need of the child. Although we agree the court must appropriately weigh the child's specific needs in evaluating an adjustment, we disagree that NAC 425.150(1) requires any adjustment to be based on a specific need of the child. NAC 425.150(1) permits district courts to adjust the child support obligation "*in accordance with* the specific needs of the child and the economic circumstances of the parties *based upon* the following factors and specific findings of fact[.]" (Emphases added.) The phrase "in accordance with" means to be "in a manner conforming with." *Accordance*, *New Oxford American Dictionary* (3d ed. 2010); *see also Accordance*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) (defining the term as to be in conformity with). Thus, the child's specific needs, if any, along with the parties' economic circumstances, provide a prism through which the court must view the requested child support deviation to determine whether it is appropriate. But pursuant to the plain language of NAC 425.150(1), it is the eight factors therein that set forth possible bases upon which to order an adjustment. Some of those factors regard specific needs a child may have, but others do not, making clear that although an adjustment under NAC 425.150(1) must conform with any specific needs the child may have, an adjustment is not contingent on the child having a specific need for that adjustment.

Here, the district court made findings on each of the NAC 425.150(1) factors, along with detailed findings on the parties' economic circumstances and B.M.'s specific needs in light of those circumstances. In ordering an upward adjustment, the court applied factors f, g, and h. Factor f is "[t]he relative income of both households, so long as the adjustment does not exceed the total obligation of the other party." NAC 425.150(1)(f). This language allows one party's relative wealth to provide a basis for an upward adjustment. The district court found that Matkulak earns 7.46 times more than Davis in a month. This factor therefore supports an upward adjustment. Factor g, however, does not. That factor references "[a]ny other necessary expenses for the benefit of the child," and although the court found that B.M. had expenses related to childcare, extracurricular activities, and health insurance, the court separately ordered Matkulak to pay for those expenses, removing them from consideration for purposes of NAC 425.150(1). Nor does factor h support an upward adjustment based on one party's relative wealth. Factor h references "[t]he obligor's ability to pay." But factor f already provides for such an adjustment and caps it at "the total obligation of the other party." To read factor h as providing the same grounds for an additional upward adjustment would create a conflict with the cap in factor f and/or make factor f redundant. *See* Comm. to Review Child Support Guidelines, Comm. Meeting Notes (Nev. Sept. 17, 2021) (discussing factor h as allowing a downward adjust-

ment when the party's life circumstances made it difficult for the party to pay the regulatory amount of child support).

Thus, only factor f provides a basis for an upward adjustment here. The district court's order focused on that factor, concluding that B.M.'s specific needs are not met by the base child support obligation because of the gross income disparity between the parties when considered in conjunction with their respective expenses for food and shelter. Because the district court ordered the adjustment in accordance with the child's specific needs and the parties' economic circumstances, based on one of the authorized factors, we conclude the district court did not err in ordering an upward adjustment. That does not fully resolve the question before us, however, as NAC 425.150(1)(f) allows an upward adjustment on that basis only "so long as the adjustment does not exceed the total obligation of the other party." This language plainly caps the limit of any upward adjustment here to Davis's monthly obligation amount, which the district court calculated as $823.04. The district court therefore erred by increasing Matkulak's monthly obligation by nearly $2,000 per month, as this far exceeds the amount allowed by factor f. We therefore reverse the district court's decision to increase Matkulak's child support obligation to $3,500 per month and remand with instructions to reduce Matkulak's monthly child support obligation to no more than an additional $823.04 per month above the base child support obligation.

*Attorney fees*

NRS 125C.250 gives the district court broad discretion in a child custody action to order reasonable attorney fees and costs as determined by the court. The district court's decision to award attorney fees will stand absent an abuse of discretion. *See Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

Here, the district court found that an award to Davis was proper because Matkulak used his superior wealth to unnecessarily increase litigation costs. Matkulak argues the district court improperly penalized him for correctly pointing out, as a negotiation tactic, that he was voluntarily paying more child support than required by the regulations and that a downward adjustment was possible. However, the district court found that Matkulak requested a downward adjustment to pressure Davis into accepting a settlement offer and that he engaged in other tactics to increase litigation expenses, such as unnecessarily involving his attorney in minutia. Matkulak does not contest these findings, and to the extent Matkulak argues it was Davis's conduct more than his own that increased the litigation costs, we decline to reweigh the evidence on appeal. *See Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (refusing to reweigh credibility determinations on appeal); *Quintero v.*

*McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (noting that this court is not at liberty to reweigh evidence on appeal). Accordingly, even though we conclude the upward adjustment here improperly exceeded the NAC 425.150(1) cap, we conclude that Matkulak fails to show that the district court abused its discretion in awarding attorney fees to Davis, and we affirm this portion of the court's decision.

## *CONCLUSION*

NAC 425.150(1) provides district courts with the discretion to adjust a child support obligation based on eight separate factors and in accordance with the child's specific needs and the parties' economic circumstances. But when a court orders an upward adjustment based on NAC 425.150(1)(f), the relative income of the households, the amount of the other party's total obligation caps the upward adjustment. Here, the district court did not err by basing an upward adjustment on NAC 425.150(1)(f), but the court did err by ordering an upward adjustment in excess of the other party's total obligation. We further conclude that the district court did not abuse its discretion by awarding attorney fees. We therefore affirm in part, reverse in part, and remand this case to the district court with instructions to reduce the amount of Matkulak's monthly child support obligation in accordance with NAC 425.150(1)(f).

Cadish and Pickering, JJ., concur.

MICHAEL J. LOCKER, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 84070

September 1, 2022 516 P.3d 149

Appeal from a judgment of conviction, pursuant to a guilty plea, of possession of less than 14 grams of a schedule I controlled substance. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

**Vacated and remanded.**

*John L. Arrascada*, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

*Aaron D. Ford*, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Kevin Naughton*, Appellate Deputy District Attorney, Washoe County, for Respondent.

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

## OPINION

By the Court, Cadish, J.:

Appellant pleaded guilty to a violation of NRS 453.336(2)(a), which criminalizes possession of less than 14 grams of certain controlled substances as a category E felony for first or second offenses. Prior to sentencing, appellant entered into a guilty-plea agreement with the State without addressing judgment deferral and filed an election to enter a substance-use treatment program under NRS 176A.240 without addressing whether he qualified for judgment deferral. Consistent with the State's argument at sentencing, the district court entered a judgment of conviction, with a corresponding suspended prison sentence, and placed appellant on probation. Appellant contends on appeal that the statutes governing his first-offense drug crime mandate judgment deferral under the circumstances. Because the plain language of NRS 176.211(3)(a)(1) requires the district court to defer judgment where the defendant consents to deferral and enters a plea of guilty to a violation of NRS 453.336(2)(a), and appellant satisfied the preconditions for such deferral, we conclude that the district court erred by entering the judgment of conviction. We therefore vacate the judgment of conviction and remand the case for judgment deferral consistent with this opinion.

*FACTS AND PROCEDURAL HISTORY*

Appellant Michael J. Locker was charged in August 2021, pursuant to an amended criminal complaint, with carrying a concealed weapon, a category C felony; possession of less than 14 grams of a schedule I controlled substance, a category E felony; and possession of drug paraphernalia, a misdemeanor.

Before Locker's arraignment, the State negotiated a plea deal with Locker in which he agreed to plead guilty to the first-time offense of possession of less than 14 grams of a schedule I controlled substance in violation of NRS 453.336(2)(a). It accordingly amended the information, dropping the concealed-weapon and drug-paraphernalia counts and including only the drug-possession count. According to the guilty-plea memorandum, Locker admitted that he "knowingly or intentionally" possessed less than 14 grams of a schedule I controlled substance. In exchange for Locker's guilty plea, the State agreed "not [to] pursue any other criminal charges arising out of this transaction or occurrence." The parties agreed "to argue for an appropriate sentence." The guilty-plea memorandum contained no provision or language regarding judgment deferral. At the arraignment, the district court accepted and entered Locker's guilty plea pursuant to the guilty-plea memorandum.

Before sentencing, Locker filed with the court an election to undergo a treatment program pursuant to NRS 176A.240 (hereinafter, treatment election).[1] In the treatment election, Locker acknowledged that "if he satisfactorily complete[d] the treatment program and satisfie[d] the conditions of the [c]ourt, the conviction [would] be set aside." At sentencing, Locker requested to participate in an outpatient, rather than inpatient, treatment program. He made no request, discussion, or argument regarding judgment deferral. For the State's part, despite an acknowledgment that Locker had no prior felonies, it expressed its belief that the drug-possession offense to which he pleaded guilty constituted "a mandatory probation case" and, coupled with Locker's misdemeanor criminal history, warranted a 19-to-48-month prison sentence. The State also argued that "the firearm presence" at the time of arrest "require[d] probation as opposed to a deferred sentence." It made no other argument regarding judgment deferral. Finally, the State urged the district court to require Locker "to complete the adult drug court" as a condition of probation because of his "multiple violations" of either positive or missed drug tests. Locker did not object to any of the State's sentencing recommendations.

[1]NRS 176A.240(1) permits placement in a treatment program for any "defendant who suffers from a substance use disorder" and who "tenders a plea of guilty . . . to . . . any offense for which the suspension of sentence or the granting of probation is not prohibited by statute," "[e]xcept as otherwise provided in" NRS 176.211(3)(a)(1).

The district court acknowledged Locker's election to participate in a treatment program. It questioned Locker about his history of "inpatient programs" and considered the "maybe 11 or 12 . . . positive drug tests or missed drug tests" since his arrest on the subject offense. Additionally, the district court expressed concern for "community" safety because Locker had "a concealed weapon on his person" at the time of arrest. The court stated that category E felonies carry "mandatory probation." Nevertheless, the district court reasoned that "the past efforts and . . . the risks [Locker] created" required a "different" approach, despite that the offense constituted Locker's "first felony." Ultimately, the court sentenced Locker to 19 to 48 months in prison, suspended the sentence, and placed him on probation for 18 months. As a condition of probation, Locker was required to enter and complete adult drug court after serving 60 days in the Washoe County Jail. The district court explained that there was "a punitive component" to the sentence because Locker had "carr[ied] a concealed weapon." The district court did not otherwise discuss judgment deferral. A judgment of conviction was entered the same day.

