superintendent to provider's president was absolutely privileged; (3) e-mail messages were not defamatory per se; (4) evidence did not establish malice, as element of business disparagement; and (5) evidence did not establish that pecuniary loss was proximately caused by disparaging statements in e-mail messages.

**Reversed.**

*C.W. Hoffman Jr.*, General Counsel, and *S. Scott Greenberg*, Associate General Counsel, Las Vegas, for Appellant.

*Jolley Urga Wirth Woodbury & Standish* and *L. Christopher Rose* and *William R. Urga*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   An order denying summary judgment is an interlocutory decision, which is not independently appealable. NRCP 56.
2. APPEAL AND ERROR.
   Where a party properly raises the denial of summary judgment on appeal from the final judgment, the supreme court will review the decision de novo. NRCP 56.
3. JUDGMENT.
   Summary judgment is appropriate when the pleadings and other evidence establish that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c).
4. LIBEL AND SLANDER.
   Under the common law, communications made in the course of judicial proceedings, even if known to be false, are absolutely privileged from defamation claims.
5. APPEAL AND ERROR; LIBEL AND SLANDER.
   The applicability of the absolute privilege from defamation claims for communications made in the course of judicial proceedings is a matter of law for the trial court to decide, which the supreme court reviews de novo.
6. LIBEL AND SLANDER.
   Because the scope of the absolute privilege from defamation claims for communications made in the course of judicial proceedings is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application.
7. LIBEL AND SLANDER.
   The purpose of the absolute privilege from defamation claims for communications made in the course of judicial proceedings is to afford all persons freedom to access the courts and freedom from liability for defamation where civil or criminal proceedings are seriously considered. Restatement (Second) of Torts § 587.
8. LIBEL AND SLANDER.
   The absolute privilege from defamation claims for communications made in the course of judicial proceedings affords parties the same protection from liability as those protections afforded to an attorney for defamatory statements made during, or in anticipation of, judicial proceedings. Restatement (Second) of Torts § 587.
9. LIBEL AND SLANDER.
   The protections of the absolute privilege from defamation claims for communications made in the course of judicial proceedings extend to in-

stances where a nonlawyer makes an allegedly defamatory communication in response to threatened litigation or during a judicial proceeding.

10. LIBEL AND SLANDER.
For the absolute privilege from defamation claims for communications made in the course of judicial proceedings to apply: (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation.

11. LIBEL AND SLANDER.
Absolute privilege from defamation claims for communications made in the course of judicial proceedings applied to letter from nonlawyer associate superintendent of county school district's human resources department to president of provider of computer-based instruction, explaining district's decision to deny salary advancement credit, under collective bargaining agreement, to teachers who completed provider's courses, where the letter responded to provider's threat to initiate legal action against district.

12. APPEAL AND ERROR.
The supreme court will not overturn a jury's verdict if the verdict is supported by substantial evidence, unless, considering all the evidence, the verdict was clearly wrong.

13. APPEAL AND ERROR.
The supreme court views all facts from the viewpoint of the prevailing party and assumes that the jury believed all evidence favorable to the prevailing party.

14. LIBEL AND SLANDER.
An action for defamation requires the plaintiff to prove four elements: (1) a false and defamatory statement; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.

15. LIBEL AND SLANDER.
If a defamatory communication imputes a person's lack of fitness for trade, business, or profession, or tends to injure the plaintiff in his or her business, it is deemed defamation per se and damages are presumed.

16. LIBEL AND SLANDER.
A claim for defamation per se primarily serves to protect the personal reputation of an individual.

17. LIBEL AND SLANDER.
Unlike defamation per se, communications constituting business disparagement are not directed at an individual's personal reputation, and instead they are injurious falsehoods that interfere with the plaintiff's business and are aimed at the business's goods or services, and thus, if a statement accuses an individual of personal misconduct in his or her business or attacks the individual's business reputation, the claim may be one for defamation per se, but if the statement is directed towards the quality of the individual's product or services, the claim is one for business disparagement.

18. LIBEL AND SLANDER.
E-mail messages from the assistant to the associate superintendent of county school district's human resources department to three individual teachers, responding to individual teachers' inquiries regarding whether district would grant salary advancement credit, under collective bargaining agreement, to teachers who completed courses offered by provider of computer-based instruction, were not defamatory per se, with respect to provider; statements in e-mail messages were not directed toward an individual's business or professional reputation, and instead they concerned the

fitness of provider's product, and provider did not seek to redress injury to the personal reputation of an individual and instead sought compensation for its business's economic losses.

19. LIBEL AND SLANDER.
To succeed in a claim for business disparagement, the plaintiff must prove: (1) a false and disparaging statement, (2) the unprivileged publication by the defendant, (3) malice, and (4) special damages.

20. LIBEL AND SLANDER.
As opposed to defamation, which merely requires some evidence of fault amounting to at least negligence, business disparagement requires something more, namely, malice.

21. LIBEL AND SLANDER.
Malice, as element of business disparagement, is proven when the plaintiff can show either that the defendant published the disparaging statement with the intent to cause harm to the plaintiff's pecuniary interests, or the defendant published a disparaging remark knowing its falsity or with reckless disregard for its truth. Restatement (Second) of Torts § 623A.

22. LIBEL AND SLANDER.
While defamation requires that the plaintiff prove special damages in the form of pecuniary loss only in limited circumstances, proof of special damages is an essential element of business disparagement.

23. LIBEL AND SLANDER.
In a business disparagement claim, the plaintiff must prove that the defendant's disparaging comments are the proximate cause of the economic loss; hence, a cause of action for business disparagement requires that the plaintiff set forth evidence proving economic loss that is attributable to the defendant's disparaging remarks.

24. LIBEL AND SLANDER.
If the plaintiff in an action for business disparagement cannot show the loss of specific sales attributable to the disparaging statement, the plaintiff may show evidence of a general decline of business; nonetheless, the general decline of business must be the result of the disparaging statements, and the plaintiff must eliminate other potential causes.

25. LIBEL AND SLANDER.
County school district was not liable to provider of computer-based instruction for business disparagement in absence of evidence of malice, relating to e-mail messages from the assistant to the associate superintendent of district's human resources department to three individual teachers, responding to individual teachers' inquiries regarding whether district would grant salary advancement credit, under collective bargaining agreement, to teachers who completed courses offered by provider.

26. LIBEL AND SLANDER.
County school district was not liable to provider of computer-based instruction for business disparagement in absence of evidence that its pecuniary loss was proximately caused by the disparaging statements in e-mail messages from the assistant to the associate superintendent of district's human resources department to three individual teachers, responding to individual teachers' inquiries regarding whether district would grant salary advancement credit, under collective bargaining agreement, to teachers who completed courses offered by provider.

Before HARDESTY, C.J., PARRAGUIRRE and DOUGLAS, JJ.

## OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we consider two issues of first impression in a business defamation action. First, we consider whether the absolute privilege applies to defamatory communications made by a non-lawyer in anticipation of a judicial proceeding. Second, we consider whether allegedly defamatory statements made about a business's product provide a basis for defamation per se or for business disparagement.

We conclude that the absolute privilege affords parties to litigation the same protection from liability that exists for an attorney for defamatory statements made during, or in anticipation of, judicial proceedings. Additionally, we conclude that when allegedly defamatory statements concern a business's product and the plaintiff seeks to redress injury to economic interest, the claim is one for business disparagement, not defamation per se.

### *FACTS AND PROCEDURAL HISTORY*

Appellant Clark County School District (CCSD) and Clark County Education Association (CCEA), the local teachers' union, are parties to a collective bargaining agreement, which sets the terms and conditions of employment for CCSD teachers. The agreement includes a provision for teachers to enhance their salaries by obtaining additional degrees, taking either upper-division, graduate-level courses or completing professional development courses offered by CCSD. However, educational courses that are not credit bearing toward a degree may be excluded from the courses eligible for salary enhancement. In addition, CCSD may deny credit for courses that it deems are of a ''frivolous nature.''

Respondent Virtual Education Software, Inc. (VESI), is a Nevada corporation that markets and sells computer-based instruction for educators and business professionals. VESI markets its distance-learning classes to various colleges and universities.

Until the fall of 2002, Chapman University (Chapman) and Southern Utah University (SUU) offered and administered VESI courses to CCSD teachers for salary enhancement. At that time, VESI had institutional agreements with Chapman and SUU, but VESI did not have a contractual relationship with CCSD.

Dr. George Ann Rice, the associate superintendent of CCSD's human resources department in 2002, had the responsibility for making the final determination as to whether a course complied with the collective bargaining agreement. Because of concerns regarding the academic rigor of VESI courses and their compliance with the

collective bargaining agreement, Dr. Rice asked her administrative assistant to research and evaluate the VESI courses.

As a result, several teachers informed VESI's president that CCSD was researching VESI courses for eligibility for salary enhancement. Concerned about the evaluation, VESI attempted to contact CCSD and Dr. Rice and provided two VESI courses to CCSD. After reviewing VESI's courses, Dr. Rice's assistant noted several concerns with the academic quality of the courses. In addition, Dr. Rice's assistant was unable to confirm that VESI's courses were offered at the graduate level by either Chapman or SUU, or that the courses were credit bearing towards a degree. As a result, Dr. Rice determined that the courses did not comply with the requirements of the collective bargaining agreement between CCSD and CCEA for salary enhancement.

In October 2002, VESI learned that CCSD was denying salary enhancement for its courses. VESI wrote several e-mails to CCSD, essentially demanding that CCSD accept the courses ''before legal means need to be pursued.'' On November 6, 2002, Dr. Rice sent a letter to VESI's president, with copies to other school administrators and CCSD counsel, explaining CCSD's decision to deny salary advancement credit for VESI courses. Dr. Rice stated, in pertinent part:

> I have researched the VESI courses that you offer for graduate credit from the following universities: Chapman, University of Phoenix, and Southern Utah University. These courses are not credit bearing toward any degree offered by these universities. In addition, some of the courses can be completed in three to five hours and the tests can be successfully passed without reading the material, as evidenced by at least two of my employees. There is no safeguard to determine that the candidate is the one who actually takes the tests. The tests are largely consistent of factual information that can be memorized or copied as notes from the slides and do not require the analysis, synthesis and application levels usually required for graduate coursework.

VESI did not respond to Dr. Rice's letter. When teachers inquired about the status of VESI courses, CCSD explained that it would not accept VESI courses for salary enhancement.

*Procedural history*

VESI filed a complaint with the district court, alleging five causes of action against CCSD, including defamation. The district court dismissed all but VESI's defamation claims.[1] VESI based its claims

[1]VESI did not appeal the dismissal of its remaining causes of action.

for defamation on Dr. Rice's November 6, 2002, letter to VESI's president, and at least 12 communications to CCSD teachers, including e-mails sent by CCSD administrative staff.

CCSD filed two motions for summary judgment seeking to dismiss the defamation claims. In its first motion, CCSD argued, in part, that VESI could not prove the elements of defamation and also asserted that the alleged defamatory statements constituted business disparagement, not defamation per se. Although VESI opposed the motion, it did not specifically respond to CCSD's argument regarding business disparagement. The district court summarily denied the first motion, without addressing business disparagement. In its second motion for summary judgment, CCSD argued that VESI could not prove defamation as a matter of law because the statements were either not defamatory or were privileged. On the second motion, the district court found that none of CCSD's statements were privileged as a matter of law but limited VESI's defamation claims to the November 6, 2002, letter and five e-mail communications.

At trial, VESI presented its case-in-chief, offering evidence that it had suffered an economic downturn, but only tenuously indicated that any economic damages were proximately caused by CCSD's statements. Although CCSD cross-examined VESI's witnesses, CCSD rested without presenting additional witnesses, documents, or other evidence. The jury returned a special verdict form, finding that four of the six communications constituted defamation by CCSD. Specifically, the jury found that, in addition to Dr. Rice's November 6, 2002, letter, three e-mail communications to individual CCSD teachers were defamatory. All three e-mails were written by Dr. Rice's assistant to individual teachers. The first e-mail provided, in part:

> This is not a new policy. The contract states that courses must be credit bearing towards a degree and courses such as those offered by VESI have only recently come to our attention as violating contract. Be wary of these 3rd party entities. If the university offering credit will not include them even as an elective in their program, there is something remiss with the course.