*DISCUSSION*

While we review a sentencing decision for an abuse of discretion, *see Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009), we review statutory interpretation de novo, *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). In interpreting a statute, we begin with the text of the statute to determine its plain meaning and apply "clear and unambiguous" language "as written." *Id.* In so doing, "we avoid statutory interpretation that renders language meaningless or superfluous." *Id.*

Locker argues that NRS 453.336(2)(a), to which he pleaded guilty, contains language that makes judgment deferral mandatory where the defendant consents. Locker maintains that because he pleaded guilty to a first offense under NRS 453.336(2)(a) and consented to judgment deferral, he satisfied the conditions of the statute, such that the district court lacked discretion to enter a judgment of conviction. Moreover, he contends that not only did the charging documents contain no firearm allegation, but also the statute does not condition a deferred sentence on the absence or presence of a firearm. He asserts, therefore, that the district court misinterpreted the mandatory deferral provided for in NRS 453.336(2)(a) insofar as it accepted the State's argument that Locker's possession of a firearm warranted probation as opposed to deferred judgment. We agree.[2]

Although Locker focuses on NRS 453.336(2)(a)'s language, our interpretation of NRS 453.336(2)(a) necessarily involves consider-

[2]The State agrees that Locker preserved the issue for appeal by virtue of his treatment election under NRS 176A.240.

ation of related statutes cross-referenced in the statutory scheme. *See Bergna v. State*, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004) (explaining that we read statutes within a statutory scheme "harmoniously with one another" to avoid "unreasonable or absurd results" (internal quotation marks omitted) (quoting *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001))). NRS 453.336(2) prescribes the punishments for "knowingly and intentionally possess[ing] a controlled substance," depending on the type and amount of the controlled substance. *See* NRS 453.336(2)(a)-(e). NRS 453.336(2)(a), to which Locker pleaded guilty, governs first and second offenses of possessing less than 14 grams of the substance at issue and provides for judgment deferral upon the defendant's consent:

> For a first or second offense, if the controlled substance is listed in schedule I or II and the quantity possessed is less than 14 grams, or if the controlled substance is listed in schedule III, IV or V and the quantity possessed is less than 28 grams, [a person] . . . shall be punished for a category E felony as provided in NRS 193.130.[3] *In accordance with NRS 176.211, the court shall defer judgment upon the consent of the person.*

*Id.* (emphasis added). NRS 176.211 governs the deferral of judgment upon, among other things, a guilty plea. Subsection 1 provides the following general rule:

> Except as otherwise provided in this subsection, upon a plea of guilty, . . . but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer judgment on the case . . . . *The court may not defer judgment pursuant to this subsection if the defendant has entered into a plea agreement with a prosecuting attorney unless the plea agreement allows the deferral.*

*Id.* (emphasis added).

NRS 176.211(3)(a)(1), however, specifically addresses defendants who plead guilty to violating NRS 453.336(2)(a): "The court . . . [u]pon the consent of the defendant . . . [s]hall defer judgment for any defendant who has entered a plea of guilty . . . to a violation of paragraph (a) of subsection 2 of NRS 453.336."

A combined reading of these statutes leads to the conclusion that NRS 176.211(1) and NRS 176.211(3)(a)(1) target different offenses and establish different degrees of discretion for judgment deferral according to the offense, with Locker's guilty plea falling within NRS 176.211(3)(a)(1)'s mandatory deferral on the defendant's con-

[3]NRS 193.130 prescribes punishment depending on the category of the felony. For category E felonies, the sentencing range is one to four years. NRS 193.130(2)(e). Moreover, "[e]xcept as otherwise provided in" NRS 453.336(2)(a), "the court shall suspend the execution of the sentence and grant probation to the person upon such conditions as the court deems appropriate." NRS 193.130(2)(e).

sent, precluding application of NRS 176.211(1)'s discretionary deferral. NRS 176.211(3)(a)(1) expressly applies to guilty pleas for violating NRS 453.336(2)(a) and includes mandatory language that provides no discretion to refuse to defer judgment. Similarly, NRS 453.336(2)(a) mandates that the court defer judgment for violations of its proscriptions in accordance with NRS 176.211(3)(a)(1). By the plain language of these statutes, the Legislature divested the court of its sentencing discretion for this specific felony drug-possession offense and permitted first- and second-time offenders the opportunity to proceed without a conviction on their record.[4] *Cf. Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) ("The use of the word 'shall' in [NRS 176.0931] divests the district court of judicial discretion.").

Nevertheless, the State contends that NRS 453.336(2)(a)'s reference to NRS 176.211 "as a whole," rather than to any specific subsection therein, implicates the entirety of NRS 176.211, and specifically, subsection 1, which generally permits deferral but situationally prohibits deferral. *See* NRS 176.211(1). According to the State, the last sentence of NRS 176.211(1) precludes judgment deferral where a defendant enters into a specific plea agreement with the State, unless the agreement provides for deferral, or the defendant pleaded "guilty to every single charge." Because Locker entered into a plea agreement with the State that contained no such deferral provision, and he pleaded guilty to only one charge, with the State dropping the other charges, including the concealed-weapon charge contained in the first amended criminal complaint but omitted from the information, the State reasons that NRS 176.211(1), as opposed to NRS 176.211(3)(a)(1), applies and precludes judgment deferral. We disagree.

NRS 176.211(1) does not apply to Locker's plea. The State's argument overlooks that NRS 176.211 as a whole distinguishes between offenses for purposes of the degree of discretion afforded to the district court to defer judgment. *See City of Henderson v. Amado*, 133 Nev. 257, 259, 396 P.3d 798, 800 (2017) (explaining that we construe statutes "as a whole," while we read statutes "in a manner that makes the words and phrases essential and the provisions consequential"). While NRS 176.211(1) does not define the offenses

[4]Our conclusion finds further support in NRS 176A.240, which governs circumstances under which a defendant may participate in a treatment program. Subsection 1(a) of that statute provides as follows: "Except as otherwise provided in [NRS 176.211(3)(a)(1)], if a defendant who suffers from a substance use disorder or any co-occurring disorder tenders a plea of guilty . . . the court may . . . suspend or defer further proceedings and place the defendant on probation [pending successful completion of a treatment program] . . . ." Thus, while this statute generally gives the district court discretion to defer judgment pending treatment, that general authority remains limited by the specific provisions of NRS 176.211(3)(a)(1), which, as discussed, require deferred judgment after a guilty plea under NRS 453.336(2)(a) and the defendant's consent.

that fall within its ambit, the other subsections of NRS 176.211 give context for subsection 1 and establish that subsection 1 acts as a generally applicable provision under which judgment deferral is discretionary. For example, as noted already, NRS 176.211(3)(a)(1) expressly mandates judgment deferral for guilty pleas for violations of NRS 453.336(2)(a). Additionally, NRS 176.211(3)(b) prohibits judgment deferral for any defendant convicted of violations of certain violent or sexual offenses. The existence of these provisions shows that the Legislature intended to treat most offenses as subject to the court's discretion for purposes of judgment deferral, but to require the court to handle a certain subset of offenses in a particular manner.

The State's reading of the last sentence of NRS 176.211(1) is unpersuasive and atextual. First, no language in NRS 176.211 exists to limit the mandatory judgment deferral for offenses under NRS 453.336(2)(a) only to situations in which the defendant pleaded guilty to all charges in an original charging document, as opposed to the actual, eventual plea. Neither does NRS 453.336(2)(a) suggest such a requirement. The State implicitly acknowledges as much because it resorts to a selective reading of the legislative history, even though legislative history is generally relevant only to interpret ambiguous statutory language. *Cf. Sharpe v. State*, 131 Nev. 269, 274, 350 P.3d 388, 391 (2015).

Second, the fact that NRS 176.211(1) rescinds the discretionary judgment deferral provided in *that* subsection where the plea results from a plea agreement that does not allow deferral does not mean that the mere existence of a plea agreement triggers NRS 176.211(1) and forecloses NRS 176.211(3). Contrary to the State's assertion, such an interpretation renders language in subsection 1 and subsection 3 meaningless. For example, a person "who has been convicted of a violent or sexual offense" would be able to avoid the prohibitory language in NRS 176.211(3)(b) and urge the court to defer judgment under NRS 176.211(1) so long as the plea agreement allowed for judgment deferral. If so, NRS 176.211(1) would subsume and render meaningless NRS 176.211(3)(b). A similar effect occurs when considering the interplay between NRS 176.211(1) and (3)(a)(1).

Third, NRS 176.211(1) explicitly states that its language pertains to "this subsection," not to the statute as a whole. A plain reading of the "this subsection" language confines any limitations on the district court's discretion to defer judgment outlined in that subsection to *that subsection*. Fourth, notably, none of the cross-referencing statutes discussed above even reference NRS 176.211(1), let alone prohibit their application where the defendant's guilty plea results from a plea agreement that lacks any provision relating to judgment deferral. Given the ubiquity of plea agreements, the Legislature's failure to exclude from mandatory judgment deferral situations in which a defendant negotiates charges down in a plea agreement or

fails to include a provision on judgment deferral in the plea agreement does not suggest an oversight on the part of the Legislature.

In sum, a harmonious reading of the statutes reveals no ambiguity within or conflict between NRS 176.211's provisions. NRS 176.211(1) applies to any offense not specifically addressed by the other provisions of the statute and remains mutually exclusive from NRS 176.211(3)(a)(1). A defendant's guilty plea to NRS 453.336(2)(a) triggers NRS 176.211(3)(a)(1), which requires judgment deferral regardless of whether the plea resulted from a plea agreement. Applying the governing statutes' plain language to the facts, we conclude that the district court lacked discretion to enter the judgment of conviction under NRS 176.211(3)(a)(1) and NRS 453.336(2)(a). The parties agree that Locker pleaded guilty to NRS 453.336(2)(a). The parties also agree that Locker consented to judgment deferral by his treatment election.[5] The conditions of NRS 176.211(3)(a)(1) now satisfied, NRS 176.211(3)(a)(1) applied, not NRS 176.211(1). The application of NRS 176.211(3)(a)(1) is unaffected by the facts that the original criminal complaint contained other charges, including a concealed-weapon charge, and Locker's plea resulted from a plea agreement without any provision on judgment deferral.

## *CONCLUSION*

We conclude that NRS 453.336(2)(a) mandates, consistent with NRS 176.211, judgment deferral on the consent of the defendant for a guilty plea to a first- or second-time offense of possession of less than 14 grams of a schedule I or II controlled substance. NRS 176.211(3)(a)(1) similarly requires the court to defer judgment on the consent of the defendant for a guilty plea to a violation of NRS 453.336(2)(a). NRS 176.211(1) is not applicable to such situations, as its plain language gives the court discretion to defer judgment for offenses not specifically identified elsewhere in the statute. Because NRS 176.211(3)(a)(1) targets a specific drug-possession offense, a guilty plea that falls within its ambit excludes the application of NRS 176.211(1). Here, Locker undisputedly pleaded guilty to a first-time violation of NRS 453.336(2)(a) and consented to deferral by his treatment election. Thus, the district court lacked discretion to decline to defer judgment. We therefore vacate the judgment of conviction and remand for judgment deferral consistent with this opinion.

Silver and Pickering, JJ., concur.

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[5]Locker asserts that he consented to judgment deferral in his treatment election. The State does not dispute this assertion or otherwise discuss whether Locker consented to judgment deferral. Therefore, we assume that the treatment election invoked Locker's consent to judgment deferral.

DONALD DOUGLAS EBY, Appellant, *v.* JOHNSTON LAW OFFICE, P.C.; BRAD M. JOHNSTON; and LEANN E. SCHUMANN, Respondents.

No. 83299-COA

September 8, 2022 518 P.3d 517

Appeal from a district court order striking a second amended complaint and dismissing a tort action with prejudice. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

**Affirmed in part, reversed in part, and remanded.**

*Donald Douglas Eby*, Gardnerville, in Pro Se.

*Santoro Whitmire, Ltd.*, and *James E. Whitmire*, Las Vegas, for Respondents.

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

## OPINION

Per Curiam:

In this opinion, we consider the extent to which a nonlawyer agent who is granted authority over claims and litigation under a power of attorney pursuant to Nevada's Uniform Power of Attorney Act, as codified in NRS Chapter 162A, may litigate a claim belonging to the principal. Construing the statutory scheme in a manner consistent with long-standing Nevada law prohibiting the unauthorized practice of law, we hold that a nonlawyer agent operating under a power of attorney concerning claims and litigation may not litigate an action in pro se in place of the principal or otherwise engage in the practice of law on the principal's behalf; rather, our statutes generally grant such an agent the same limited authority a client has over claims and litigation in an attorney-client relationship.

Because the district court correctly determined below that appellant's nonlawyer agent under a power of attorney was engaged in the unauthorized practice of law, we affirm its decision to strike the second amended complaint prepared by the agent. But because the district court proceeded to dismiss appellant's last remaining claim in the action with prejudice without conducting the requisite analysis for imposing case-concluding sanctions, we reverse that dismissal and remand this matter to the district court for proceedings consistent with this opinion.

### *FACTS AND PROCEDURAL HISTORY*

Appellant Donald Douglas Eby was convicted in April 2018 of battery causing substantial bodily harm and sentenced to a term

of imprisonment for 12-48 months. Shortly after Eby's conviction, the victim of the crime filed a tort action against him in connection with the battery. Eby retained respondents Johnston Law Office, P.C.; Brad M. Johnston; and LeAnn E. Schumann to defend against the suit, and he executed a power of attorney giving them authority to settle the case, which they ultimately did in October 2018 in the amount of $500,000.

In September 2020, Eby filed the underlying action in pro se against respondents, asserting various causes of action, including legal malpractice. Shortly thereafter, he filed a first amended complaint, adding an additional claim and more detailed allegations. He essentially claimed that respondents could have obtained a more favorable resolution of the case had they properly advised him on the law and proceeded with litigation. He also vaguely alleged that respondents forced him to sign the power of attorney granting them authority to settle. These first two pleadings were signed only in Eby's name.

Respondents filed a motion to dismiss the first amended complaint, arguing that Eby failed to state a claim under NRCP 12(b)(5). Eby opposed the motion, again in papers signed only in his name. However, prior to the scheduled hearing on the motion to dismiss, Eby filed a motion requesting that the court permit Theodore Stevens, an inmate serving a life sentence at Lovelock Correctional Center, to appear at the hearing on Eby's behalf by audiovisual means. In the motion, Eby stated that, because he is not a lawyer, has no legal training, and is of limited education, he had been relying on Stevens's assistance for preparing the legal filings in the case. Eby further stated that he would not be able to argue his case alone before the court and that he therefore required Stevens's assistance at the hearing. The motion also included a signed declaration from Eby attesting to these representations. The district court issued a written order denying the motion, identifying Stevens as a "jailhouse lawyer" who "is not a licensed attorney in the State of Nevada" and therefore "cannot represent [Eby]," as "[a]ny representation would be the unauthorized practice of law."

The district court proceeded to hold the hearing on respondents' motion to dismiss, at which Eby appeared on his own behalf. Following argument by the parties on the motion to dismiss and respondents' oral motion for a more definite statement in the alternative, the court orally ruled that it was dismissing the first amended complaint on the merits in its entirety except to the extent Eby based his malpractice claim on the allegation that respondents forced him to sign the power of attorney concerning settlement. The court explained that it was granting Eby leave to amend to provide a more definite statement on the power-of-attorney allegation and that it would dismiss the action without prejudice if Eby failed to file a second amended complaint within 30 days. The court fur-

ther admonished Eby that he would either need to hire an attorney or prepare the pleading himself without the assistance of Stevens. Eby confirmed that he understood the court's ruling, and he at no point disputed the representations in his earlier motion that Stevens had been assisting in the preparation of pleadings and papers on his behalf.

After the hearing, the district court issued a written order dismissing the first amended complaint with prejudice under NRCP 12(b)(5), except for the malpractice claim, for which it was granting Eby leave to amend to provide a more definite statement, thereby leaving the merits of that claim unresolved.[1] The written order reflected the court's oral ruling from the hearing in all respects except that it stated the action would be dismissed with prejudice rather than without if Eby failed to properly file an amended complaint within 30 days. Eby—through Stevens, in violation of the court's admonitions—filed an objection to the content of the written order, but he did not challenge the extent to which the order provided that dismissal for failure to comply with it would be with prejudice. In light of what followed, the district court did not ultimately rule on this objection.

Eby, again through Stevens, proceeded to file a second amended complaint on the last day of the 30-day period. The pleading purported to substitute Stevens into the action as plaintiff in Eby's place, provided that Stevens was proceeding on Eby's behalf as his attorney-in-fact under a power of attorney pursuant to NRS 162A.470 and NRS 162A.560, and was signed by Stevens in that capacity. The district court, before any response to the pleading was filed and without holding a hearing or addressing the statutes relied upon by Eby/Stevens, entered a written order concluding that Stevens was engaged in the unauthorized practice of law, striking all documents authored by Stevens as fugitive documents—including the second amended complaint—and dismissing the action with prejudice for failure to comply with the court's prior order. This appeal followed.

## *ANALYSIS*

On appeal, Eby primarily contends that Stevens had the authority to represent him and litigate the underlying matter on his behalf by virtue of the limited power of attorney he executed giving Stevens such authority. Specifically, Eby contends that NRS 162A.470 and NRS 162A.560 expressly allow for a principal to grant such

[1]On appeal, Eby does not challenge the district court's decision to dismiss all claims other than the malpractice claim with prejudice under NRCP 12(b)(5). Thus, the issue is not before us. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

authority to an attorney-in-fact under a power of attorney.[2] Eby also challenges the form of the district court's dismissal, contending that it was inconsistent with the court's oral ruling at the hearing on respondents' motion to dismiss, where the court stated that it would dismiss the action *without* prejudice if Eby failed to properly file an amended complaint within 30 days. We address each argument in turn.

*An individual may not authorize a nonlawyer to litigate in pro se or practice law on his or her behalf by virtue of a power of attorney*

Because resolving the issue of whether Stevens was permitted to litigate the underlying matter on Eby's behalf by virtue of the power of attorney requires interpreting statutes and court rules, our review on this point is de novo. *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006).

NRS Chapter 162A governs powers of attorney for financial matters and healthcare decisions. A "[p]ower of attorney" is defined as "a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term 'power of attorney' is used."[3] NRS 162A.090. Nevada's Uniform Power of Attorney Act (UPOAA), enacted by the Legislature in 2009, *see* 2009 Nev. Stat., ch. 64, §§ 1-56, at 174-98, is codified within NRS Chapter 162A and sets forth the scope and operation of powers of attorney for financial matters.[4] *See* NRS 162A.200-.660. As relevant to this appeal, NRS 162A.470, entitled "[c]onstruction of authority generally," provides as follows:

> Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in NRS 162A.200 to 162A.660, inclusive, . . . a principal authorizes the agent to . . . [d]emand, receive and obtain, *by litigation* or otherwise, money or another

[2]Eby likewise contends that Stevens could bring the action himself and/or on Eby's behalf under NRCP 17. *See* NRCP 17(a)(1)(G) (identifying "a party authorized by statute" as one who "may sue in [his or her] own name[ ] without joining the person for whose benefit the action is brought"); NRCP 17(b)(1) (providing that "[c]apacity to sue . . . for an individual, including one acting in a representative capacity, [is determined] by the law of this state"). As this argument is wholly dependent on Eby's contention that Stevens was authorized to litigate the underlying case under NRS Chapter 162A, we reject it for the reasons discussed herein.

[3]NRS 162A.030 defines "[a]gent" as "a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact or otherwise."

[4]At the same time, the Legislature enacted separate provisions concerning powers of attorney for healthcare decisions. *See* 2009 Nev. Stat., ch. 64, §§ 57-73, at 198-207.

> thing of value to which the principal is, may become or claims to be entitled . . . .

NRS 162A.470(1) (emphasis added). And one of the "subject[s] described in NRS 162A.200 to 162A.660" is that found in NRS 162A.560, entitled "[c]laims and litigation." Under that statute, unless otherwise stated, if a power of attorney grants an agent "general authority with respect to claims and litigation," the agent may "[a]ssert and maintain before a court . . . a claim, claim for relief, [or] cause of action, . . . including an action to recover . . . damages sustained by the principal." NRS 162A.560(1).

NRS 162A.560 proceeds to enumerate various other powers granted to such an agent, including that the agent may "[b]ring an action to determine adverse claims or intervene or otherwise participate in litigation;" "[s]ubmit to alternative dispute resolution, settle, and propose or accept a compromise;" and "appear for the principal, . . . verify pleadings, seek appellate review, . . . contract and pay for the preparation and printing of records and briefs, and receive, execute and file or deliver [any] instrument in connection with the prosecution, settlement or defense of a claim or litigation." NRS 162A.560(2), (5), (6). Thus, the plain language of the UPOAA allows a principal to grant considerable authority over the litigation of his or her own causes of action to an agent under a power of attorney.

However, it is well established that it is unlawful for a person to practice law in Nevada unless that person is an "active member of the State Bar of Nevada or otherwise authorized to practice law in this state pursuant to the rules of the Supreme Court." NRS 7.285(1)(a);[5] *see* SCR 77 ("No person may practice law as an officer of the courts in this state who is not an active member of the state bar, unless authorized to practice subject to [other Supreme Court Rules]."). And our supreme court has previously noted that, "[a]lthough an individual is entitled to represent himself or herself in the district court, no rule or statute permits a non-attorney to represent any other person . . . in the district courts or in [the appellate] court[s]." *Guerin v. Guerin*, 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000) (citation omitted) (citing *Salman v. Newell*, 110 Nev. 1333, 1336, 885 P.2d 607, 608 (1994)). The underlying purpose of this prohibition on the unauthorized practice of law is "to ensure that the public is served by those who have demonstrated training and competence and who are subject to regulation and discipline." *In re Discipline of Lerner*, 124 Nev. 1232, 1237, 197 P.3d 1067, 1072 (2008).

In *Lerner*, the supreme court held "that what constitutes the practice of law must be determined on a case-by-case basis, bearing in

[5]Under NRS 7.285(2), a person who engages in the unauthorized practice of law may be charged with a criminal offense.

mind the overarching principle that the practice of law is involved when the activity requires the exercise of judgment in applying general legal knowledge to a client's specific problem." *Id.* at 1234, 197 P.3d at 1069. And here, Eby does not substantially dispute that Stevens—by advising Eby in connection with the underlying action and preparing and submitting filings therein on his behalf—was engaged in conduct that generally constitutes practicing law. Nor could he reasonably dispute this point, as Stevens's actions in litigating the underlying case clearly amounted to such practice. *See id.* at 1241, 197 P.3d at 1074 (recognizing that, even short of litigating an action in court, the "exercise of professional judgment" and "evaluating a . . . claim, advising clients of the claim's merits, and negotiating the claim" constitute the practice of law); 7 Am. Jur. 2d *Attorneys at Law* § 1 (2017) ("[The practice of law] embraces the preparation of pleadings and other papers incident to actions . . . ."). Instead, Eby seems to contend that the UPOAA allows a nonlawyer agent with a valid power of attorney concerning claims and litigation to essentially step into the shoes of the principal and litigate an action as if the principal were proceeding in pro se, or that it simply authorizes such an agent to engage in the practice of law on the principal's behalf. We disagree.

Although our appellate courts have not specifically addressed this issue, the supreme court considered a similar issue in *Martinez v. Eighth Judicial District Court*, 102 Nev. 561, 729 P.2d 487 (1986). In that original writ proceeding, the court rejected the petitioner's argument that a nonattorney agent could represent him in the district court under a statute providing that a person claiming unemployment benefits could "be represented [before a court] by counsel or other duly authorized agent." *Id.* at 562, 729 P.2d at 488 (emphasis omitted) (quoting NRS 612.705(2) (1967)). The court summarily determined that the statute did not operate in the manner suggested, as "only a licensed attorney may be duly authorized to represent a client" in a court of law. *Id.* (citing SCR 77 and NRS 7.285). However, unlike the power-of-attorney statutes at issue in this case, the statute addressed in *Martinez* did not purport to convey any sort of specific authority concerning claims and litigation to an agent.