The second e-mail provided, in part:

> Credit bearing toward a degree does NOT mean a particular individual must be in that degree program, only that the university offering it values the course enough to allow at least elective credit w/i their own university. VESI is a consulting agency and many of the courses have been deemed ''[frivolous.]'' None of the colleges sponsoring the courses offer degree credit for them so, yes, they should not be taken for salary growth.

The third e-mail communication provided:

> Thank you for your recent letter to Dr. Rice regarding VESI courses. The 3 classes you have already taken . . . will be allowed for salary growth . . . but as they do not comply with the CCEA Negotiated agreement, please be sure any future courses are upper division or graduate credits and are listed in a degree program of the university offering the credit.

The jury awarded damages of $161,024 to VESI. The district court also found that VESI met its offer of judgment and was therefore entitled to an award of attorney fees. Thereafter, the district court awarded VESI prejudgment interest and attorney fees and entered judgment in VESI's favor in the total amount of $340,622.40. CCSD appeals.

## *DISCUSSION*

We address two of CCSD's issues on appeal. First, CCSD contends that the district court erred by denying summary judgment as to Dr. Rice's November 6, 2002, letter to VESI, arguing that the letter was absolutely privileged. Second, CCSD argues that VESI could not rely on the defamation per se doctrine to excuse the need to show special damages. Specifically, CCSD maintains that VESI's defamation claim should have been alleged as a claim for business disparagement, which differs from a defamation per se claim because the former requires proof of malice and special damages whereas the latter requires a showing of negligence and presumes damages.

Because we conclude that the absolute privilege applies to nonlawyers in anticipation of judicial proceedings, we hold that Dr. Rice's November 6, 2002, letter was absolutely privileged. We also conclude that the elements of a claim for business disparagement should be distinguished from the elements of a claim for defamation per se.[2] After determining that VESI's claims involve business disparagement, we conclude that VESI could not rely on presumed damages and did not present sufficient evidence to support the jury's verdict for economic damages. We therefore reverse the judgment.

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[2]In its motions for summary judgment and on appeal, CCSD further argues that the four communications were not defamatory because they were true or substantially true. In the alternative, CCSD asserts that if the statements were false, they were not defamatory because they constituted opinions rather than facts. Additionally, CCSD argued that even if the statements were defamatory, they were also privileged under the ''common interest privilege.'' Because we reverse the judgment on other grounds, we do not address these additional issues.

*The absolute privilege applies to communications made by nonlawyers where judicial proceedings have commenced or are under serious consideration*

CCSD argues that as to Dr. Rice's November 6, 2002, letter, the district court erred in denying CCSD's motion for summary judgment because Dr. Rice sent the letter in response to VESI's threat to file a civil lawsuit against CCSD and the letter was therefore absolutely privileged. VESI contends that the absolute privilege does not apply because the privilege is limited to communications by lawyers representing clients.

[Headnotes 1-3]

A district court's order denying summary judgment is an interlocutory decision and is not independently appealable. *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001). However, where a party properly raises the denial of summary judgment on appeal from the final judgment, this court will review the decision de novo. *Id.*; *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence establish that ''no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'' *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (alteration in original) (quoting NRCP 56(c)).

[Headnotes 4-6]

It is a ''long-standing common law rule that communications [made] in the course of judicial proceedings [even if known to be false] are absolutely privileged.'' *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983). In addition, the applicability of the absolute privilege is a matter of law for the court to decide, which this court will review de novo. *Id.* at 62, 657 P.2d at 105; *Fink v. Oshins*, 118 Nev. 428, 432, 49 P.3d 640, 643 (2002). Further, because the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application. *Fink*, 118 Nev. at 433-34, 49 P.3d at 644.

[Headnotes 7, 8]

In *Fink v. Oshins*, we determined that an attorney's statements made to his client were absolutely privileged after his client began seriously considering commencing proceedings to remove the defendant as cotrustee of a trust. *Id.* at 434, 49 P.3d at 644. In order to support the interpretation of the absolute privilege in *Fink* and in other cases, we have relied on the Restatement (Second) of Torts section 587, which does not limit the application of the absolute privilege to attorney communications. *Fink*, 118 Nev. at 433 n.13, 49

P.3d at 644 n.13;[3] *see also Pope v. Motel 6*, 121 Nev. 307, 316, 114 P.3d 277, 283 (2005); *K-Mart Corporation v. Washington*, 109 Nev. 1180, 1191 n.7, 866 P.2d 274, 282 n.7 (1993), *receded from on other grounds by Pope*, 121 Nev. at 316-17, 114 P.3d at 283. The purpose of the absolute privilege is to afford all persons freedom to access the courts and freedom from liability for defamation where civil or criminal proceedings are seriously considered. Restatement (Second) of Torts § 587 cmts. a, e (1977). Therefore, the absolute privilege affords parties the same protection from liability as those protections afforded to an attorney for defamatory statements made during, or in anticipation of, judicial proceedings. Restatement (Second) of Torts § 587 cmt. d (1977).

Thus, where a judicial proceeding has commenced or is, in good faith, under serious consideration, we determine no need to limit the absolute privilege to communications made by attorneys. *See Hall v. Smith*, 152 P.3d 1192, 1195-96 (Ariz. Ct. App. 2007) (''The privilege applies to both attorneys and parties to litigation.''). In *Hall v. Smith*, an Arizona Court of Appeals also relied on the Restatement (Second) of Torts section 587 to conclude that the absolute privilege applies to both attorneys and parties to litigation. *Id*. We concur for two reasons. First, there is no good reason to distinguish between communications between lawyers and nonlawyers. Second, it is anticipated that potential parties to litigation will communicate before formally retaining counsel.

[Headnotes 9, 10]

Consequently, we extend the protections of the absolute privilege to instances where a nonlawyer asserts an alleged defamatory communication in response to threatened litigation or during a judicial proceeding. Thus, just as we announced in *Fink*, for the privilege to apply (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation. 118 Nev. at 433-34, 49 P.3d at 644.

[Headnote 11]

In this case, we conclude that Dr. Rice's November 6, 2002, letter was absolutely privileged. Before November 6, 2002, VESI demanded that CCSD accept its courses for salary enhancement. VESI sent an e-mail to Dr. Rice explaining its intent to ''turn this matter over'' to legal counsel. The e-mail also informed Dr. Rice

[3]Although in *Fink*, 118 Nev. at 435 n.16, 49 P.3d at 645 n.16, we also cite and rely on Restatement (Second) of Torts section 586, which discusses the absolute privilege as it applies to attorneys, comment e of Restatement (Second) of Torts section 587 explicitly makes clear that the protection from liability for defamation accorded to an attorney under section 586 applies equally to parties to litigation. Restatement (Second) of Torts § 587 cmt. e (1977).

that VESI attorneys planned to send a demand letter to CCSD, requiring that CCSD draft a written statement formally accepting VESI courses for salary enhancement. If CCSD did not draft the formal acceptance, VESI would file ''a civil petition against you, Dr. Rice, and the CCSD to allow the courts to decide on this matter.''

In response, Dr. Rice sent the November 6, 2002, letter to explain the reasons why CCSD would not comply with VESI's demand to accept its courses for salary enhancement. Dr. Rice's letter to VESI was in response to VESI's threat to initiate legal action against CCSD. The letter would be absolutely privileged had it been drafted by CCSD's legal counsel; therefore, we conclude that the protections afforded by the absolute privilege should be extended to Dr. Rice, who was a party involved in a dispute where judicial proceedings were under serious consideration.

Accordingly, we reverse the district court's denial of summary judgment as to the November 6, 2002, letter because it was absolutely privileged as a matter of law.

*Where the defendant's defamatory communications injured the entity's business reputation, the claim is one for business disparagement, not defamation per se*

CCSD also maintains that the defamation per se doctrine is not applicable in this case and that VESI did not present substantial evidence of actual damages. Specifically, CCSD contends that defamation, by its definition, tends to injure individuals, and because VESI is a business, it would be unmerited for any alleged defamatory statements to necessarily constitute defamation per se. CCSD further argues that absent presumed damages under the defamation per se doctrine, VESI failed to prove actual damages, such as the loss of business or sales, attributable to CCSD's statements.

[Headnotes 12, 13]

This court will not overturn a jury's verdict if the verdict is supported by '' 'substantial evidence, unless, [considering] all the evidence . . . , the verdict was clearly wrong.' '' *Wohlers v. Bartgis*, 114 Nev. 1249, 1261, 969 P.2d 949, 958 (1998) (quoting *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). On appeal, this court views all facts from the viewpoint of the prevailing party and assumes that the jury believed all evidence favorable to the prevailing party. *Id.*

VESI contends that CCSD's statements constituted defamation per se because they impugned VESI's lack of fitness for trade, business, or profession. VESI further argues that even if the defamation per se doctrine is not applicable, evidence adduced at trial showed a substantial decline in profits after CCSD communicated to teachers that it would not award salary enhancement for VESI courses.

[Headnotes 14, 15]

An action for defamation requires the plaintiff to prove four elements: ''(1) a false and defamatory statement . . . ; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.'' *Pope*, 121 Nev. at 315, 114 P.3d at 282; *see Lubin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001). However, if the defamatory communication imputes a ''person's lack of fitness for trade, business, or profession,'' or tends to injure the plaintiff in his or her business, it is deemed defamation per se and damages are presumed. *K-Mart Corporation*, 109 Nev. at 1192, 866 P.2d at 282.

Our opinions concerning defamation per se have discussed defamatory communications in relation to individuals. *See Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006) (affirming that defendant plastic surgeon was liable for defamation per se after the defendant told plaintiff's potential client that the plaintiff was being investigated for the recent death of another patient); *K-Mart Corporation*, 109 Nev. at 1192, 866 P.2d at 282 (holding that the act of placing a customer in handcuffs and walking him throughout the store constituted defamation per se); *Nevada Ind. Broadcasting v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983) (concluding that a political candidate was entitled to recover under defamation per se for comments that injured his professional reputation). However, we have not clearly stated whether a corporation or other business entity can proceed on a theory of defamation per se where communications concern the business's product or injure the business's reputation.

[Headnotes 16, 17]

A claim for defamation per se primarily serves to protect the personal reputation of an individual. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 312 (2005); *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). But where communications concern the goods or services provided by a business entity, a plaintiff generally seeks to redress injury to economic interests. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 312 (2005). This distinction is the basis for the difference between an action for defamation per se and an action for business disparagement. *Id.* Unlike defamation per se, communications constituting business disparagement are not directed at an individual's personal reputation; rather, they are injurious falsehoods that interfere with the plaintiff's business and are aimed at the business's goods or services. *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988). Thus, if a statement accuses an individual of personal misconduct in his or her business or attacks the individual's business reputation, the claim may be one for defamation per se; however, if the statement is directed towards the quality of the individual's product or

services, the claim is one for business disparagement. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 312 (2005).

[Headnote 18]

Based on the foregoing authority, we conclude that the three e-mails sent by CCSD to individual teachers did not constitute defamation per se. The statements were not directed toward an individual's business or professional reputation; rather, the statements concerned the fitness of VESI's product. In addition, VESI did not seek to redress injury to the personal reputation of an individual, it sought compensation for its business's economic losses. Therefore, we conclude that VESI's claim is not one for defamation per se, but more appropriately is one for business disparagement. Moreover, we conclude that even if VESI had properly brought its claim as one for business disparagement, it could not have prevailed as a matter of law.