With respect to the power-of-attorney statutes at issue here, the only authority citing them is an unpublished order of dismissal from the United States District Court for the District of Nevada. *See Handley v. Bank of Am., N.A.*, No. 2:10-cv-01644-RLH-PAL, 2010 WL 4607014, at *2 (D. Nev. Nov. 4, 2010). There, as here, a nonlawyer acting pursuant to a power of attorney represented the plaintiff in a civil action. *Id.* at *1. The defendants filed a motion to dismiss the complaint, which the court granted, concluding summarily that "[t]he power of attorney defined in NRS Chapter 162A does not circumvent NRS 7.285's prohibition on the unauthorized practice of law." *Id.* at *2. The court further noted that while "[the agent] may

be able to secure proper legal representation for Plaintiff pursuant to Plaintiff's power of attorney," the agent could not "represent[ ] Plaintiff as a so called attorney-in-fact." *Id.* (citing NRS 162A.470). Although the analysis in its written order was cursory, for the reasons set forth below, we agree with the *Handley* court's decision.

Courts in other jurisdictions have addressed whether power-of-attorney statutes like Nevada's can be used to circumvent the general prohibition on the practice of law by nonlawyers in greater depth, including the California Court of Appeal in *Drake v. Superior Court*, 26 Cal. Rptr. 2d 829 (Ct. App. 1994).[6] The *Drake* court considered "whether the long-standing, statutory prohibition against the practice of law by persons not admitted to the Bar has been abrogated by the more recently adopted Uniform Statutory Form Power of Attorney Act."[7] *Id.* at 830. Specifically, the court evaluated the broad powers conferred on an attorney-in-fact under Cal. Civ. Code § 2494 (West 1993),[8] *id.*, a provision concerning claims and litigation that was materially similar to NRS 162A.560. In *Drake*, Terry Drake obtained a form power of attorney from two other individuals giving him general authority over claims and litigation, which he used in an attempt to appear in legal proceedings on their behalf. 26 Cal. Rptr. 2d at 831. When the lower court rejected these attempts, Drake petitioned the court of appeal for a writ of mandate directing the lower court to allow him to appear. *Id.*

The court of appeal denied Drake's petition, concluding that, "despite [its] broad language, the Power of Attorney Act does not permit attorneys in fact to engage in legal activities clothed only with a power of attorney." *Id.* In so doing, the court first noted that, while principals under a power of attorney may appear in pro se, an agent may not do so on their behalf, as, "[b]y definition, one cannot appear in 'propria' persona for another person."[9] *Id.*

The court went on to address Drake's contention that he could essentially practice law on behalf of a principal under a power

[6]*See In re Foster*, Bk. No. 11-17709-WRL, 2012 WL 6554718, at *4, *5 (B.A.P. 9th Cir. Dec. 14, 2012) (noting that "[c]ase law is rather sparse on the issue of whether an attorney-in-fact can sign a complaint or otherwise appear on behalf of her principal" and that *Drake* is "[t]he leading California case on this issue").

[7]California's power-of-attorney law was a precursor to the current uniform act. *See* Unif. Power of Attorney Act § 404(2) (Unif. Law Comm'n 2006) (repealing the Uniform Statutory Form Power of Attorney Act). Nevertheless, its relevant provisions are sufficiently analogous to the UPOAA as enacted in Nevada to inform our analysis here.

[8]This provision was later recodified without change as the current Cal. Prob. Code § 4459 (West 2009). *See* 1994 Cal. Stat., ch. 307, §§ 9, 16, at 1982-83, 2010-11.

[9]Appearing "in pro se" is synonymous with appearing "in propria persona" and means to appear "[f]or oneself; on one's own behalf; without a lawyer." *Pro Se*, *Black's Law Dictionary* (11th ed. 2019).

of attorney that "expressly authorizes him to '[a]ssert and prosecute before a court . . . a claim [or] cause of action,' . . . '[b]ring an action to determine adverse claims, intervene in litigation and act as amicus curiae,' . . . and 'appear for [his principals] . . . in connection with the prosecution, settlement or defense of a claim or litigation.'" *Id.* at 831-32 (alterations in original) (quoting Cal. Civ. Code § 2494(a), (b), (e)). In rejecting this argument, the court determined that accepting Drake's construction of the power-of-attorney statutes would reach the absurd result of "sanction[ing] criminal conduct" by allowing for "the unauthorized practice of law." *Id.* at 832. The court relied on long-standing California law allowing for persons to represent their own interests in court but prohibiting nonlawyers from doing so on behalf of others, and it recognized the general legal distinction between an attorney-in-fact under a power of attorney on the one hand, and an attorney-at-law on the other. *Id.* (providing "that a power of attorney is not a vehicle which authorizes an attorney in fact to act as an attorney at law," as holding otherwise would "relegate[ the prohibition on the unauthorized practice of law] to contempt by any layman who secured from his principal an ordinary power of attorney, for the purpose of representing him in pending litigation" (internal quotation marks omitted)); *see Attorney*, *Black's Law Dictionary* (11th ed. 2019) (distinguishing between an "attorney-in-fact" as an agent "designated to transact business for another" and an "attorney-at-law" as "[s]omeone who practices law").

The rationale of the *Drake* court is persuasive, and we adopt a similar approach in concluding that a nonlawyer agent with a power of attorney concerning claims and litigation is not authorized to appear in a pro-se capacity in place of the principal or practice law on the principal's behalf. In line with *Drake*, we conclude that Stevens, by definition, cannot appear in pro se on Eby's behalf; only Eby may do so. *See* 26 Cal. Rptr. 2d at 831; *see also* SCR 44. Moreover, the Nevada provisions relied upon by Eby in arguing that Stevens could advocate for him in a representative capacity are sufficiently similar to the California statute addressed in *Drake* that the *Drake* court's reasoning applies with equal force here. *Compare* 26 Cal. Rptr. 2d at 831-32 (discussing the former Cal. Civ. Code § 2494), *with* NRS 162A.470, .560 (granting agents similar authority under a power of attorney concerning claims and litigation). For example, both states' statutes expressly authorize an agent to, among other things, "[a]ssert . . . before a court . . . a claim, claim for relief, [or] cause of action . . . to recover . . . damages sustained by the principal," "[b]ring an action to determine adverse claims," and "appear for the principal" with respect to claims and litigation. *Compare* NRS 162A.560(1)-(2), (6), *with* Cal. Prob. Code § 4459(a)-(b), (e) (West 2009).

Like the *Drake* court noted in its application of California's materially similar law, we find no support in the UPOAA for the notion that the Nevada Legislature intended to supplant well-established law prohibiting the unauthorized practice of law. *See* NRS 162A.380 ("Unless displaced by a provision of NRS 162A.200 to 162A.660, inclusive, the principles of law and equity supplement NRS 162A.200 to 162A.660, inclusive."); *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 677, 310 P.3d 574, 580 (2013) ("Whenever possible, we will interpret a rule or statute in harmony with other rules or statutes." (alteration and internal quotation marks omitted)); *cf. Drake*, 26 Cal. Rptr. 2d at 832 ("[T]he authority of attorneys in fact under section 2494 is restricted—it is subject to conditions of fact and law that exist outside this chapter." (internal quotation marks omitted)). Indeed, interpreting the statutes in the manner Eby suggests would reach the absurd result of "sanction[ing] criminal conduct" by allowing nonlawyers to engage in "the unauthorized practice of law." *Drake*, 26 Cal. Rptr. 2d at 832; *see also* NRS 7.285; *Platte River Ins. Co. v. Jackson*, 137 Nev. 773, 778, 500 P.3d 1257, 1262 (2021) ("We strive to the extent possible to interpret a statute in a matter that avoids unreasonable or absurd results unintended by the Legislature." (alteration and internal quotation marks omitted)). And although the UPOAA provides a principal the ability to grant broad authority over claims and litigation to an agent, the powers enumerated in the statutes do not specifically contemplate the practice of law and instead indicate that such authority is excluded.[10]

For example, NRS 162A.560(6) provides that an agent may "verify pleadings" and "contract and pay for the preparation . . . of records and briefs." But it does not provide that the agent may actually prepare such documents himself or argue in support of them in court. *See Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 34, 481 P.3d 860, 873 (2021) (acknowledging "the canon of construction '*expressio unius est exclusio alterius*,'" meaning "the expression of one thing is the exclusion of another" (internal quotation marks omitted)); *see also Drake*, 26 Cal. Rptr. 2d at 832 (employing similar reasoning under identical statutory language). And the UPOAA expressly grants an agent the ability to "[d]o any *lawful* act with respect to the subject [of the power of attorney]," NRS 162A.470(10) (emphasis added), which of course does not include the *unlawful* practice of law.[11] *See Drake*, 26 Cal. Rptr. 2d at 833 (applying a

[10]An agent who is also a duly licensed attorney would of course have the authority to practice law on the principal's behalf, but it would be the agent's law license—not the power of attorney—that would give rise to such authority.

[11]While the language in NRS 162A.560(6) providing that an agent may "appear for the principal" is seemingly broad enough to allow a nonlawyer agent to do what Stevens did in this case, in light of our analysis herein, we construe NRS 162A.560 to mean that an agent may appear for the principal in

materially similar provision of the California statute in concluding that a nonlawyer agent may not engage in the unauthorized practice of law).

Courts in multiple other jurisdictions have addressed this issue and reached similar conclusions. *See, e.g.*, *Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997); *Weber v. Garza*, 570 F.2d 511, 514 (5th Cir. 1978); *Christiansen v. Melinda*, 857 P.2d 345, 346-49 (Alaska 1993); *Jones v. Brooks*, 97 A.3d 97, 103-04 (D.C. 2014); *In re Conservatorship of Riebel*, 625 N.W.2d 480, 481-83 (Minn. 2001); *Kohlman v. W. Pa. Hosp.*, 652 A.2d 849, 850-52 (Pa. Super. Ct. 1994). Thus, consistent with the foregoing, and contrary to Eby's reading of the statutes, we conclude the UPOAA is better understood as allowing a principal to grant an agent the authority over claims and litigation the principal would have as a client in an attorney-client relationship. *See Christiansen*, 857 P.2d at 349 (concluding that the "powers [enumerated in Alaska's similar power-of-attorney law] are best characterized as authorizing the agent to act *as* the client in an attorney-client relationship"); *accord Jones*, 97 A.3d at 103; *Riebel*, 625 N.W.2d at 482; *Kohlman*, 652 A.2d at 852. On this point, we note that the powers set forth in NRS 162A.560, which generally encompass bringing an action, submitting to alternative dispute resolution, seeking appellate review, and settling a claim or otherwise concluding an action or satisfying a judgment, are consistent with those decisions that are reserved to a client under the Nevada Rules of Professional Conduct. *See* RPC 1.2(a) (providing that, "[s]ubject to [certain exceptions], a lawyer shall abide by a client's decision concerning the objectives of representation," including the "decision whether to settle a matter"); *cf. Kohlman*, 652 A.2d at 852 (noting that "the decisions whether to prosecute, defend, settle, or arbitrate a claim belong to the client, not to the attorney," and that "[t]he agent, therefore, while lacking authority to litigate pro se in his or her principal's stead, creates and controls the attorney-client relationship as fully as if he or she were the principal").