[Headnotes 19-21]

The elements required to prove a cause of action for business disparagement differ from the elements required to prove classic defamation and, necessarily, defamation per se. *Hurlbut*, 749 S.W.2d at 766. To succeed in a claim for business disparagement, the plaintiff must prove: (1) a false and disparaging statement,[4] (2) the unprivileged publication by the defendant, (3) malice, and (4) special damages. *Id*. Notably, the principal differences between defamation per se and business disparagement concern the elements of intent and damages. As opposed to defamation, which merely requires some evidence of fault amounting to at least negligence, business disparagement requires something more, namely, malice. Malice is proven when the plaintiff can show either that the defendant published the disparaging statement with the intent to cause harm to the plaintiff's pecuniary interests, or the defendant published a disparaging remark knowing its falsity or with reckless disregard for its truth. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 722, 57 P.3d 82, 92-93 (2002); *Hurlbut*, 749 S.W.2d at 766; Restatement (Second) of Torts § 623A (1977).

[Headnotes 22-24]

As for the element of damages, defamation requires that the plaintiff prove special damages in the form of pecuniary loss only in limited circumstances. *Hurlbut*, 749 S.W.2d at 766. However, proof of

[4]Restatement (Second) of Torts section 629 defines a disparaging statement as one that is

> understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and
>
> (a) the publisher intends the statement to cast doubt, or
>
> (b) the recipient's understanding of it as casting the doubt was reasonable.

special damages is an essential element of business disparagement. *Id.* at 767. Moreover, in a business disparagement claim, the plaintiff must prove that the defendant's disparaging comments are the proximate cause of the economic loss. *Id.*; *Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1, 7-8 (Minn. 1984). Hence, a cause of action for business disparagement requires that the plaintiff set forth evidence proving economic loss that is attributable to the defendant's disparaging remarks. *Advanced Training Sys.*, 352 N.W.2d at 7. Lastly, if the plaintiff cannot show the loss of specific sales attributable to the disparaging statement, the plaintiff may show evidence of a general decline of business. *Id.* at 7-8; 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 322 (2005). Nonetheless, the general decline of business must be the result of the disparaging statements and the plaintiff must eliminate other potential causes. *Advanced Training Sys.*, 352 N.W.2d at 7-8; 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 322 (2005).

[Headnote 25]

We thus conclude that VESI failed as a matter of law to establish the elements of intent and damages for a claim of business disparagement. First, although there was substantial evidence for the jury to conclude that the information contained in the e-mail communications was false and disparaging, VESI failed to prove that CCSD maliciously intended to cause VESI pecuniary loss, or that CCSD acted with malice because it knew the statements were false or acted in reckless disregard of their falsity. CCSD drafted the e-mail communications in response to individual teachers' inquiries regarding whether CCSD would accept VESI courses for salary enhancement. Although there was some indication that the statements in the e-mails may be false, VESI did not present evidence for the jury to conclude that CCSD acted with reckless disregard when it responded to teachers' questions or concerns regarding VESI's courses.

[Headnote 26]

Likewise, VESI did not provide sufficient evidence to prove special damages. Although VESI presented evidence showing that after the e-mails were transmitted, it suffered a loss in profit due to declining sales, it did not prove that the pecuniary loss was proximately caused by the disparaging statements. First, the statements were narrowly transmitted to individual teachers, and VESI did not prove that the recipient teachers republished the disparaging statements. Secondly, VESI failed to show that its economic losses were a result of the disparaging statements and not merely a result of CCSD's decision to deny teachers salary enhancement for VESI courses. Thus, VESI neither proved specific losses in sales attributable to CCSD's disparaging statements nor eliminated CCSD's decision to deny

VESI's courses for purposes of salary enhancement as a cause for the general decline in business.

Therefore, we conclude that, had the district court instructed the jury on a claim for business disparagement, the jury could not have found that CCSD's disparaging statements were malicious or caused VESI's pecuniary loss. *See El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (standing for the proposition that if the district court had not erred, the result would not have been substantially different). Accordingly, we reverse the judgment.

*CONCLUSION*

The district court improperly denied summary judgment as to Dr. Rice's November 6, 2002, letter to VESI because the letter was absolutely privileged. The absolute privilege applies to both lawyers and nonlawyers who make defamatory statements during a judicial proceeding or where a judicial proceeding is under serious consideration. Because Dr. Rice sent the November 6, 2002, letter in response to VESI's threat to file a civil lawsuit against CCSD, we conclude that the letter was in response to anticipated litigation and was, therefore, absolutely privileged. Accordingly, we reverse the district court's denial of summary judgment as to the November 6, 2002, letter.

Secondly, we reverse the jury's verdict as to the remaining three e-mail communications since the verdict was improperly based on a claim for defamation per se. Because VESI sought compensation for economic loss for defamatory statements about its products, VESI's claim was one for business disparagement and not defamation per se. Further, VESI could not have proven the elements of business disparagement because it did not produce sufficient evidence of malice or of special damages that were proximately caused by CCSD's disparaging statements. Accordingly, we reverse the district court's judgment.

PARRAGUIRRE and DOUGLAS, JJ., concur.

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STEVE FRANCIS ZAMORA, APPELLANT, *v.*
TYSHAE PRICE, RESPONDENT.

No. 51321

August 6, 2009 213 P.3d 490

Appeal from a district court judgment entered on a jury verdict in a tort action conducted under the short trial program. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Plaintiff brought action against defendant arising out of an automobile accident. Complaint was referred to mandatory nonbinding arbitration. Arbitrator issued award in plaintiff's favor. Defendant requested new jury trial. The judge pro tempore entered judgment on short trial jury's verdict in plaintiff's favor, and defendant appealed. The supreme court, CHERRY, J., held that: (1) statute mandating that nonbinding arbitration award be admitted for consideration by jury in any trial de novo when amount in controversy did not exceed $50,000 did not violate driver's right to jury trial, and (2) statute mandating that nonbinding arbitration award be admitted for consideration by jury in any trial de novo where amount in controversy did not exceed $50,000 did not violate equal protection.

**Affirmed.**

[Rehearing denied September 24, 2009]

*Keith B. Gibson*, Las Vegas, for Appellant.

*Weiss Weiss Newark & Newark* and *Matthew Dion* and *James G. Christensen*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The constitutionality of a statute, including issues related to a party's constitutional right to a jury trial, is a question of law that the supreme court reviews de novo. Const. art. 1, § 3.
2. CONSTITUTIONAL LAW.
   Legislative enactment of substantive evidentiary rules is well within the powers conferred upon the Legislature, and the court must defer to the Legislature regarding the statute's validity.
3. CONSTITUTIONAL LAW.
   The burden of demonstrating a statute's unconstitutionality is met when the challenger makes a clear showing of invalidity.
4. JURY.
   Statute mandating that nonbinding arbitration award be admitted for consideration by jury in any trial de novo where amount in controversy did not exceed $50,000 did not violate driver's right to jury trial, in action based on tort claims arising from automobile accident; award was mere evidence for jury to consider, which evidence jury was free to accept or reject, and mandatory jury instruction provided that jury was not to give undue weight to arbitration award. Const. art. 1, § 3; NRS 38.259(2).
5. ALTERNATIVE DISPUTE RESOLUTION; CONSTITUTIONAL LAW.
   Statute mandating that nonbinding arbitration award be admitted for consideration by jury in any trial de novo where amount in controversy did not exceed $50,000 did not violate equal protection under either federal or state constitutions based on claim that admission of award in trial where amount in controversy was at least $50,000 effectively admitted such awards only for cases below that threshold; distinction was rationally related to legitimate government interest in providing more expedited and less expensive proceedings for smaller claims, while preserving litigants' right to jury trial and appeal, and in encouraging litigants to take arbitration seriously. U.S. CONST. amend. 14; NRS 38.250.

6. CONSTITUTIONAL LAW.
Both the United States and Nevada Constitutions' equal protection clauses are implicated when a law treats similarly situated people differently. Const. art. 4, § 21; U.S. CONST. amend. 14.

7. CONSTITUTIONAL LAW.
When a law that treats similarly situated people differently and, therefore, implicates equal protection clauses of the United States and Nevada Constitutions, does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest. Const. art. 4, § 21; U.S. CONST. amend. 14.

Before CHERRY, SAITTA and GIBBONS, JJ.

## OPINION

By the Court, CHERRY, J.:

In this appeal, we consider the constitutionality of NRS 38.259(2), which requires that, when a party requests a new trial at the conclusion of mandatory nonbinding arbitration proceedings in a short trial matter, the arbitrator's findings must be admitted during the new trial. Specifically, we address whether the admission of this arbitration award deprives a party of the constitutional right to a jury trial and whether it violates equal protection rights. For the reasons set forth below, we conclude that NRS 38.259(2)'s requirement that the arbitration award be admitted at the new trial does not violate a party's constitutional right to a jury trial or a party's right to equal protection under the law.

### *PROCEDURAL HISTORY*

The procedural history of this case is straightforward. Respondent Tyshae Price filed a complaint in district court against appellant Steve Zamora, asserting tort claims arising out of an automobile accident. Because the amount at issue in the suit was less than $40,000, the case was referred to Nevada's nonbinding arbitration program as mandated by NRS 38.250(1).[1] After a hearing, the arbitrator awarded Price $18,000. Zamora then requested a new trial, which was conducted as part of the short trial program. The short trial jury also awarded Price $18,000, and judgment was subsequently entered on that verdict by the judge pro tempore.[2] Zamora now appeals.

[1]Price filed her district court complaint on January 15, 2004, at which time NRS 38.250 applied to civil actions in which the amount at issue did not exceed $40,000. In 2005, NRS 38.250 was amended to require civil actions with amounts at issue not exceeding $50,000 to be submitted to nonbinding arbitration. *See* 2005 Nev. Stat., ch. 122, § 2, at 391-92.

[2]Judgment was entered prior to the effective date of amended NSTR 3(d)(4), which provides that a judge pro tempore's proposed judgment ''is not effective

*DISCUSSION*

Under NRS 38.250(1)(a), civil actions for damages filed in district court that do not exceed $50,000, as the amount in controversy, must, subject to certain exceptions, first be submitted to nonbinding arbitration. This requirement is mandatory for district courts in any judicial district with populations of 100,000 or more and permissive for Nevada's remaining judicial districts. NRS 38.255(2). Within 30 days after an arbitration award is served on the parties, any party may request a new trial in district court. NAR 18(A). In those districts where the nonbinding arbitration process is mandatory, if a new trial is requested, the case is assigned to Nevada's short trial program, which provides expedited civil jury trials through the use of limited discovery, small juries, and time limits on the presentation of evidence.[3] NSTR 1 and 4(a)(1). Central to the issues before us on appeal, NRS 38.259(2) requires that the written findings of the arbitrator—that is, the award—be admitted into evidence during the new trial. NRS 38.259(2) also provides a mandatory jury instruction that, among other things, provides guidance to the jury regarding its consideration of the arbitration award.

On appeal, Zamora raises two issues regarding the constitutionality of NRS 38.259(2). First, he argues that NRS 38.259(2)'s requirement that the arbitration award be admitted at a new trial violated his constitutional right to a jury trial. Second, Zamora contends that NRS 38.259(2) violated his rights to equal protection under the law because, under the statutory system, arbitration awards are effectively only admitted into evidence for claims not exceeding $50,000. We address each of these arguments in turn.

*Standard of review*

[Headnote 1]

The constitutionality of a statute, including issues related to a party's constitutional right to a jury trial, is a question of law that this court reviews de novo. *Moldon v. County of Clark*, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008); *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007). Here, the statute at issue, NRS 38.259(2), is a substantive rule of evidence requiring that the arbitration award be admitted at trial in cases subject to the nonbinding arbitration program. *See McDougall v. Schanz*, 597 N.W.2d 148, 156 n.15 (Mich. 1999) (noting that substantive rules of evidence involve declarations of policy, even if drafted in terms of

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until expressly approved by the district court as evidenced by the signature of the district court judge.'' Thus, because judgment was entered prior to the effective date of the amended rule, Zamora's direct appeal from the judgment entered by the judge pro tempore was proper.

[3]In all other judicial districts, establishment of a short trial program is merely permissive. NSTR 1(b).

the admission or exclusion of evidence); *see also State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) (noting that the judiciary has inherent power to govern its own procedures, but that any such rules may not ''abridge, enlarge or modify any substantive right'' (quoting NRS 2.120)).