By reading the statutes in this way, we construe them consistently with existing Nevada law prohibiting the unauthorized practice of law, *see CityCenter*, 129 Nev. at 677, 310 P.3d at 580, and avoid a construction that would allow laymen to easily circumvent the same through the use of a power of attorney, *see Drake*, 26 Cal. Rptr. 2d at 832. We therefore reject Eby's arguments and hold that a nonlawyer agent under a power of attorney is not entitled to appear in pro

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any manner otherwise consistent with law. This does not include appearing in a purportedly pro-se capacity on behalf of the principal or as an unlicensed legal practitioner but may include appearing through counsel or testifying on the principal's behalf. *Compare* NRS 162A.560(4) (providing that an agent may "consent to examination and bind the principal in litigation"), *with* Cal. Prob. Code § 4459(c)(2) (providing an agent similar authority).

se in place of the principal or engage in the practice of law on the principal's behalf. Accordingly, Eby has failed to demonstrate that reversal is warranted on this point, and we affirm the district court's order insofar as it struck Eby's second amended complaint.

*The district court plainly erred by imposing a case-concluding sanction without conducting the requisite analysis*

We turn now to Eby's remaining argument on appeal, which is that the district court's decision to dismiss his malpractice claim with prejudice was inconsistent with the court's oral pronouncement at the hearing on respondents' motion to dismiss that it would dismiss the case *without* prejudice if Eby failed to properly file an amended complaint within 30 days. Thus, he contends that the district court actually intended to dismiss the case without prejudice and that this court should reverse the dismissal on that ground. But this argument fails, as the written order granting Eby leave to amend plainly stated that the court would dismiss the case *with* prejudice, and written orders control over conflicting statements made at a hearing. *Kirsch v. Traber*, 134 Nev. 163, 168 n.3, 414 P.3d 818, 822 n.3 (2018). Moreover, Eby failed to properly raise this issue before the district court and has therefore waived it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981) (concluding that appellant waived its challenge to an alleged oversight in the district court's order, as "[i]t was incumbent upon the appellant to direct the trial court's attention to its asserted omission," but it failed to do so).

Because we generally decline to reach issues not properly raised by the parties, our analysis concerning the form of the district court's order dismissing Eby's malpractice claim would normally end here. *See Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021); *Hung v. Genting Berhad*, 138 Nev. 547, 550-51, 513 P.3d 1285, 1288 (Ct. App. 2022). But our "ability . . . to consider relevant issues *sua sponte* in order to prevent plain error is well established." *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (characterizing "plain error" as occurring where "clearly controlling [law] was not applied by the trial court"). And because the district court plainly erred by dismissing Eby's last remaining claim with prejudice without conducting the analysis required for imposing case-concluding sanctions under the seminal case of *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and its progeny, we address this issue and reverse the district court's order dismissing Eby's malpractice claim. *See Fox v. Warren*, Nos. 80668 & 81212, 2021 WL 4205697, at *1 n.1 (Nev. Sept. 15, 2021) (Order of Reversal and Remand) (reaching the same issue sua sponte and noting that "[t]he imposition of case-concluding sanctions without an analysis under the *Young* factors is plain error because it contradicts controlling law").

In *Young*, our supreme court recognized that, in addition to specific sanctioning authority provided by law, "courts have inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices." 106 Nev. at 92, 787 P.2d at 779 (omission in original) (internal quotation marks omitted). Such sanctions are generally reviewed for an abuse of discretion on appeal, but the *Young* court held "that a somewhat heightened standard of review" applies when the sanction is dismissal with prejudice. *Id.* This is because "dismissal with prejudice is a harsh remedy to be utilized only in extreme situations," which a court must weigh against the policy favoring disposition of cases on their merits. *Moore v. Cherry*, 90 Nev. 390, 393, 528 P.2d 1018, 1021 (1974). And "while dismissal need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case." *Young*, 106 Nev. at 92, 787 P.2d at 780. Finally, *Young* required that trial courts support every order of dismissal with prejudice as a discovery sanction with "an express, careful and preferably written explanation of the court's analysis of [a nonexhaustive list of] pertinent factors," including, among others, "the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, . . . [and] the feasibility and fairness of alternative, less severe sanctions." *Id.* at 93, 787 P.2d at 780.

Although *Young* concerned sanctions for discovery abuses, our supreme court has recognized its general applicability beyond this context in situations in which a court issues a case-terminating sanction in response to a party's conduct in litigation. *See Rish v. Simao*, 132 Nev. 189, 198, 368 P.3d 1203, 1210 (2016) (applying the heightened standard of review for case-concluding sanctions where the district court struck appellant's answer, entered a default, and conducted a prove-up hearing after appellant's counsel violated a pretrial order); *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998) (reaffirming the applicability of *Young*'s heightened standard of review to cases involving "abusive litigation practices"); *see also Fox*, Nos. 80668 & 81212, 2021 WL 4205697, at *2 (reversing and remanding where the district court failed to weigh the *Young* factors when it dismissed appellant's complaint with prejudice after finding that appellant engaged in misconduct by impermissibly influencing witnesses and that appellant was vexatious). Indeed, the supreme court has noted that, even where the circumstances of an action ending in case-terminating sanctions are procedurally and factually distinct from those addressed in *Young*, it is "[t]he magnitude of the sanction [that] brings the action under the purview of *Young*." *Chamberland v. Labarbera*, 110 Nev. 701, 704-05, 877 P.2d 523, 525 (1994); *see Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 615 n.6, 245 P.3d 1182, 1188 n.6 (2010) (defining case-concluding sanctions as occurring in "cases in which

the complaint is dismissed or the answer is stricken as to both liability and damages"); *see also Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 664 n.2, 262 P.3d 705, 710 n.2 (2011) (recognizing that a dismissal without prejudice does not implicate *Young*).

Here, particularly in light of the district court's change of position concerning the form of dismissal (i.e., without prejudice to with prejudice) from the time of the hearing on respondents' motion to dismiss to the entry of the resulting written order directing a more definite statement of the malpractice claim, it is not entirely clear why the district court determined that dismissal with prejudice would be appropriate if Eby failed to comply with the order within 30 days. Nevertheless, regardless of the rationale, the district court's decision to dismiss the action with prejudice after Eby failed to timely file a proper amended complaint amounted to a case-concluding sanction for Eby's failure to comply with a court order. *See Rish*, 132 Nev. at 198, 368 P.3d at 1210; *Bahena*, 126 Nev. at 615 n.6, 245 P.3d at 1188 n.6. Indeed, NRCP 12(e) states that, "[i]f the court orders a more definite statement and the order is not obeyed within . . . the time the court sets, the court may strike the pleading or issue any other appropriate order." And federal cases applying the identical Federal Rule of Civil Procedure 12(e) have characterized the court's options in this regard as "sanctions" for noncompliance with the court's order directing a more definite statement.[12] *See, e.g.*, *Chennareddy v. Dodaro*, 282 F.R.D. 9, 14 (D.D.C. 2012) ("A party must comply with a district court order granting a motion for a more definite statement under Federal Rule 12(e) or run the risk of possible sanctions." (internal quotation marks omitted)).

Thus, although NRCP 12(e) broadly contemplates dismissal for noncompliance in appropriate situations, our district courts must carefully consider the circumstances of each case when fashioning an appropriate sanction under the rule. *See Young*, 106 Nev. at 92-93, 787 P.2d at 779-80; *Moore*, 90 Nev. at 393, 528 P.2d at 1021; 5C Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1379 (3d ed. Supp. 2022) ("The language 'any other appropriate order,' in the text of Rule 12(e), permits a variety of sanctions that stand midway between the harsh course of dismissal and the relatively benign punishment of repeating the order for a more definite statement."). In the words of one federal court of appeals, "[w]hile it is true that [Rule 12(e)] confers power upon a court to dismiss a claim for failure to amend the pleadings as directed, it is a power which is not to be exercised lightly, for it forecloses inquiry into the merits of the action."

[12]"Federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority for Nevada appellate courts considering the Nevada Rules of Civil Procedure." *Venetian Casino Resort, LLC v. Eighth Judicial Dist. Court*, 136 Nev. 221, 225 n.7, 467 P.3d 1, 5 n.7 (Ct. App. 2020) (alteration and internal quotation marks omitted).

*Schaedler v. Reading Eagle Publ'n, Inc.*, 370 F.2d 795, 797-98 (3d Cir. 1967) (footnote omitted). And "[t]he draconian remedy of dismissal of the action should be invoked only as a last resort and not on the first evidence of inability of an inarticulate plaintiff to satisfy the requirements of the court." *Id.* at 799.

Given the foregoing, although some of the specific factors identified in *Young* pertain to discovery abuses and are inapplicable to the circumstances of this case, *see* 106 Nev. at 93, 787 P.2d at 780, the district court was nonetheless required to support and explain its decision to dismiss the underlying action with prejudice by analyzing the pertinent factors, particularly "the willfulness or culpability of the offending party, the prejudice to the non-offending party caused by the [offending party's conduct], and the feasibility and fairness of alternative, less severe sanctions," *see MDB Trucking, LLC v. Versa Prods. Co.*, 136 Nev. 626, 631-32, 475 P.3d 397, 403 (2020) (internal quotation marks omitted) (identifying these as the "[e]ssential[ ]" *Young* factors); *see also Chennareddy*, 282 F.R.D. at 14 ("The court should strike an indefinite pleading without leave to replead only when the judge is satisfied that the pleader cannot or will not serve a pleading that will enable the opposing party to respond." (internal quotation marks omitted)); 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1379 (3d ed. 2004) (providing that, "unless the moving party is prejudiced by the pleader's noncompliance [with an order directing a more definite statement], dismissal usually will not be granted"). Requiring such an analysis under these circumstances "not only facilitates appellate review, but also impresses upon the district court the severity of [the] sanction." *Chamberland*, 110 Nev. at 705, 877 P.2d at 525. We therefore reverse the district court's order dismissing Eby's malpractice claim with prejudice, and we remand this matter for further proceedings consistent with this opinion.

## *CONCLUSION*

Despite the broad authority granted under the UPOAA, a nonlawyer agent operating under a power of attorney concerning claims and litigation may not litigate an action in pro se in place of the principal or otherwise engage in the practice of law on the principal's behalf. The district court therefore correctly concluded that Eby's nonlawyer agent was engaged in the unauthorized practice of law, and we affirm its decision to strike the second amended complaint on that ground. But because the district court dismissed the remaining malpractice claim with prejudice without conducting the analysis required under *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 787 P.2d 777 (1990), and its progeny, we reverse that dismissal and remand for further proceedings consistent with this opinion.

THE STATE OF NEVADA, Appellant, *v.* CHARLES WADE McCALL, Respondent.

No. 82640

September 22, 2022 517 P.3d 230

Appeal from a district court order granting a motion to suppress in a criminal prosecution. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

**Affirmed in part, vacated in part, and remanded.**

*Aaron D. Ford*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander Chen* and *Jonathan E. VanBoskerck*, Chief Deputy District Attorneys, and *Austin C. Beaumont*, Deputy District Attorney, Clark County, for Appellant.

*Sanft Law* and *Michael W. Sanft*, Las Vegas, for Respondent.