[Headnotes 2, 3]

We note that the enactment of such substantive evidentiary rules is well within the powers conferred upon the Legislature by the Nevada Constitution, *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000); *Barrett v. Baird*, 111 Nev. 1496, 1512, 908 P.2d 689, 700 (1995), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), and we must defer to the Legislature regarding this statute's validity. *See Moldon*, 124 Nev. at 511, 188 P.3d at 79 (noting that statutes are presumed to be constitutional, and the individual challenging that presumption bears the burden of showing the statute's unconstitutionality); *Universal Electric v. Labor Comm'r*, 109 Nev. 127, 129, 847 P.2d 1372, 1373-74 (1993) (noting that a party attacking a statute's validity faces a formidable task because statutes are presumed to be valid and this court will only intervene when the constitution is clearly violated). The burden of demonstrating a statute's unconstitutionality is met when the challenger makes ''a clear showing of invalidity.'' *Moldon*, 124 Nev. at 511, 188 P.3d at 79 (internal quotation omitted).

*Right to a jury trial*

[Headnote 4]

Zamora contends that the introduction of the arbitrator's award violated his constitutional right to a jury trial because it effectively removed the jury as the fact-finder, as demonstrated by the jury awarding the exact same amount as the arbitrator, and improperly turned the jury into an appellate body reviewing the reasonableness of the arbitration award. Zamora further asserts that this arrangement is irrational, as the only purpose for introducing the arbitration award is to prejudice the party requesting a new trial, which defeats the very purpose of having a new trial.

Price, however, argues that the introduction of the arbitration award to the short trial jury did not violate Zamora's constitutional right to a jury trial because it did not undermine in any way the role of the jury as the fact-finder. She asserts that the jury was repeatedly told that its duty was to find the facts after examining all of the evidence, and that it was free to disregard any evidence, including the arbitrator's award, if it chose to do so.

The Nevada Constitution states, in pertinent part, that ''[t]he right of trial by [j]ury shall be secured to all and remain inviolate forever,'' Nev. Const. art. 1, § 3, and guarantees the right to have factual issues determined by a jury. *Barrett*, 111 Nev. at 1501, 908

P.2d at 694. The right to a jury trial extends to civil proceedings, such as the district court complaint filed in the underlying action. *Chamberland v. Labarbera*, 110 Nev. 701, 704, 877 P.2d 523, 524 (1994). A statute will unconstitutionally restrict the right to a jury trial when that right is ''burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.'' *Barrett*, 111 Nev. at 1502, 908 P.2d at 694 (internal citations and quotation marks omitted).

With regard to whether NRS 38.259(2)'s requirement that the arbitration award be introduced at trial violated Zamora's right to a jury trial, we find our decision in *Barrett*, 111 Nev. 1496, 908 P.2d 689, particularly instructive. In *Barrett*, this court addressed an argument that NRS 41A.049(2) and NRS 41A.016(2) unconstitutionally denied the right to a jury trial by providing that a medical malpractice screening panel's decision may be admitted at trial.[4] 111 Nev. 1496, 908 P.2d 689. In that case, the appellant contended that a jury was likely to be overly deferential to the panel's finding of no probability of negligence and that admitting the panel's decision allowed preadjudication of the issues of negligence and causation by an entity other than the jury. *Id.* at 1501, 908 P.2d at 693. In rejecting this argument, we explained that the admission of the screening panel's decision was the equivalent of allowing an expert to testify at trial and did nothing to prevent the jury from freely accepting or rejecting that evidence. *Id.* at 1503, 908 P.2d at 694.

The *Barrett* court further noted that the jury was sufficiently instructed not to give undue weight to the screening panel's decision to ensure that there was no infringement on the jury's fact-finding duty. *Id.* at 1503-04, 908 P.2d at 695. The court cited, with approval, a Ninth Circuit Court of Appeals case, *Wray v. Gregory*, 61 F.3d 1414 (9th Cir. 1995), which suggested that juries should be instructed not to give the screening panel's decision ''undue weight'' and in such a manner '' 'that will ensure that the evidence of the outside panel's conclusions does not interpose [an] obstacle to a full contestation of all the issues, and take[ ] [a] question of fact from . . . the jury.' '' *Barrett*, 111 Nev. at 1503, 908 P.2d at 695 (quoting *Wray*, 61 F.3d at 1419). Thus, based on the conclusions that the medical malpractice screening panel's decision was evidence that the jury could accept or reject and that the instructions given to the jury were sufficient to prevent infringement on the jury's fact-finding role, the *Barrett* court concluded that the admission of the screening panel's decision did not violate the appellant's constitutional right to a jury trial. 111 Nev. at 1503, 908 P.2d at 694-95.

[4]While not relevant to our analysis, we nonetheless note that NRS 41A.049 and NRS 41A.016 have since been repealed. *See* 2002 Nev. Stat. Spec. Sess., ch. 3, § 69, at 25.

Here, NRS 38.259(2) requires the nonbinding arbitration award to be admitted for consideration by the jury at any trial de novo. In this context, the award is mere evidence, which the jury is free to accept or reject. *Barrett*, 111 Nev. at 1503, 908 P.2d at 694. Indeed, nothing in NRS 38.259 precludes a party from attacking a particular arbitration award as faulty by presenting evidence demonstrating that the award represents an incorrect resolution of the case at bar. Accordingly, the fact that the arbitration award was introduced as evidence to the jury did not infringe on the jury's fact-finding duty so as to deny Zamora his constitutional right to a jury trial. *Barrett*, 111 Nev. at 1503-04, 908 P.2d at 694-95. Although Zamora attempts to distinguish *Barrett* by arguing that, unlike the medical malpractice screening panel, which the court held was akin to expert testimony, an arbitrator's award cannot be considered expert testimony, we find this argument unpersuasive. Regardless of whether the award is or is not considered expert testimony, the award is nonetheless evidence that the Legislature, by enacting the substantive rule of evidence set forth in NRS 38.259(2), has authorized for admission at the trial de novo. Thus, Zamora's attempt to distinguish *Barrett* on this ground is immaterial to our determination of whether the introduction of the award violates Zamora's right to a jury trial.[5]

Further support for our conclusion that the required introduction of the arbitration award does not violate Zamora's jury trial right can be found in the mandatory jury instruction for these cases, which, as required by *Barrett*, provides that the jury must not give undue weight to the arbitrator's decision. Specifically, the mandatory jury instruction set forth in NRS 38.259(2)(b) states, in relevant part, that

> [t]he findings of the arbitrator may be given the same weight as other evidence or may be disregarded. However, you must not give those findings undue weight because they were made by an arbitrator, and you must not use the findings of the arbitrator as a substitute for your independent judgment. You must weigh all the evidence that was presented at trial and arrive at a conclusion based upon your own determination of the cause of action.[6]

This instruction informs the jury that it is free to disregard the arbitration award and warns the jury not to give an award undue weight so as to allow the award to act as a substitute for the jury's independent judgment.

Moreover, this instruction sufficiently addresses the concerns set forth in *Barrett* and *Wray* regarding unconstitutional infringement on the jury's fact-finding role and ensures that a litigant's constitutional

[5]Because we find this distinction irrelevant to the issue before us, we need not address whether the arbitrator's award is considered expert testimony.

[6]We note that Zamora does not challenge the short trial judge's failure to provide an exact rendition of NRS 38.259(2)(b)'s instruction.

right to a jury trial is protected. We thus reject Zamora's attempt to distinguish *Barrett* in his reply brief. As set forth above, the arbitration award is mere evidence that the jury can accept or reject, *Barrett*, 111 Nev. at 1503, 908 P.2d at 694, and the mandatory jury instruction provides sufficient protection to ensure that the award does not infringe on the jury's fact-finding role. *Id.* at 1503-04, 908 P.2d at 695.

Accordingly, Zamora has not met his burden of overcoming the presumption of constitutionality, and we reject Zamora's argument that NRS 38.259(2)'s requirement that the nonbinding arbitration award be admitted at any subsequent new trial violates a litigant's constitutional right to a jury trial.[7] *See id.*; *see also Moldon v. County of Clark*, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008) (explaining that statutes are presumed to be constitutional, and the individual challenging that presumption must make ''a clear showing of invalidity'' (internal quotation omitted)).

*Equal protection under the law*

[Headnote 5]

Zamora next contends that requiring the arbitration award to be introduced at trial only for claims under NRS 38.250's threshold amount violates his equal protection rights under the United States and Nevada Constitutions because his case is subject to procedures that cases with amounts at issue greater than NRS 38.250's threshold amount are not.[8] Price counters that there is clearly a rational basis for proving a simplified procedure for claims when the amount in controversy is less than the threshold amount.

[Headnotes 6, 7]

Both the United States and Nevada Constitutions' equal protection clauses are implicated when a law treats similarly situated people differently.[9] *Secretary of State v. Burk*, 124 Nev. 579, 595 n.55, 188 P.3d 1112, 1123 n.55 (2008). When the law, however, does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest. *Id.* (citing the United States Supreme Court case *Romer v. Evans*, 517 U.S. 620, 631 (1996)). Here, Zamora expressly states that he is not con-

[7]We also reject as meritless Zamora's attempt to demonstrate that admitting the award at a trial is unconstitutional because he has not found any other states that similarly require admission of an arbitration award from mandatory nonbinding arbitration at a subsequent trial de novo.

[8]As noted above, Price filed her district court complaint on January 15, 2004, at which time NRS 38.250 applied to civil actions where the amount at issue did not exceed $40,000. NRS 38.250 was subsequently amended to raise this minimum amount at issue to $50,000. *See* 2005 Nev. Stat., ch. 122, § 2, at 391-92.

[9]*See* U.S. Const. amend. XIV, § 1; Nev. Const. art. 4, § 21.

tending that a suspect class or a fundamental right is implicated, and therefore we apply rational basis review. *Id.*; *see also Barrett*, 111 Nev. at 1509, 908 P.2d at 698 (indicating that the ability to bring a civil action sounding in tort is not a fundamental right and does not involve a suspect classification). This court has explained rational basis review to mean that we will not overturn a law unless the treatment of different groups '' 'is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [L]egislature's actions were irrational.' '' *Barrett*, 111 Nev. at 1509-10, 908 P.2d at 698-99 (quoting *Allen v. State Pub. Emp. Ret. Bd.*, 100 Nev. 130, 136, 676 P.2d 792, 796 (1984)).

In *Barrett*, this court rejected, under a rational basis review, the contention that a statute requiring victims of medical malpractice allegedly committed by hospitals and physicians to first present their case to the medical malpractice screening panel, which did not place a similar requirement on victims of medical malpractice allegedly committed by other healthcare providers, ran afoul of the plaintiff's equal protection rights. 111 Nev. at 1509, 908 P.2d at 698. Instead, we noted that this distinction was rational, as the Legislature had evidence that hospitals and physicians were experiencing large increases in malpractice insurance premiums, whereas there was not similar evidence before the Legislature regarding other healthcare providers. *Id.* at 1510, 908 P.2d at 699.

Similarly, here, to the extent that litigants with claims not exceeding NRS 38.250's threshold amount are treated differently than litigants with claims that do, this distinction is likewise a rational legislative choice because it provides more expedited and less expensive proceedings for smaller claims, while preserving litigants' right to a jury trial and an appeal. *See Arata v. Faubion*, 123 Nev. 153, 160, 161 P.3d 244, 249 (2007) (explaining that, in the context of rational basis scrutiny, this court may hypothesize the legislative purpose behind a statute and that a statute will be upheld if any facts may be reasonably conceived to justify the legislation); *see also Jain v. McFarland*, 109 Nev. 465, 472, 851 P.2d 450, 455 (1993) (stating, in the medical malpractice context, that this court hesitates to disturb carefully crafted legislation that provides benefit to the parties, limits the burden on the courts, and reduces costs by discouraging frivolous litigation).

Additionally, this court has recently stated that the quicker and less costly resolution provided by arbitration is rationally related to a legitimate governmental interest. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 301, 183 P.3d 895, 903-04 (2008) (concluding, however, in addressing an equal protection argument, that the two groups at issue were not being treated differently). Applying this *Arrowcreek* principle here, requiring the admission of the arbitration award is likely to provide an additional incentive to the

parties so that they will take the arbitration proceedings seriously, thereby furthering the legitimate governmental interest of providing quicker and less costly dispute resolution.

Accordingly, we conclude that having cases with an amount in controversy below a threshold amount subject to mandatory nonbinding arbitration, and having the arbitration award introduced at a subsequent new trial, is rationally related to a legitimate governmental interest, and therefore, no equal protection clause violation exists. *See Secretary of State v. Burk*, 124 Nev. 579, 595 n.55, 188 P.3d 1112, 1123 n.55 (2008) (stating that, under rational basis review, a law will be upheld when it is rationally related to a legitimate government interest).

*CONCLUSION*

Because we determine that Zamora was not unconstitutionally deprived of his rights to a jury trial or equal protection under the law, we affirm the judgment entered on the short trial jury's verdict.

SAITTA and GIBBONS, JJ., concur.

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BOULDER OAKS COMMUNITY ASSOCIATION, A NEVADA CORPORATION, DBA RED MOUNTAIN RV RESORT, APPELLANT, *v.* B & J ANDREWS ENTERPRISES, LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA BOULDER OAKS RV RESORT, RESPONDENT.

No. 46010

August 20, 2009 215 P.3d 27

Petition for rehearing of *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 123 Nev. Adv. Op. No. 46, 169 P.3d 1155 (2007) (opinion withdrawn April 18, 2008).[1] Appeal from a district court order granting a preliminary injunction in a real property action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Recreational vehicle community developer's successor-in-interest brought action for preliminary injunction in opposition to vote of lot owners' association to amend covenants and restrictions to terminate successor's exclusive right to manage lot rentals. The district court granted the injunction, and association appealed. On rehearing, the

[1]The opinion was withdrawn from publication before it was printed in the *Nevada Reports*.

supreme court held that: (1) successor was a land-owning declarant under covenant section governing material amendments, (2) covenant section on material amendments created an improper voting class in violation of NRS Chapter 116, (3) successor's consent was not required for amendment, and (4) association bylaws allowed a vote by mail.

**Rehearing granted; reversed.**

[En banc reconsideration denied January 19, 2010]

*Sterling Law, LLC*, and *Beau Sterling*, Las Vegas; *Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP*, and *Richard J. Vilkin*, Las Vegas, for Appellant.

*Bailus Cook & Kelesis* and *Mark B. Bailus* and *Marc P. Cook*, Las Vegas, for Respondent.

1. INJUNCTION.
   A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits. NRS 33.010.
2. APPEAL AND ERROR; INJUNCTION.
   A district court has discretion in deciding whether to grant a preliminary injunction, and the district court's decision will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.
3. APPEAL AND ERROR.
   Questions of law are reviewed de novo, even in the context of an appeal from a preliminary injunction.
4. COVENANTS.
   Recreational vehicle community developer's successor-in-interest, which sought preliminary injunction to prohibit amendment of covenants and restrictions to terminate successor's exclusive right to manage lot rentals, was a land-owning declarant under covenant section allowing a material amendment to covenants and restrictions with the consent of 67 percent of the members entitled to vote and of the land-owning declarant; section's definition of declarant, which included developer's successors and assigns, fit within the statutory definition provided in NRS Chapter 116, and successor owned two lots it purchased from developer. NRS 116.003, 116.035, 116.089.
5. STATUTES.
   When a term is defined in NRS Chapter 116, the statutory definition controls and any definition that conflicts will not be enforced. NRS 116.003.
6. COVENANTS.
   Section of covenants and restrictions of recreational vehicle community allowing a material amendment to covenants and restrictions with the consent of 67 percent of the members entitled to vote and of the land-owning declarant created an improper voting class in violation of NRS Chapter 116, which prohibits units from constituting a class for the purposes of voting merely because they were owned by a declarant. NRS 116.003, 116.035, 116.089, 116.2107(4).

7. COVENANTS.

Consent of recreational vehicle community developer's successor-in-interest was not required under community's covenants and restrictions to amend covenants and restrictions to terminate successor's exclusive right to manage lot rentals, as amendment did not change the manner in which successor could use its two lots; removing the exclusive rental provision did not mean that successor could no longer rent lots in community, but meant that successor was not only entity that could rent lots.

8. ASSOCIATIONS; COVENANTS.

Bylaws of association of lot owners in recreational vehicle community allowed a vote by mail, as opposed to by meeting, on proposed amendment to covenants and restrictions to terminate exclusive right of developer's successor to manage lot rentals; bylaws stated that an action that otherwise would be taken at a meeting could be ''taken without a meeting, without notice and without a vote, if a consent in writing, setting forth the action so taken'' was signed by members with the percentage of voting power required to take such action, association mailed ballots to all members on the issue of eliminating the exclusive rental provision, and association ultimately reported that the requisite minimum 67 percent of the members had voted in favor of amendment.

Before HARDESTY, C.J., PARRAGUIRRE and SAITTA, JJ.

## OPINION

*Per Curiam:*

### *INTRODUCTION*

On November 1, 2007, this court issued an opinion in this appeal affirming the district court's order. Thereafter, appellant Boulder Oaks Community Association (the Association) filed a petition for rehearing pursuant to NRAP 40. On April 18, 2008, this court issued an order withdrawing the opinion from publication pending resolution of the petition for rehearing. We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(c)(2). Having reviewed the briefing associated with the Association's petition for rehearing, we conclude that rehearing is warranted, and we grant the Association's petition for rehearing. We now issue this opinion in place of our prior opinion.

Respondent B & J Andrews Enterprises, LLC (Andrews), owns the Boulder Oaks R.V. Resort (the resort), a common-interest community that consists of 275 recreational vehicle lots and two additional lots initially owned by BCRV, Ltd.[2] The resort is governed by its covenants, conditions, and restrictions (CC&Rs). Andrews argues

[2]*See* NRS 116.021 (defining a common-interest community as ''real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit'').

that CC&R section 5.04 gives it an exclusive right to rent the recreational vehicle lots when the lot owners are not using them and that, pursuant to CC&R section 9.04(a), the CC&Rs cannot be materially amended without its approval. Andrews moved for a preliminary injunction when the Association attempted to amend the CC&Rs to remove the exclusive rental provision without Andrews' approval. The district court granted the preliminary injunction, thereby enjoining the Association from amending the CC&Rs to eliminate the exclusive rental provision. This appeal followed.

Because this appeal involves a common-interest community, it is governed by NRS Chapter 116, which is Nevada's codification of the Uniform Common-Interest Ownership Act (UCIOA). On appeal, the primary questions we resolve are (1) whether Andrews is a ''declarant'' and (2) whether section 9.04(a) of the CC&Rs contravenes NRS 116.2107(4), which prohibits units from constituting a class for the purposes of voting merely because they are owned by a declarant. We conclude that Andrews is a declarant. Further, we conclude that CC&R section 9.04(a) violates NRS 116.2107(4) by creating an improper voting class in the declarant, making this part of section 9.04 void. Thus, the Association was not required to obtain Andrews' consent before amending the CC&Rs. We also conclude that it was proper for the Association to vote on the proposed amendment by mail, as opposed to voting at a meeting. Therefore, because the record demonstrates that the Association received the requisite number of votes to amend the CC&Rs, we conclude that Andrews does not have a reasonable likelihood of success on the merits in the case below. Our conclusion illustrates that the amendment was proper and the Association should not have been enjoined from enforcing it. Accordingly, we reverse the district court's grant of the preliminary injunction.

## *FACTS AND PROCEDURAL HISTORY*

### *Development of the community*

The resort was developed by BCRV, Ltd. Upon completion of the development, BCRV drafted and recorded the resort's CC&Rs, which fully incorporated NRS Chapter 116. In 1995, the Association, a nonprofit corporation and lot owners' association, was formed. At the time the resort was developed, Boulder City prohibited recreational vehicle lot owners from occupying their lots for more than 180 days per year, and in 1996, BCRV amended the CC&Rs to add section 5.04, which governs the rental of lots.[3] Sec-

[3]In full, CC&R section 5.04 states:

> *Rental of Lots*. No restrictions are placed herein regarding an Owner's right to sell his Lot. However, the Developer shall have for a period of ninety-nine (99) years from the date of this Declaration the exclusive

tion 5.04 states that ''the Developer'' has a 99-year exclusive right to rent a lot when it is not being used by the owner or his approved guest. Section 5.04 further gives the developer the right to retain 40 percent of the rent collected, while the remaining 60 percent belongs to the lot owner.

*BCRV assigns its rights to Andrews*

In 2001, BCRV sold its two lots, the resort, and all attendant rights, including the right to manage the rentals, to Andrews. For some time after Andrews took over the resort and rental services, the lot owners continued to use Andrews' services to rent their lots, as required by the CC&Rs. However, in 2002 and in apparent violation of CC&R section 5.04, a few lot owners began to rent their lots independent of Andrews. Initially, Andrews sought to enforce section 5.04 through the Association.

*Amendment of the CC&Rs*

CC&R section 9.04 governs the procedures for amending the CC&Rs. Section 9.04(a) permits a material amendment upon receiving the consent of 67 percent of the ''Members entitled to vote and of the Declarant, so long as the Declarant owns any land subject to this Declaration.''[4] CC&R section 1.12 defines ''declarant'' as BCRV and ''its successors and assigns.'' If a proposed amendment changes ''the uses to which a particular Lot is restricted,'' then section 9.04(d) provides that the affected lot owner and the majority of lot owners must consent. Section 2.06 of the Association's bylaws sets forth the procedure for taking action without a meeting. It provides that a meeting is not required if the percentage of members

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right, in the absence of use by the Owner or his registered and approved guest, to rent Lots which are a part of the Resort at scheduled rates promulgated from time to time by the Developer. The Developer shall retain for its services forty percent (40%) of the gross amount of the rental collected on any Lot with the remaining sixty percent (60%) reserved for the benefit of the Lot Owner.

[4]Precisely, section 9.04 states, in pertinent part:

(a) *Majority Vote*. Except as provided in Section 9.04(c), no amendment of this Declaration shall be effective unless adopted by a majority of the Members. Notwithstanding the foregoing, the consent of sixty-seven percent (67%) of the Members entitled to vote and of the Declarant, so long as the Declarant owns any land subject to this Declaration, and the approval of Eligible Holders on Lots to which at least fifty-one percent (51%) of the votes of Lots subject to a Mortgage, shall be required to materially amend any provisions of this Declaration . . . .

(d) *Restrictions on Amendment*. Except to the extent expressly permitted or required by the provisions of NRS Chapter 116, no amendment may change . . . the uses to which a particular Lot is restricted, in the absence of consent of the Owner of the Lot affected and the consent of a majority of the Owners of the remaining Lots.

required to take the specific action give their written consent to proceed without a meeting.[5]

Beginning in 2004, members of the Association sought amendment of the CC&Rs to eliminate section 5.04. The Association mailed ballots to every lot owner of record, which stated that votes had to be received by the deadline or any extension thereof. The initial ballot set the voting deadline at January 15, 2004, which was apparently a typographical error because that date had already passed. The Association informed members of the error and corrected the date to be January 15, 2005. Subsequently, the Association passed two 30-day extensions. Ultimately, 187 votes, or just over 67 percent of the 277 possible votes, were cast in favor of amending the CC&Rs to remove section 5.04.

Andrews immediately filed suit seeking a preliminary injunction in the district court seeking to stop the Association from eliminating section 5.04 from the CC&Rs. Andrews claimed that the amendment was invalid, arguing that in order to materially amend the CC&Rs, its consent as a land-owning declarant was required. Further, Andrews argued that the written ballot procedure used by the Association to pass the amendment violated section 2.06 of the Association's bylaws. Andrews also asserted that NRS Chapter 116 did not apply to the case.