Before the Supreme Court, Hardesty, Stiglich, and Herndon, JJ.

## OPINION

By the Court, Stiglich, J.:

It is axiomatic that all persons shall be free from unreasonable, warrantless search and seizure. The United States Supreme Court has carved out an exception to this general rule, however, permitting officers to conduct warrantless protective sweeps of areas for which they can articulate—and *only* when they can articulate—specific facts that lead them to believe the area being swept harbors an individual posing a danger to those on scene. Here, the district court granted a motion to suppress the evidence found as a result of and during a protective sweep, determining that the officers did not have an appropriate basis for the protective sweep and that the protective sweep was per se unconstitutional because it was not preceded by an arrest.

While we hold that a protective sweep does not require a prior arrest, we conclude that the district court correctly concluded that the search performed here was not a lawful protective sweep because it was not based on articulable facts supporting a reasonable belief that the premises harbored a dangerous individual. The district court's order, however, did not indicate the specific evidence that was improperly seized as a result of the protective sweep or as its fruit. Accordingly, we affirm in part, vacate in part, and remand for the district court to clarify the evidence that falls within the purview of the suppression order and which items were permissibly seized by law enforcement.

*BACKGROUND*

Colette Winn resided in a home owned by respondent Charles Wade McCall. Winn was on probation and subject to a search clause that allowed officers to search her living quarters.[1] While McCall was an ex-felon, he was not on probation or parole.

Winn's probation officer received an anonymous letter that claimed Winn was violating her probation. The letter focused primarily on Winn, alleging that she was "engaged in criminal activity with all ex felons," and warned that "[w]e[a]pons might be found, so please be careful." The letter also contended that Winn was "slinging drugs out of the far back bedroom." The letter only tangentially referred to McCall as a "convicted felon" but did not otherwise allege that McCall was engaged in any illegal activity or was dangerous. As a result of the anonymous letter, Winn was arrested at the probation office and interviewed. Winn told the officers that she lived with two other roommates, McCall and Mahatuhi Santos.[2] The officers researched McCall and learned he was an ex-felon and not subject to supervision. A total of eight officers, with Winn in tow, headed to Winn's home to search her place of residence pursuant to the search clause of the probation agreement.

This search devolved into a raid. For purposes of "containment," three officers flanked the sides and rear of the home. Meanwhile, four other officers in tactical gear banged on the door, let themselves into the home using a key code provided by Winn, and made entry with their guns drawn. Upon entry, they encountered both McCall, who had come out of his bedroom in the far back of the home with his dog, and Santos. The officers instructed McCall to reenter his bedroom and place his dog in the bathroom located therein. Even though McCall readily complied with the officers' instruction, three officers followed McCall into his bedroom without his consent to sweep the room. Once inside McCall's room, one of the officers observed shotgun shells on McCall's dresser and detained McCall because they believed they would find guns as well. The officers read McCall his *Miranda* rights, after which McCall admitted to having firearms in the bedroom and identified them to the officers. The officers later admitted that they entered the home with the intention to search every room and that they conduct sweeps of the entirety of every home they enter as a matter of course even if they believe no one is present.

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[1]The search clause reads as follows: "You shall submit your person, place of residence, vehicle or areas under your control to search including electronic surveillance or monitoring of your location, at any time, with or without a search warrant or warrant of arrest, for evidence of a crime or violation of probation by the Division of Parole and Probation or its agent."

[2]The officers did not ask Winn about the letter's contents, and the record does not indicate that Winn corroborated any of the letter's allegations beyond that she did not live alone.

The officers contacted the Las Vegas Metropolitan Police Department, which obtained a search warrant to further search the house and McCall's vehicle. In McCall's bedroom and vehicle, officers found and seized three firearms, a credit card embosser, blank credit card stock, and several other items. McCall was charged with one count of establishing or possessing a financial forgery laboratory, three counts of ownership or possession of a firearm by a prohibited person, and five counts of possession of document or personal identifying information.

McCall filed a motion to suppress, arguing that the protective sweep violated the Fourth Amendment and that the derivative evidence seized was fruit of the poisonous tree. The State opposed, and the district court held an evidentiary hearing. At the hearing, the officers admitted that they went into the home with the intention of conducting a protective sweep of every room and that they would not have gone directly to Winn's room without conducting a full protective sweep of the house. One officer explained that "whenever we go into a residence, we clear the residence, we make sure that there are no other people there every time. . . . We do that every time."

The district court determined that "[t]here was no lawful basis for the protective sweep" for two reasons. First, there was no arrest preceding the protective sweep. Second, the officers "failed to testify to a reasonable belief based on specific and articulable facts that the area to be swept harbored an individual posing a danger to those on the scene." The district court concluded that there were no exigent circumstances warranting the protective sweep and thus suppressed the items seized during the sweep and those seized thereafter pursuant to the search warrant as fruit of the poisonous tree. The State appeals.

## *DISCUSSION*

### *A protective sweep does not require a prior arrest*

The district court determined that a protective sweep requires a prior arrest. The State challenges this conclusion, arguing that law enforcement may conduct a protective sweep before an arrest and that the "reasonableness balancing required by the Fourth Amendment weighs towards allowing probation officers to conduct protective sweeps in non-arrest scenarios." We review this constitutional issue de novo. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013) ("A district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review.").

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; Nev. Const. art. 1, § 18; *see also Lloyd*, 129 Nev. at 743, 312 P.3d at 469. Warrantless searches are generally deemed unreasonable, with a few well-established exceptions. *Lloyd*, 129 Nev. at 743, 312 P.3d at 469. One of these

exceptions is a protective sweep. *See Maryland v. Buie*, 494 U.S. 325, 327 (1990). A protective sweep is generally described as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Id*. Such a sweep is permissible under the Fourth Amendment if the officer held "a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Id*. (alteration, citation, and internal quotation marks omitted). The search is a cursory inspection of places where a person may be found and "lasts no longer than is necessary to dispel the reasonable suspicion of danger." *Id.* at 335-36.

The United States Supreme Court has not addressed whether a protective sweep requires a prior arrest. *See* Leslie A. O'Brien, Note, *Finding a Reasonable Approach to the Extension of the Protective Sweep Doctrine in Non-Arrest Situations*, 82 N.Y.U. L. Rev. 1139, 1140-41 (2007) (noting that the Supreme Court has yet to address this issue). So too did this court remain silent on this issue in *Hayes v. State*, 106 Nev. 543, 797 P.2d 962 (1990), *overruled on other grounds by Ryan v. Eighth Judicial Dist. Court*, 123 Nev. 419, 168 P.3d 703 (2007), the one case in which this court has applied *Buie*.[3]

Other courts that have considered this issue have largely, but not uniformly, determined that a protective sweep does not require a prior arrest. The New Jersey Supreme Court held that an arrest is not required to conduct a protective sweep where (1) the officers are lawfully on the premises, (2) the officers "have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger," (3) the sweep is conducted quickly, and (4) it

[3]Likewise, when this court addressed protective sweeps before *Buie*, it did not settle whether a prior arrest was required. When this court considered a protective sweep in *Koza v. State*, the search was conducted after appellant had been arrested, and the court upheld the constitutionality of a protective sweep where the circumstances presented reasonable grounds by which officers could conclude that a search was necessary to prevent an urgent risk to their or others' lives. 100 Nev. 245, 250, 252-53, 681 P.2d 44, 46, 48-49 (1984) (interpreting the protective sweep under the emergency exception to the Fourth Amendment warrant requirement). *Koza* did not consider whether the search would be permissible absent a prior arrest. And in *Gagliano v. State*, the court held a warrantless protective sweep unconstitutional where the circumstances presented no basis to conclude that rooms of the apartment other than that permissibly searched contained anyone or anything threatening officer security. 97 Nev. 297, 298-99, 629 P.2d 781, 782-83 (1981). To the extent that *Gagliano* cites a United States Supreme Court decision considering searches incident to arrest to suggest that a protective sweep requires a prior arrest, *see id.* at 298, 629 P.2d at 782 (citing *Chimel v. California*, 395 U.S. 752, 762-63 (1969), *overruled in part by Arizona v. Gant*, 556 U.S. 332 (2009)), *Gagliano* did not rely on arrest status, and the suggestion is thus dicta.

We accordingly disavow *Gagliano* to the extent that it suggests a protective sweep requires a prior arrest.

is restricted to areas in which the person(s) posing a danger could hide. *State v. Davila*, 999 A.2d 1116, 1119 (N.J. 2010). Further, "[t]he police cannot create the danger that becomes the basis for a protective sweep." *Id*. Similarly, the United States Court of Appeals for the Eleventh Circuit approved of a protective sweep that occurred before an arrest where the officers had a reasonable belief that there was another individual present who could do them harm. *United States v. Caraballo*, 595 F.3d 1214, 1224-25 (11th Cir. 2010). So too has the First Circuit held "that police who have lawfully entered a residence possess the same right to conduct a protective sweep whether an arrest warrant, a search warrant, or the existence of exigent circumstances prompts their entry." *United States v. Martins*, 413 F.3d 139, 150 (1st Cir. 2005), *abrogated on other grounds by Hill v. Walsh*, 884 F.3d 16 (1st Cir. 2018). The Second, Fifth, Sixth, and D.C. Circuits are in accord. *See United States v. Miller*, 430 F.3d 93, 99 (2d Cir. 2005); *United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004), *abrogated on other grounds by Kentucky v. King*, 563 U.S. 452 (2011); *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001); *United States v. Patrick*, 959 F.2d 991, 996-97 (D.C. Cir. 1992), *abrogated on other grounds by United States v. Webb*, 255 F.3d 890 (D.C. Cir. 2001).

The Tenth Circuit veered slightly off the path trod by the other circuits. In *United States v. Torres-Castro*, the Tenth Circuit concluded "that a protective sweep is only valid when performed incident to an arrest." 470 F.3d 992, 997 (10th Cir. 2006). However, this difference may be only a matter of degrees, as the court noted that a protective sweep "may precede an arrest, and still be incident to that arrest, so long as the arrest follows quickly thereafter." *Id*. at 998.[4]

The Ninth Circuit's caselaw is inconsistent on this issue. *See Mendez v. County of Los Angeles*, 815 F.3d 1178, 1191 (9th Cir. 2016) (noting the intracircuit split), *vacated*, 581 U.S. 420 (2017). In *United States v. Garcia*, the Ninth Circuit upheld a protective sweep conducted before the defendant's arrest. 997 F.2d 1273, 1282 (9th Cir. 1993). Conversely, the Ninth Circuit determined in *United States v. Reid* that officers were not entitled to conduct a protective sweep where the defendant was not already under arrest. 226 F.3d 1020, 1027 (9th Cir. 2000). However, it is unclear whether the lack of a prior arrest was the dispositive issue in *Reid*, because the government's lack of articulable facts "that the apartment harbor[ed] an individual posing a danger" also prompted the Ninth Circuit's decision. *Id*. (alteration in original) (internal quotation marks omitted).

We agree with the majority approach, as it appropriately balances the rights of an individual to be free from an unreasonable search

[4]The Tenth Circuit noted that "quickly" might be satisfied when "the search and arrest were separated by times ranging from five to sixty minutes." *Id*.

and the safety of the officers and other people on the scene. *See Buie*, 494 U.S. at 327 (recognizing a concern for the officer's safety as well as that of other people on scene). Officers may be lawfully in an individual's home under nonarrest situations (for example, by consent) where they have articulable, legitimate safety concerns justifying a protective sweep. *See Davila*, 999 A.2d at 1118-19. Accordingly, we conclude that a protective sweep is permissible where there are articulable facts that would cause a reasonably prudent officer to believe that the area to be swept harbors an individual who poses a danger to those at the scene. We decline to adopt a per se rule requiring an arrest before a protective sweep.