In response, the Association argued that NRS Chapter 116 applied. Accordingly, the Association argued that Andrews was not a declarant because, regardless of whether the CC&Rs categorized Andrews as such, the CC&R definition was null since Andrews was not a declarant under the term's definition as set forth in NRS 116.035. Therefore, because Andrews was not a declarant, the Association claimed that the amendment was proper because the Association was not required to obtain Andrews' consent. In the alternative, the Association argued that, even if Andrews was a declarant, NRS 116.3105 authorized it to terminate any contract executed by the declarant before the lot owners assumed control of the Association. Finally, the Association argued that the vote to amend the CC&Rs was proper pursuant to NRS 82.326 and because it complied with section 2.06 of the Association's bylaws.

The district court disagreed with the Association, finding that it had violated CC&R section 9.04(a) and that Andrews was entitled to injunctive relief. The district court entered an injunction enjoining the Association from eliminating CC&R section 5.04 and thereby prohibiting independent rentals by the lot owners.

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[5]Specifically, section 2.06 of the Association's bylaws states, in part:

> Any action required or permitted to be taken at a meeting of the Members may be taken without a meeting, without notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the Members with the percentage of the voting power required to take such action.

The Association appealed the matter to this court. The Association argued that not only was the amendment proper for the reasons it had presented to the district court, but it was also proper because the clause in CC&R section 9.04(a) that required the consent of a land-owning declarant to pass a material amendment violated NRS 116.2107(4).

## *DISCUSSION*

### *Standard for granting and reviewing a preliminary injunction*

[Headnotes 1-3]

A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits. *See* NRS 33.010; *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *Dangberg Holdings v. Douglas Co.*, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). A district court has discretion in deciding whether to grant a preliminary injunction. *University Sys.*, 120 Nev. at 721, 100 P.3d at 187. The district court's decision " 'will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.' " *Attorney General v. NOS Communications*, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004) (quoting *U.S. v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)); *see S.O.C., Inc. v. The Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001). Questions of law are reviewed de novo, even in the context of an appeal from a preliminary injunction. *University Sys.*, 120 Nev. at 721, 100 P.3d at 187; *S.O.C., Inc.*, 117 Nev. at 407, 23 P.3d at 246.

Here, we conclude that the district court abused its discretion in granting Andrews' motion for a preliminary injunction because Andrews does not enjoy a reasonable likelihood of success on the merits. Although Andrews is a land-owning declarant, the Association did not need Andrews' consent to amend the CC&Rs because that clause of section 9.04(a) is void for being in violation of NRS 116.2107(4). Therefore, because the Association properly voted to eliminate CC&R section 5.04, the preliminary injunction was not appropriate.[6]

### *Reasonable likelihood of success on the merits*

In arriving at our conclusion that the district court abused its discretion when it granted the preliminary injunction, we first deter-

[6]Given our conclusion that Andrews does not have a reasonable likelihood of success on the merits, we need not reach the issue of whether Andrews would suffer irreparable harm.

mine that NRS Chapter 116 applies. We next conclude that Andrews is a land-owning declarant. However, we hold that the Association did not need Andrews' consent to eliminate section 5.04 from the CC&Rs because the clause from section 9.04(a) that required Andrews' consent as a land-owning declarant is void for being in violation of NRS 116.2107(4). Further, we conclude that it was proper for the Association to vote on the proposed amendment by mail, instead of at a meeting. Thus, because we conclude that the Association properly amended the CC&Rs to eliminate section 5.04, Andrews has failed to demonstrate a reasonable likelihood of success on the merits and the grant of the preliminary injunction must be reversed.

*NRS Chapter 116*

NRS Chapter 116 codifies Nevada's adoption of the UCIOA, an act adopted by the National Conference of Commissioners on Uniform State Laws. *See* NRS 116.001; A.B. 221, Summary of Legislation, 66th Leg. (Nev. 1991). The purpose of NRS Chapter 116 is to ''make uniform the law with respect to the subject of this chapter among states enacting it.'' NRS 116.1109(2). While NRS Chapter 116 generally applies to all Nevada common-interest communities, it only applies to communities containing lots reserved exclusively for nonresidential use if the declaration so provides. NRS 116.1201(1) and (2)(b). A lot has a ''residential use'' if it is used as a dwelling or for ''personal, family or household purposes by ordinary customers, whether rented to particular persons or not.'' NRS 116.083. Examples of residential use lots are ''marina boat slips, piers, stable or agricultural stalls or pens, campground spaces or plots, parking spaces or garage spaces, storage spaces or lockers and garden plots for individual use, but do not include spaces or units primarily used to derive commercial income from, or provide service to, the public.'' *Id.*

Here, the CC&Rs explicitly state that they incorporate NRS Chapter 116.[7] Nonetheless, Andrews attempts to convince this court that the application of NRS Chapter 116 is limited because the resort is nonresidential. Andrews bases this contention on the fact that the Boulder City Municipal Code restricts resort lot owners from occupying their spaces for more than 180 days per year. We reject this contention. Despite the 180-day restriction, we conclude that the resort is a residential common-interest community. By listing campground spaces and piers as examples of residential use lots,

[7]The recitals of the CC&Rs state that BCRV was developing the resort as a ''recreational vehicle community'' and was developing the CC&Rs ''under a general plan of development pursuant to Chapter 116 of the Nevada Revised Statutes.''

NRS 116.083 clearly implicates that permanent occupancy is not necessary for a lot to qualify as ''residential.'' Moreover, the resort lots are not primarily used for commercial income or public service, another factor NRS 116.083 notes as defining what constitutes a residential unit. Rather, the lots are used as spaces to park recreational vehicles, just as a campground space is used as a site for tents. Further, NRS 116.083 anticipates that residential units will be rented, so the fact that resort lot owners do so does not remove the lots from being categorized as ''residential.'' For these reasons, we conclude that pursuant to NRS 116.083, the lots, and the resort generally, are ''residential'' and NRS Chapter 116 applies accordingly.[8]

*Andrews is a declarant*

[Headnote 4]

The parties contest whether Andrews is a land-owning declarant for purposes of CC&R section 9.04(a). Andrews asserts that it is a declarant because the CC&Rs define it as such. The Association counters that it is irrelevant how the CC&Rs define a declarant because the statutory definition of declarant controls and Andrews does not fit within that definition. While we agree with the Association that the statutory definition of the term ''declarant'' controls to the extent that a CC&R definition conflicts with the statutory definition, we conclude that, in this case, the CC&R definition of ''declarant'' fits neatly within the definition provided in NRS 116.035. Therefore, there is no reason to look beyond the CC&R definition, and we disagree with the Association's contentions to the contrary. Since the CC&R definition of ''declarant'' is consistent with the statutory definition, we conclude that Andrews is the ''declarant.''

NRS 116.003 states that ''[a]s used in this chapter and in the declaration and bylaws of an association, *unless the context otherwise requires*, the words and terms defined in NRS 116.005 to 116.095, inclusive, have the meanings ascribed to them in those sections.'' (Emphasis added.) The language of NRS 116.003 is based on UCIOA section 1-103. A.B. 221, Summary of Legislation, 66th Leg. (Nev. 1991). The UCIOA states that section 1-103 allows terms defined in the Act ''to be defined differently . . . declaration[s] and bylaws.'' UCIOA § 1-103 cmt. 1 (1994). ''Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.'' *Id*. The UCIOA then

[8]Our conclusion is supported by the UCIOA. *See* UCIOA § 1-103(27) & cmt. 22 (1994); *cf*. UCIOA § 1-207(a) (stating that a nonresidential common-interest community is one ''in which all units are restricted exclusively to nonresidential purposes'').

explains, by example, that if a declarant attempted to alter the definition of ''unit owner'' to exclude itself in an attempt to avoid assessments for units that he owns, the attempt would fail because the Act defines a declarant as a unit owner. *Id.*

[Headnote 5]

When NRS 116.003 is read in context with the UCIOA, it is clear that when a term is defined in NRS Chapter 116, the statutory definition controls and any definition that conflicts will not be enforced. To read NRS 116.003 otherwise would lead to the absurd result of rendering the definitions provided in NRS 116.005 to 116.095 mere surplusage. *See Speer v. State*, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000). Further, any other reading of the statute would be contrary to the express purpose of NRS Chapter 116, which is to ''make uniform the law with respect to the subject of this chapter among states enacting it.'' NRS 116.1109(2). If this court were to enforce any definition provided by a declaration, then the goal of making the laws concerning common-interest communities uniform would never be reached. *See Speer*, 116 Nev. at 679, 5 P.3d at 1064 (stating that statutes should not be read in a manner that violates the '' 'spirit of the act' '' (quoting *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997))).

Here, CC&R section 1.12 defines a ''declarant'' as BCRV and ''its successors and assigns.'' NRS 116.035 defines a ''declarant,'' in part, as ''any person or group of persons acting in concert who . . . [r]eserves or succeeds to any special declarant's right.'' NRS 116.089 defines ''special declarant's rights'' in part, as ''rights reserved for the benefit of a declarant to . . . [m]aintain sales offices, management offices, signs advertising the common-interest community and models . . . .'' When the CC&Rs were written, BCRV entitled itself the ''declarant'' and stated in CC&R section 1.13 that its lots would be used for the operation of a sales and rental office and for the purposes of maintaining the resort generally. In other words, BCRV reserved a special declarant right. As BCRV's successor, Andrews obtained this special declarant right to maintain a sales and rental office. Thus, in this case, the CC&R definition of ''declarant'' is consistent with the definition provided in NRS 116.035. Therefore, the context does not require us to apply a definition other than that provided in CC&R section 1.12, and we conclude that Andrews is the declarant. Further, because Andrews owns the two lots it purchased from BCRV, it is also a land-owning declarant.

*Section 9.04 creates an improper voting class*

[Headnote 6]

Because it is a land-owning declarant, Andrews argues that under CC&R section 9.04(a), the Association could not materially amend the CC&Rs without Andrews' consent. We disagree.

NRS 116.2107(4) states that ''[e]xcept as otherwise provided in NRS 116.31032, a declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this chapter nor may units constitute a class because they are owned by a declarant.''[9] The UCIOA acknowledges that precluding units from constituting a voting class simply because they are owned by the declarant ''prohibits a practice common in planned communities, where units owned by declarant constitute a separate class of units for voting and other purposes.'' UCIOA § 2-107 cmt. 9 (1994). Thus, the provision ''makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner.'' *Id*.

In this case, CC&R section 9.04(a) states that to materially amend the CC&Rs, it is necessary to obtain ''the consent of sixty-seven percent (67%) of the Members entitled to vote and of the Declarant, *so long as the Declarant owns any land* subject to this Declaration.'' (Emphasis added.) According to the CC&Rs, lots constitute land subject to the declaration. CC&R section 9.04(d) states that an amendment may not change ''the uses to which a particular Lot is restricted,'' without the lot owner and the majority of the other owners' consent. Section 9.04(d) complies with NRS 116.2117(4).[10]

By requiring the declarant's consent for a material amendment only if the declarant owns units, the CC&Rs create the exact type of class voting that NRS 116.2107(4) prohibits. As noted above, NRS 116.2107(4) expressly states that ''units [may not] constitute a class because they are owned by a declarant.'' Therefore, we conclude that the clause requiring the consent of a *land-owning declarant* to materially amend the CC&Rs is impermissible pursuant to NRS 116.2107(4) and is void. *See* NRS 116.1206(1) (stating that ''[a]ny provision contained in a declaration . . . of a common-interest community that violates the provisions of this chapter shall be deemed to conform with those provisions by operation of law, and any such declaration . . . is not required to be amended to conform to those provisions''). We further note that while we conclude that this one clause of section 9.04(a) is void, this determination does not nullify the remainder of section 9.04. *See* NRS 116.2103(1) (noting that the inclusion of a provision in a governing document that ''violates any provision of this chapter does not render any other provisions of the governing document invalid or otherwise unenforceable'').

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[9]We note that, as used in this opinion, the terms ''units'' and ''lots'' are synonymous.

[10]In pertinent part, NRS 116.2117(4) states that ''no amendment may change . . . the uses to which any unit is restricted, in the absence of unanimous consent of the units' owners affected and the consent of a majority of the owners of the remaining units.''