*The district court correctly concluded that the protective sweep was unlawful*

The district court found that officers did not testify to a reasonable belief that the premises harbored a dangerous individual compelling a protective sweep and concluded that the search was accordingly unlawful. The State argues that articulable facts support the officers' decision to conduct a protective sweep of McCall's bedroom. McCall counters that no facts justified a protective sweep of his room and that the officers were limited to searching areas within Winn's control. We review the district court's factual findings for clear error and analyze the legal consequences of those findings de novo. *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013).

As discussed above, before conducting a protective sweep, an officer needs articulable facts that would warrant a reasonably prudent officer to believe that the area to be swept harbors an individual who poses a danger to those at the scene. *See Buie*, 494 U.S. at 327; *Hayes*, 106 Nev. at 550, 797 P.2d at 966. In applying this test in *Hayes*, we noted that it was insufficient to simply point to a possibility that an individual could be there, because "[i]f any possibility of danger were sufficient to create a reasonable belief of a danger, the police would have *carte blanche* power to conduct sweep searches of citizens' homes incident to virtually any arrest for a felony." 106 Nev. at 551, 797 P.2d at 967. Otherwise, "by means of post-hoc rationalizations, the police could justify virtually any sweep search." *Id*. Thus, we strongly disapproved of the police conducting protective sweeps as "standard operating procedure," calling it a "patently unconstitutional" practice. *Id*. at 552, 797 P.2d at 967.

We conclude that the district court did not clearly err in finding that the officers did not testify as to a reasonable belief that the area to be swept harbored a dangerous individual and that the district court correctly held the search to be unlawful. Our disposition here rests on the officers' troubling admission that they conduct a protective sweep of an entire residence as a matter of course. This search was conducted without considering whether the circum-

stances presented articulable facts supporting a reasonable belief that the premises harbored a dangerous person. Rather, the search was carried out regardless of what the circumstances presented. The bare possibility that a dangerous person *might be* present and hiding in a given location does not justify a protective sweep. The search here demonstrates a practice of warrantless searches unbound by the guidelines stated in *Buie*, *Hayes*, and elsewhere indicating when such searches may be constitutional. This practice cannot continue. We conclude that the protective sweep was unconstitutional where the officers' testimony established that the search was not based on articulable facts supporting a reasonable belief that the area harbored a dangerous individual. The search here paid no heed to what the articulable facts might have been.

In light of the officers' admissions that they did not predicate the search on articulable indicia that a dangerous person was present, the State's arguments for conducting the sweep strike us as post-hoc rationalizations that cannot retroactively cure the unconstitutionality of the search.[5] *See Brumley v. Commonwealth*, 413 S.W.3d 280, 287 (Ky. 2013) ("The absence of information cannot be an articulable basis for a protective sweep that requires information to justify it in the first place."); *see also Hayes*, 106 Nev. at 551, 797 P.2d at 967 (disapproving of "post-hoc rationalizations"). The argument that the officers needed to engage in the sweep because they did not know if the room was safe has the inquiry backwards. A protective sweep is constitutionally permissible *only* where officers have a reasonable belief of danger, not when they are merely unsure if an area is safe. This limitation is critical to ensure that officers may not conduct warrantless sweeps as a matter of course, but only where justified by particular, exigent circumstances. *See Hayes*, 106 Nev. at 551, 797 P.2d at 967.

While we agree with the district court's order that the search was unconstitutional, we are concerned about its scope. The order opaquely mentions that "the evidence seized pursuant to the search

[5]The State makes the following arguments: (1) the anonymous letter informed the officers that drugs were sold out of the far back bedroom (McCall's bedroom); (2) the letter informed them that there may be weapons in the house and warned them to be careful; (3) an officer believed Winn was attempting to alert residents in the house by telling the officers she did not remember her keypad code for the front door and by offering them two different codes; (4) during his surveillance before entering the residence, an officer saw an unidentified person coming and going from the residence and did not know, when entering the premises, whether this man was inside the house; (5) officers did not know how many people were inside the house or whether the house was safe inside; and (6) the officers engaged in merely a cursory search of the area and only to prevent danger to themselves. We need not resolve whether these bases might justify a protective sweep, as the officers' admissions here make evident that these are post-hoc rationalizations that cannot support a protective sweep.

warrant must also be suppressed" but does not specify which pieces of evidence were so seized. The parties at oral argument before this court were unable to clarify the scope of the suppression order as well. As a result, we vacate in part and remand for the district court to enter findings regarding the specific evidence that was obtained through the improper protective sweep or as its fruit and that which was obtained permissibly. *Cf. United States v. Finucan*, 708 F.2d 838, 844-45 (1st Cir. 1983) (vacating blanket suppression order and remanding with instructions for the district court to specify which items should be suppressed as unlawfully seized and as tainted by the unlawful seizure).[6]

## *CONCLUSION*

Protective sweeps are permissible to ensure officer safety, not as an end-run around obtaining a search warrant. In this opinion, we hold that a protective sweep does not require a prior arrest. We affirm the district court's suppression order in part because it did not err in concluding that the warrantless protective sweep here violated McCall's Fourth Amendment rights. We vacate in part and remand, however, for the district court to clarify the scope of the suppression order.

Hardesty and Herndon, JJ., concur.

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[6]McCall also argues that his possession of a shotgun shell was not a state crime and thus his arrest violated his Fourth Amendment rights. However, we decline to consider this issue in light of our decision and because the district court did not discuss this issue in its suppression order. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (determining that this court need not consider a claim that was not addressed by the district court), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

AIRBNB, INC., a Foreign Corporation, Appellant, *v.* ERIC RICE, Individually; JEFFERSON TEMPLE, as Special Administrator of the ESTATE OF RAHEEM RICE; and BRYAN LOVETT, Respondents.

No. 81346

September 29, 2022 518 P.3d 88

Appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

**Reversed and remanded.**

Stiglich, J., with whom Herndon, J., agreed, dissented.

*O'Melveny & Myers LLP* and *Dawn Sestito*, Los Angeles, California, and *Damali A. Taylor*, San Francisco, California; *McDonald Carano LLP* and *Jeff Silvestri* and *Chelsea Latino*, Las Vegas; *P.K. Schrieffer LLP* and *David T. Hayek*, West Covina, California, for Appellant.

*Lewis Roca Rothgerber Christie LLP* and *Joel D. Henriod, Daniel F. Polsenberg, Abraham G. Smith*, and *Erik J. Foley*, Las Vegas; *The702Firm* and *Michael C. Kane*, Las Vegas, for Respondents Eric Rice and Jefferson Temple.

*The Schnitzer Law Firm* and *Jordan P. Schnitzer*, Las Vegas, for Respondent Bryan Lovett.

Before the Supreme Court, En Banc.

## OPINION

By the Court, Hardesty, J.:

In this appeal, we must apply the United States Supreme Court's holding in *Henry Schein, Inc. v. Archer & White Sales, Inc*., that, under the Federal Arbitration Act (FAA), a court has no power to determine the arbitrability of a dispute where the contract delegates the arbitrability question to an arbitrator, even if the argument that the arbitration agreement applies to the dispute is "wholly groundless." 586 U.S. 63, 65 (2019) (internal quotations omitted). Because the agreement in this case is governed by the FAA and includes a delegation provision, *Henry Schein* requires that the arbitrability question be decided by the arbitrator. Accordingly, we conclude that the district court erred in denying the motion to compel arbitration and refusing to submit the arbitrability determination to an arbitrator.

*FACTS*

In the summer of 2018, Raheem Rice and Bryan Lovett were walking to a house party in Las Vegas and were on or near the premises when an unknown individual opened fire on the crowd, killing Raheem and injuring Bryan. Eric Rice, Raheem's father; Jefferson Temple, as special administrator of Raheem's estate (the Estate); and Bryan sued Airbnb, Inc., and other defendants for wrongful death and personal injury. They alleged that Airbnb's services had been used by the party's host to rent the house where the shooting occurred.

In response, Airbnb filed a motion to compel arbitration. Airbnb asserted that Raheem, Bryan, and Eric all had Airbnb accounts at the time of the shooting and had agreed to Airbnb's Terms of Service during the account registration process. The Terms of Service included an arbitration agreement, which specified the following:

> You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.
>
> . . . .
>
> The Arbitration Agreement evidences a transaction in interstate commerce and thus the Federal Arbitration Agreement governs the interpretation and enforcement of this provision.

Airbnb argued that the Estate's, Bryan's, and Eric's claims were therefore subject to arbitration under the Terms of Service agreements and that any dispute about whether the arbitration agreement applied to those claims had to be submitted to an arbitrator.

The district court denied Airbnb's motion to compel arbitration in two separate orders. In its order concerning Bryan, the district court found that he was underage when he assented to Airbnb's Terms of Service. In its order concerning Eric and the Estate, the district court found that Airbnb could not compel arbitration under the Terms of Service agreements because the dispute did not arise from the agreements. Airbnb appeals only the order concerning Eric and the Estate.

*DISCUSSION*

Airbnb argues that the district court lacked discretion to determine whether the dispute was arbitrable because the arbitration agreement in the Terms of Service included a delegation provision

requiring the issue of arbitrability to be submitted to an arbitrator. Airbnb asserts that the Supreme Court made clear in *Henry Schein*, 586 U.S. at 65, that when, as here, the parties clearly and unmistakably delegate the issue of arbitrability to an arbitrator, a court may not disregard that intent, even if the arguments in favor of arbitration are wholly groundless.

Eric and the Estate respond that the district court had discretion to decide that the dispute is not arbitrable because the dispute did not arise from the parties' contractual agreements but from duties owed under Nevada law. They allege that Raheem did not book the Airbnb rental where the shooting occurred, that nothing indicates Raheem knew the house was rented through Airbnb when he died, and that the record does not indicate that Raheem or Eric ever utilized Airbnb's services at all. For the above reasons, Eric and the Estate assert that the parties did not clearly and unmistakably agree to submit this dispute to arbitration and argue that holding such would create an absurd result.

The parties do not dispute that Raheem and Eric both assented to the arbitration agreement in Airbnb's Terms of Service, which delegates the matter of arbitrability to an arbitrator, nor do they dispute the validity of the arbitration agreement or delegation provision. Rather, the issue before us is whether the district court erred in finding that the arbitration agreement did not apply to the claims at issue and in refusing to submit the question of arbitrability to an arbitrator.

The arbitration agreement specified that the FAA governs its enforcement and interpretation. Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Id.* at 67. Generally, when deciding whether to compel arbitration, a court must resolve two issues: (1) whether the parties have a valid agreement to arbitrate and (2) whether the agreement applies to the dispute. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). However, the Supreme Court has recognized that parties may agree to arbitrate "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (internal quotations omitted). Thus, when the parties clearly and unmistakably agree to delegate these questions to an arbitrator, the delegation agreement must be enforced like any other arbitration agreement under the FAA. *Id.* at 70 (recognizing that the FAA operates on an "additional" agreement to arbitrate a gateway issue); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[T]he court's standard for reviewing the arbitrator's decision [of who has the primary power to decide arbitrability] should not differ from the standard that courts apply when they review any other matter that parties have agreed to arbitrate."). As the Supreme Court explained in *Henry Schein*,

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is *wholly groundless*.

586 U.S. at 68 (emphasis added).

Here, the parties have a valid arbitration agreement with a clear delegation clause requiring that an arbitrator decide any dispute as to whether the agreement applies to the claims at issue. However, the district court determined that the arbitration agreement did not apply to Eric's and the Estate's claims because those claims arose from Nevada's wrongful death statute, rather than the Terms of Service or Eric's or Raheem's contractual relationships with Airbnb. Essentially, the district court found that Airbnb's argument that the arbitration agreement applied to Eric's and the Estate's claims was wholly groundless, a finding that *Henry Schein* oddly, but explicitly, precludes the court from making when there is a delegation agreement.

Eric and the Estate attempt to distinguish *Henry Schein* by focusing on its language requiring "clear and unmistakable evidence" that the parties intended to delegate the arbitrability of a dispute between them. 586 U.S. at 69 (internal quotation marks omitted). They argue that because their claims clearly do not relate to or arise from Airbnb's Terms of Service, there is no arbitration agreement that applies to those claims and thus no showing that the parties intended to arbitrate the claims.

The Supreme Court has held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options*, 514 U.S. at 944 (alterations omitted) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). This reflects the principle that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83 (internal quotation marks omitted). However, a valid arbitration agreement that delegates the arbitrability issue to an arbitrator serves as "clear and unmistakable" evidence of an agreement to arbitrate arbitrability. *See Henry Schein*, 586 U.S. at 69. While Eric and the Estate argue that their claims are unrelated to the Terms of Service agreement and thus there is no valid arbitration agreement, their argument about the validity of the arbitration agreement depends on a determination that the claims are not arbitrable—a determination that the arbitration agreement expressly delegates to an arbitrator.

We are cognizant that, unlike in *Henry Schein*, the dispute here did not arise out of a contract between the parties. The facts under-

lying Eric's and the Estate's wrongful death action have no relation to Eric's or Raheem's use of Airbnb's services or platform. They do not arise out of Airbnb's duties to Eric or Raheem by virtue of their agreements to Airbnb's Terms of Service. Further, the parties here do not agree that the contract containing the arbitration agreement generally governs the parties' dispute.

Nevertheless, we believe the rule from *Henry Schein* applies to this situation, particularly when we consider *Henry Schein*'s abrogation of the Fifth Circuit's decision in *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014). In *Douglas*, an attorney in a bankruptcy matter embezzled money from a client, who then sued the bank where the attorney maintained his accounts, alleging negligence and conversion. *Id.* at 461. The bank moved to compel arbitration based on a delegation provision in an arbitration agreement that the client had signed when she briefly opened a checking account with the bank's predecessor years earlier. *Id.* The trial court denied the motion, and the Fifth Circuit Court of Appeals affirmed, concluding that the delegation provision in "the completely unrelated contract" could not "possibly bind [her] to arbitrate gateway questions of arbitrability in all future disputes with the other party, no matter their origin." *Id.* at 462. The court found that in signing the arbitration agreement, the client intended "only to bind herself to arbitrate gateway questions of arbitrability if the argument that the dispute falls within the scope of the agreement is not wholly groundless." *Id.* at 464. The court thus adopted the "wholly groundless" exception used by other circuits and concluded that the client's claims, which had no connection to the arbitration agreement she had signed years earlier, were clearly not arbitrable. *Id.*

The Court in *Henry Schein* expressly rejected use of the "wholly groundless" exception to get around the delegation provision, concluding that it was not consistent with the FAA, thus abrogating *Douglas*. 586 U.S. at 65-68. We can infer from this that the wholly groundless exception is improper even where the arbitration agreement clearly is unrelated to the dispute, and we thus feel constrained to apply the rule from *Henry Schein* when a valid arbitration agreement between the parties contains a delegation clause. If there is a delegation clause, the court has no authority to decide the arbitrability question but must instead grant the motion to compel arbitration.

The cases cited by Eric and the Estate do not alter our understanding of *Henry Schein*. The Tenth Circuit case on which they rely—*Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995)—pre-dates *Schein* and did not specifically address the issue of who should decide whether the dispute was arbitrable. Furthermore, the Tenth Circuit more recently has rejected the argument that courts may decide the arbitrability of a dispute despite a delegation provision and has disavowed reaching a contrary conclu-

sion in earlier decisions such as *Coors. Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1289-90 (10th Cir. 2017) (explaining that the issue was never briefed or expressly addressed in *Coors*).

The other case on which Eric and the Estate primarily rely—*Moritz v. Universal City Studios LLC*, 268 Cal. Rptr. 3d 467 (Ct. App. 2020)—is distinguishable. There, the parties had multiple movie contracts with arbitration agreements, and the contract at issue in the litigation did not include a separate arbitration clause but instead included a provision subjecting movies produced as sequels or remakes to an arbitration clause contained in an earlier contract. *Id.* at 471. The district court determined that the plaintiff's contract claims did not pertain to a movie that was a remake or a sequel and thus were not subject to arbitration. *Id.* at 472-73. The California Court of Appeal affirmed the district court's denial of the motion to compel arbitration, concluding that the arbitration agreement and delegation clause in the earlier contract did not apply to the dispute. *Id.* at 474-75. Thus, in *Moritz*, the issue was not whether the claims were governed by a contract, but whether the relevant contract actually required the arbitrability of the claims to be delegated. Although *Moritz* states that "[t]he FAA requires no enforcement of an arbitration provision with respect to disputes unrelated to the contract in which the provision appears," *id*. at 476, we cannot countenance such a reading of *Henry Schein* and are bound by the decisions of the Supreme Court on this matter.

*CONCLUSION*

The Supreme Court has held that, when a contract delegates the arbitrability question to the arbitrator, a court has no authority to decide whether the arbitration agreement applies to the dispute, even where the argument for arbitrability is wholly groundless. *Henry Schein*, 586 U.S. at 65-68. Because the FAA governs the enforcement of the arbitration agreement at issue here, and the agreement delegates the arbitrability question to an arbitrator, the district court erred in deciding the arbitrability question itself. Accordingly, we reverse the district court's order denying Airbnb's motion to compel arbitration and remand for further proceedings consistent with this opinion.

Parraguirre, C.J., and Cadish, Silver, and Pickering, JJ., concur.

Stiglich, J., with whom Herndon, J., agrees, dissenting:

I respectfully dissent from the majority's opinion that both misreads *Henry Schein*[1] and will lead to absurd consequences in the future. As a California appellate court has demonstrated, there is a

[1]*Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019).

way to harmonize *Henry Schein* with common sense. I would have elected to follow this path tread by our neighboring colleagues.

In *Moritz v. Universal City Studios LLC*, the California Court of Appeal explained that "[a]n arbitration agreement is tied to the underlying contract containing it, and applies 'only where a dispute has its real source in the contract.'" 268 Cal. Rptr. 3d 467, 473 (Ct. App. 2020) (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991)). Additionally, the court noted, "[n]o authority permits sending a matter to arbitration simply because the same parties agreed to arbitrate a different matter." *Id. Henry Schein*, the *Moritz* court concluded, is not to the contrary, because that case "presupposes a dispute arising out of the contract or transaction, i.e., some minimal connection between the contract and the dispute." *Id.* at 475. *Moritz* observed that *Henry Schein* "expressly understood that the [FAA] requires enforcement of arbitration clauses with respect to disputes 'thereafter arising out of such contract'" but did not require "enforcement of an arbitration provision with respect to disputes unrelated to the contract in which the provision appears." *Id.* (quoting *Henry Schein*, 586 U.S. at 67). It thus rejected defendants' "argument that an arbitration provision creates a perpetual obligation to arbitrate any conceivable claim that [plaintiff] might ever have against them" as "plainly inconsistent with the FAA's explicit relatedness requirement." *Id.*

I believe the California court's interpretation of *Henry Schein* is sound as a matter of law and policy. The tort law claims that undergird the dispute here did not arise out of a contract between the parties; indeed, there is no evidence respondents *ever* utilized Airbnb's services.[2] *Henry Schein* does not change the principle that "[t]he FAA requires no enforcement of an arbitration provision with respect to disputes unrelated to the contract in which the provision appears." *Moritz*, 268 Cal. Rptr. 3d at 476; *see* 9 U.S.C. § 2 (providing that an arbitration agreement applies to a "controversy arising out of such contract"); *cf. Zoller v. GCA Advisors, LLC*, 993 F.3d 1198, 1201 (9th Cir. 2021) (recognizing that before a court enforces an arbitration agreement, it must first determine whether a valid arbitration agreement exists); *Coors Brewing Co. v. Molson*

[2]As this court has previously recognized, "tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property and seeks to enforce standards of *conduct*. These standards are imposed by society, without regard to any agreement." *Calloway v. City of Reno*, 116 Nev. 250, 261, 993 P.2d 1259, 1265 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 243-44, 89 P.3d 31, 33 (2004). Furthermore, a tort is "a wrong independent of contract." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (quoting *Malone v. Univ. of Kan. Med. Ctr.*, 552 P.2d 885, 888 (Kan. 1976)). And so, where a dispute between two parties is wholly unrelated to any contract between them, such a contract has no bearing on the resolution of the dispute. Put simply, a party's dispute cannot be governed by a contract out of which it did not arise.

*Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995) ("A dispute within the scope of the contract is still a condition precedent to . . . involuntary arbitration . . . .").

In cautioning against extending an arbitration clause's scope beyond the reach of the parties' contract, the Tenth Circuit Court of Appeals provided the following example to show how doing so could lead to absurd results:

> [I]f two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship.

*Coors Brewing Co.*, 51 F.3d at 1516. Consequently, the district court must ensure that claims sent to arbitration arise under the parties' agreement. *Cf. Metro. Life Ins. Co. v. Bucsek*, 919 F.3d 184, 191 (2d Cir. 2019) (examining whether there was "a clear and unmistakable agreement by the parties to have the question of arbitrability of *this dispute* determined by arbitrators rather than the court" (emphasis added)). The Terms of Service bind hosts and guests who utilize Airbnb. As relevant to the underlying tort claims, respondents were neither.

What the aforementioned cases suggest, common sense confirms. Airbnb's argument that the Terms of Service applies to this dispute is unreasonable and would lead to an absurd result. *Cf. Moritz*, 268 Cal. Rptr. 3d at 474 (concluding that "no reasonable person" would construe an arbitration provision in a contract "to require arbitration of any future claim of whatever nature or type, no matter how unrelated to the agreement[ ] nor how distant in the future the claim arose"); *Home Warranty Adm'r of Nev., Inc. v. State, Dep't of Bus. & Indus.*, 137 Nev. 43, 47, 481 P.3d 1242, 1247 (2021) (observing that "an absurd result is one 'so gross as to shock the general moral or common sense' " (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930))); *Smith v. Steinkamp*, 318 F.3d 775, 777 (7th Cir. 2003) (observing that "absurd results ensue" when an arbitration clause is "read as standing free from any [underlying] agreement"). In this scenario, "it is simply fortuitous that the parties happened to have a contractual relationship" completely unrelated to the underlying tort claims. *Coors Brewing Co.*, 51 F.3d at 1516. But it is the foundational tenants of contract formation, not chance, that bind parties into a contractual relationship.

Accordingly, I believe that the majority has erred in reaching its disposition, and therefore I respectfully dissent.