[Headnote 7]

Further, we conclude that Andrews' consent to amend the CC&Rs was not required under section 9.04(d) or NRS 116.2117(4). While the CC&Rs state that Andrews' lots are to be used for the purpose of maintaining a sales and rental office, removing the 99-year *exclusive* rental provision does not mean that Andrews can no longer rent lots at the resort.[11] Rather, the amendment means that Andrews is not the *only* entity that can rent lots. Therefore, because the amendment does not change the manner in which Andrews can use its lots, its consent was not required.

Therefore, because more than 67 percent of eligible members voted to eliminate CC&R section 5.04 and its exclusive rental agreement, and because Andrews' consent was not necessary, we conclude that the amendment was proper.[12]

*Mailing ballots was proper*

[Headnote 8]

The ballots containing the proposed amendment to the CC&Rs eliminating section 5.04 were mailed to all members of the Association. Andrews asserts that the amendment thus fails because the declaration does not allow for an amendment to be made without a meeting.[13] The Association counters that the mail-in vote was permitted according to section 2.06 of the Association's bylaws.

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[11]We note that CC&R section 5.03 prohibits ''professional, commercial or industrial operation of any kind'' from being conducted at the resort, unless ''expressly authorized'' by the Association's board of directors. However, because CC&R section 1.13 states that the ''Declarant's Lot shall be used for the operation of the sales and rental office which shall be constructed on the Declarant's Lot,'' we conclude that the CC&Rs intend for the declarant's lots to be excepted from section 5.03. Therefore, because Andrews is a declarant, it can continue to maintain a rental and sales office on its lot despite the elimination of section 5.04.

[12]In so concluding, we acknowledge that to materially amend the CC&Rs, section 9.04 requires not only 67 percent of eligible members to vote for the amendment but also the approval of at least 51 percent of the eligible mortgage holders. However, CC&R section 7.01(d) states that, upon written request, an eligible mortgage holder will be notified of ''any proposed action which would require the consent of a specified percentage of Eligible Holders.'' The record indicates that the Association did not receive any written requests from eligible mortgage holders stating a desire to vote on Association matters. Accordingly, whether the Association received the consent of 51 percent of eligible mortgage holders is not pertinent to the resolution of this appeal.

[13]Andrews further contends that the Association improperly extended the voting deadline because NRS 82.326 does not provide for extensions. We reject this argument because NRS 82.326 does not support this conclusion. Further, we note that Andrews, and all other voting members, had notice that the voting deadline could be extended because the ballot so provided. The Association then gave all voting members notice of the subsequent extensions.

There are no provisions within NRS Chapter 116 stating that CC&Rs may only be amended at a meeting. Further, NRS 82.326(1), which governs the action of nonprofit corporation members by written ballot in lieu of a meeting, states that ''unless prohibited or limited by the articles or bylaws, an action that may be taken at a regular or special meeting of members . . . may be taken without a meeting if the corporation mails or delivers a written ballot to every member entitled to vote on the matter.''

Section 2.06 of the Association's bylaws states that an action that otherwise would be taken at a meeting, can be ''taken without a meeting, without notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the Members with the percentage of the voting power required to take such action.'' In accordance with the bylaws, the Association mailed ballots to all members on the issue of eliminating section 5.04. The Association ultimately reported that at least 67 percent of the members had voted in favor of the amendment.[14]

Section 2.06 of the Association's bylaws, and its allowance for action to occur without a meeting, is permissible pursuant to NRS 82.326. Section 2.06 does not explain how the written consent must be acquired. Thus, we conclude that each member that returned a ballot was simultaneously voting and giving written consent for the amendment to take place without a meeting. Because the Association acquired the requisite 67 percent vote in favor of eliminating CC&R section 5.04, it also acquired the requisite votes necessary for the amendment to take place without a meeting, as is necessary under the bylaws.

## *CONCLUSION*

We conclude that Andrews is a land-owning declarant. We also determine that the Association was not required to obtain Andrews' consent before materially amending the CC&Rs to eliminate section 5.04, which created a 99-year exclusive rental agreement enjoyed by Andrews. Therefore, because Andrews' consent was not necessary and because the Association acquired the requisite number of votes to pass the amendment, we conclude that Andrews has no reasonable likelihood of success on the merits. Accordingly, the district court abused its discretion in so deciding, and we reverse the order granting a preliminary injunction.

[14]We note that Andrews contests how many votes were received in favor of the amendment. However, after reviewing the record, we conclude that the evidence supports the Association's assertion that 187 votes out of 277 were cast in favor of amending the CC&Rs.

MICHELLE RIVERO, APPELLANT, *v.*
ELVIS RIVERO, RESPONDENT.

No. 46915

August 27, 2009 216 P.3d 213

Petition for rehearing of *Rivero v. Rivero*, 124 Nev. Adv. Op. No. 84, 195 P.3d 328 (2008), appeal from a district court post-divorce decree order modifying a joint child custody award. Eighth Judicial District Court, Family Court Division, Clark County; Stefany Miley, Judge.

Former wife brought motion to modify child custody and child support. Wife also moved to disqualify judge. Motion to disqualify was denied, and husband was awarded attorney fees. The district court modified custody but denied child support and wife appealed. The supreme court, GIBBONS, J., held that: (1) joint physical custody arrangement required that each parent had physical custody of child at least 40 percent of time; (2) for joint physical custody, each parent had to have physical custody of child at least 146 days per year; (3) primary physical custody was when one parent had physical custody of child subject to the district court's power to award other parent visitation rights; (4) on motion to modify custody, trial court was required to use Nevada's definitions for joint physical custody and primary custody, regardless of how custody agreement had defined custody; (5) trial court was required to make specific findings as to nature of custody arrangement and determine appropriate standard for modification; (6) modification of child support required proof of change in circumstances and finding that modification was in best interest of child, abrogating *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991), and *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990); (7) trial court was required to make specific findings as to basis for not awarding child support and reasons for deviating from child support guidelines; (8) wife did not state legally cognizable grounds for judge's disqualification; (9) statute prohibiting trial court from punishing for contempt for filing motion to disqualify did not apply to prohibit trial court from awarding attorney fees to former husband for defending against wife's motion to disqualify; and (10) in order to impose sanctions for filing frivolous motion to disqualify, there must be evidence supporting district court's finding that motion was unreasonable or brought to harass.

**Rehearing denied; opinion withdrawn; affirmed in part, reversed in part, and remanded.**

PICKERING, J., dissented in part.

*Steinberg Law Group* and *Brian J. Steinberg* and *Jillian M. Tindall*, Las Vegas, for Appellant.

*Bruce I. Shapiro, Ltd.*, and *Bruce I. Shapiro*, Henderson, for Respondent.

*Fahrendorf, Viloria, Oliphant & Oster, LLP*, and *Raymond E. Oster*, Reno, for Amicus Curiae State Bar of Nevada, Family Law Section.

1. CHILD CUSTODY.
   Parties may enter into custody agreements and create their own custody terms and definitions, and the courts may enforce such agreements as contracts; however, once the parties move the court to modify the custody agreement, the court must use the terms and definitions under Nevada law.
2. CHILD CUSTODY.
   Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing: sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents.
3. CHILD CUSTODY.
   Joint legal custody requires that the parents be able to cooperate, communicate, and compromise to act in the best interest of the child. NRS 125.490(2).
4. CHILD CUSTODY.
   In a joint legal custody situation, the parents must consult with each other to make major decisions regarding the child's upbringing, while the parent with whom the child is residing at that time usually makes minor day-to-day decisions. NRS 125.490(2).
5. CHILD CUSTODY.
   In a joint legal custody situation, the parents need not have equal decision-making power, *e.g.*, one parent may have decision-making authority regarding certain areas or activities of the child's life, like education or healthcare, but if the parents in a joint legal custody situation reach an impasse and are unable to agree on a decision, then the parties may appear before the court on an equal footing to have the court decide what is in the best interest of the child. NRS 125.490(2).
6. CHILD CUSTODY.
   Physical custody involves the time that a child physically spends in the care of a parent, and, during this time, the child resides with the parent and that parent provides supervision for the child and makes the day-to-day decisions regarding the child.
7. CHILD CUSTODY.
   Parents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights.
8. CHILD CUSTODY; CHILD SUPPORT.
   The type of physical custody arrangement is particularly important in three situations: first, it determines the standard for modifying physical custody; second, it requires a specific procedure if a parent wants to move out of state with the child; and third, the type of physical custody arrangement affects the child support award.
9. CHILD CUSTODY.
   To modify a primary physical custody arrangement, the court must find that it is in the best interest of the child and that there has been a substantial change in circumstances affecting the welfare of the child. NRS 125.510(2).

10. CHILD CUSTODY.
Nevada law presumes that joint physical custody approximates a 50/50 timeshare. NRS 125.490.

11. CHILD CUSTODY.
Joint custody is presumably in the best interest of the child if the parents agree to it, and this policy encourages equally shared parental responsibilities. NRS 125.490.

12. CHILD CUSTODY.
Although joint physical custody must approximate an equal timeshare, given the variations inherent in child rearing, such as school schedules, sports, vacations, and parents' work schedules, to name a few, an exactly equal timeshare is not always possible, and therefore, there must be some flexibility in the timeshare requirement. NRS 125.490.

13. CHILD CUSTODY.
If a parent does not have physical custody of the child at least 40 percent of the time, then the arrangement is one of primary physical custody with visitation.

14. CHILD CUSTODY.
Each parent must have physical custody of the child at least 40 percent of the time to constitute joint physical custody. NRS 125.490.

15. CHILD CUSTODY.
In calculating the minimum 40 percent of time that a parent should have physical custody of the child in a joint physical custody arrangement, the district court should calculate the time during which a party has physical custody of the child over one calendar year; and based on a 40-percent minimum, each parent must have physical custody of the child at least 146 days per year. NRS 125.490.

16. CHILD CUSTODY.
A parent has primary physical custody when he or she has physical custody of the child subject to the district court's power to award the other parent visitation rights.

17. CHILD CUSTODY.
The focus of primary physical custody is the child's residence, and the party with primary physical custody is the party that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs.

18. CHILD CUSTODY.
The determination of who has primary physical custody revolves around where the child resides.

19. CHILD CUSTODY.
The supreme court will review the district court's decisions regarding custody, including visitation schedules, for an abuse of discretion.

20. CHILD CUSTODY.
District courts have broad discretion in child custody matters, but substantial evidence must support the court's findings.

21. EVIDENCE.
Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment.

22. CHILD CUSTODY.
On former wife's motion to modify custody, trial court was required to use Nevada's definitions for joint physical custody and primary custody, regardless of how custody agreement had defined custody arrangement.

23. CHILD CUSTODY.
The terms of the parties' custody agreement will control, except when the parties move the court to modify the custody arrangement, and, in that

case, the court must use the terms and definitions provided under Nevada law. NRS 125.510(2).

24. CONTRACTS.
Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy.

25. CHILD CUSTODY.
Once parties move the court to modify an existing child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions of the terms in the agreement no longer control.

26. CHILD CUSTODY.
On former wife's motion to modify custody, trial court was required to make specific findings of fact in determining nature of custody arrangement parties had in effect, determine applicable standard governing motion based on existing custody arrangement, and then make findings of fact to support its ruling. NRS 125.510(2).

27. CHILD SUPPORT.
Modification of child support required proof of change in circumstances and finding that modification was in best interest of child, abrogating *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991), and *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990). NRS 125B.145(2)(b).

28. CHILD SUPPORT.
The requirement of changed circumstances in modification of child support cases prevents parties from filing immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts; therefore, a court cannot modify a child support order if the predicate facts upon which the court issued the order are substantially unchanged. NRS 125B.145(2)(b).

29. CHILD SUPPORT.
The district court has discretion to review a support order on a motion to modify based on changed circumstances but is not required to do so. NRS 125B.145.

30. CHILD SUPPORT.
Although the statutory provisions governing modification of child support indicate when the review of a support order is mandatory or discretionary, they do not require the court to modify the order upon the basis of these mandatory or discretionary reviews. NRS 125B.145(1)(b), (2)(b), (4).

31. CHILD SUPPORT.
The district court has authority to modify a child support order if there has been a factual or legal change in circumstances since it entered the order. NRS 125B.145.

32. CHILD SUPPORT.
In evaluating whether the factual circumstances have changed since the entry of a prior child support order, in order to justify modification of the order, the district court may consider facts that were previously unknown to the court or a party, even if the facts predate the support order at issue. NRS 125B.145.

33. CHILD SUPPORT.
Although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order. NRS 125B.145(1).

34. CHILD SUPPORT.
On a motion for child support in cases of primary physical custody by one parent, the court applies the statutory formulas for calculating support,

and the noncustodial parent pays the custodial parent support. NRS 125B.080(9).

35. CHILD SUPPORT.

The amount of time spent with the child, along with the other lesser-weighted statutory child support factors, can serve as a basis for the district court to modify a support award, upon a showing by the secondary custodian that payment of the statutory formula amount would be unfair or unjust given his or her substantial contributions of a financial or equivalent nature to the support of the child. NRS 125B.080(9).

36. CHILD SUPPORT.

Child support in joint physical custody arrangements is calculated based on the parents' gross incomes: each parent is obligated to pay a percentage of his or her income, according to the number of children, as determined by statute, the difference between the two support amounts is calculated, and the higher-income parent is obligated to pay the lower-income parent the difference. NRS 125B.070(1)(b).

37. CHILD SUPPORT.

The purposes of the *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), formula for calculating child support are to adjust child support to equalize the child's standard of living between parents and to provide a formula for consistent decisions in similar cases. NRS 125B.070(1)(b).

38. CHILD SUPPORT.

Maintaining the lifestyle of the child between the parties' households is the goal of the *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), formula for calculating child support awards in cases of joint physical custody, and the financial circumstances of the parties remain the most important factors. NRS 125B.070(1)(b).

39. CHILD SUPPORT.

In a joint physical custody situation, if a party seeks a reduction in child support based on the amount of time spent with the child, the party must prove that payment of the full statutory amount of child support is unfair or unjust, given that party's substantial contributions to the child's support. NRS 125B.070(1)(b), 125B.080, 125B.145.

40. CHILD SUPPORT.

On former wife's motion for child support, trial court was required to make specific findings as to basis for not awarding child support and reasons for deviating from child support guidelines and what support would have been without deviation. NRS 125B.020, 125B.080(6).

41. CHILD SUPPORT.

The supreme court reviews the district court's decisions regarding child support for an abuse of discretion.

42. CHILD SUPPORT.

Even if the record reveals the district court's reasoning for the deviation from the statutory child support formula, the court must expressly set forth its findings of fact to support its decision. NRS 125B.080(6).

43. JUDGES.

Former wife's unsupported allegations that judge was biased against her because husband was attractive man and former wife was attractive woman, without more, did not state legally cognizable grounds for inference of bias, thus warranting summary dismissal of motion to disqualify judge from presiding over motion for modification of custody and child support. NRS 1.230(1).

44. APPEAL AND ERROR.

The supreme court gives substantial weight to a judge's decision not to recuse himself or herself and will not overturn such a decision absent a clear abuse of discretion.

45. JUDGES.

A judge is presumed to be unbiased, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification. NRS 1.230(1).

46. JUDGES.

To disqualify a judge based on personal bias, the moving party must allege bias that stems from an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from his or her participation in the case. NRS 1.230(1).

47. JUDGES.

Where the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice, a court should summarily dismiss a motion to disqualify a judge. NRS 1.230(1).

48. CONTEMPT.

Contempt preserves the authority of the court, punishes, enforces parties' rights, and coerces.

49. COSTS.

The district court's discretion to award attorney fees as a sanction for bringing a frivolous motion promotes the efficient administration of justice without undue delay and compensates a party for having to defend a frivolous motion. NRS 18.010(2)(b).

50. COSTS.

Statute prohibiting trial court from punishing for contempt for filing motion to disqualify did not apply to prohibit trial court from awarding attorney fees to former husband for defending against wife's motion to disqualify judge who presided over her motions to modify custody and child support. NRS 1.230(4), 18.010(2)(b).

51. COSTS.

Trial court's finding that former wife's motion to disqualify judge who presided over her motion for modification of child custody and child support was meritless was not sufficient basis for awarding husband attorney fees to defend motion as sanction; rather, in order to impose sanctions for filing frivolous motion, there must be evidence supporting finding that motion was unreasonable or brought to harass. NRS 18.010(2)(b); NRCP 11; EDCR 7.60(b).

52. APPEAL AND ERROR.

The supreme court reviews the district court's award of attorney fees for an abuse of discretion.

53. COSTS.

The district court may award attorney fees as a sanction if it concludes that a party brought a frivolous claim, and in considering whether to impose such a sanction, the district court must determine if there was any credible evidence or reasonable basis for the claim at the time of filing. NRS 18.010(2)(b); NRCP 11; EDCR 7.60(b).

54. COSTS.

Although a district court has discretion to award attorney fees as a sanction for filing a frivolous claim, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass. NRS 1.230(4), 18.010(2)(b); EDCR 7.60(b).

Before the Court EN BANC.

## OPINION

By the Court, GIBBONS, J.:

We previously issued an opinion in this case on October 30, 2008, affirming in part, reversing in part, and remanding. Respondent Elvis Rivero's petition for rehearing followed. We then ordered answers to the petition from appellant Michelle Rivero and amicus curiae, the State Bar of Nevada Family Law Section.

We will consider rehearing when we have overlooked or misapprehended material facts or questions of law or when we have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal. NRAP 40(c)(2). Having considered the petition and answers thereto in light of this standard, we conclude that rehearing is not warranted. Therefore, we deny the petition for rehearing. Although we deny rehearing, we withdraw our October 30, 2008, opinion and issue this opinion in its place.

Ms. Rivero and Mr. Rivero stipulated to a divorce decree that provided for ''joint physical custody'' of their minor child, with Ms. Rivero having the child five days each week and Mr. Rivero having the child two days each week. The decree awarded no child support. Less than two months after entry of the divorce decree, Ms. Rivero brought a motion to modify child support. The district court dismissed the motion. Less than one year later, Ms. Rivero brought a motion to modify child custody and support. The district court ordered that the decree would remain in force, with the parties having joint custody of their child and neither party receiving child support. The district court deferred ruling on the motion to modify custody and ordered the parties to mediation to devise a timeshare plan.

Ms. Rivero then requested that the district court judge recuse herself. When the judge refused to recuse herself, Ms. Rivero moved to disqualify her. The Chief Judge of the Eighth Judicial District Court denied Ms. Rivero's motion for disqualification, concluding that it lacked merit. The district court later awarded Mr. Rivero attorney fees for having to defend Ms. Rivero's disqualification motion.

At the court-ordered mediation, the parties were unable to reach a timeshare agreement. Following mediation, after a hearing, the district court modified the custody arrangement from a five-day, two-day split to an equal timeshare. Ms. Rivero appeals.

We are asked to resolve several custody and support issues on appeal. Preliminarily, the parties dispute the definition of joint physical custody. Additionally, Ms. Rivero challenges the following district court rulings: (1) the court's determination that the parties had joint physical custody, (2) the court's modification of the custody arrangement, (3) the court's denial of her motion for child support,

(4) the district court judge's refusal to recuse herself and the chief judge's denial of Ms. Rivero's motion for disqualification, and (5) the court's award of attorney fees to Mr. Rivero for defending against Ms. Rivero's disqualification motion.

Initially, to address the definition of joint physical custody, we define legal custody, including sole legal custody and joint legal custody. We then define physical custody, including joint physical custody and primary physical custody. In defining joint physical custody, we adopt a definition that focuses on minor children having frequent associations and a continuing relationship with both parents and parents sharing the rights and responsibilities of child rearing. Consistent with the recommendation of the Family Law Section, this joint physical custody definition requires that each party have physical custody of the child at least 40 percent of the time. We then address the district court's rulings.

[Headnote 1]

First, we address the district court's finding that the parties had a joint physical custody arrangement. In reaching our conclusion, we clarify that parties may enter into custody agreements and create their own custody terms and definitions. The courts may enforce such agreements as contracts. However, once the parties move the court to modify the custody agreement, the court must use the terms and definitions under Nevada law. In this case, the district court properly disregarded the parties' definition of joint physical custody in the divorce decree and applied Nevada law in determining that an equal timeshare was appropriate. Although it reached the proper conclusion, the district court abused its discretion by failing to set forth specific findings of fact to support its determination.

Second, we conclude that the district court abused its discretion by modifying the custody timeshare arrangement without making specific findings of fact that the modification was in the child's best interest.

Third, we conclude that the district court abused its discretion by denying Ms. Rivero's motion to modify child support without making any factual findings to justify its decision. We also clarify the circumstances under which a district court may modify a child support order. Under NRS Chapter 125B and our caselaw, a court has authority to modify a child support order upon a finding of a change in circumstances since the prior order. Also, in accordance with the Family Law Section's suggestion, we withdraw the *Rivero* formula for calculating child support.

Fourth, we conclude that the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero's motion for disqualification. The record contains no evidence that the district court judge had personal bias against either of the parties.

Fifth and finally, we conclude that the district court abused its discretion by awarding Mr. Rivero attorney fees as a sanction for Ms.

Rivero's disqualification motion because the district court made no determination whether the motion was frivolous, and no evidence supports the sanction.

*FACTS AND PROCEDURAL HISTORY*

Ms. Rivero filed a complaint for divorce, and the parties eventually reached a settlement. The district court entered a divorce decree incorporating the parties' agreement. The parties agreed to joint physical custody of the child, with Ms. Rivero having physical custody five days each week and Mr. Rivero having physical custody for the remaining two days. The divorce decree also reflected the parties' agreement that neither party was obligated to pay child support.

Less than two months after entry of the divorce decree, Ms. Rivero moved the court to modify the decree by awarding her child support. The district court dismissed her motion. Less than one year later, Ms. Rivero moved the district court for primary physical custody and child support. She alleged that Mr. Rivero did not spend time with the child, that instead his elderly mother took care of the child, and that he did not have suitable living accommodations for the child. Ms. Rivero also argued that she had de facto primary custody because she cared for the child most of the time. Mr. Rivero countered that Ms. Rivero denied him visitation unless he provided food, clothes, and money and denied him overnight visitation once he became engaged to another woman. Mr. Rivero requested that the district court enforce the 5/2 timeshare in the divorce decree, or, alternatively, order a 50/50 timeshare.

The district court held a custody hearing, during which the parties presented contradictory testimony regarding how much time Mr. Rivero actually spent with the child. The district court ruled that the matter did not warrant an evidentiary hearing. The district court further found that the use of the term joint physical custody in the divorce decree did not accurately reflect the timeshare arrangement that the parties were actually practicing, in which Ms. Rivero seemed to have physical custody most of the time. As a result, the court denied Ms. Rivero's motion for child support, found that the parties had joint physical custody, and ordered the parties to mediation to establish a more equal timeshare plan to reflect a joint physical custody arrangement.

After the mediation, but before the next district court hearing, Ms. Rivero served a subpoena on Mr. Rivero's employer for his employment records. The district court granted Mr. Rivero's motion to quash the subpoena, explaining that under the divorce decree, each party had joint physical custody, neither party owed child support, and the only pending issue was whether the parties could agree on a timeshare plan. Ms. Rivero then argued that the district court should reopen the child support issue and allow relevant discovery.

When the district court refused, Ms. Rivero requested that the district court judge recuse herself. The district court judge denied the request. Ms. Rivero then moved to disqualify the district court judge, alleging that the judge did not seriously consider the facts or the law because she was biased based on the parties' physical appearance. Mr. Rivero opposed the motion and moved for attorney fees. The district court judge submitted an affidavit in which she swore that she was unbiased. After considering Ms. Rivero's motion to disqualify the district court judge, the supporting affidavits, and Mr. Rivero's opposition, the chief judge denied the motion. She did not conduct a hearing, and Ms. Rivero did not file a reply. The chief judge concluded that Ms. Rivero's claims appeared to rely on ''prior adverse rulings of the judge'' and that ''[r]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.'' Thus, the chief judge found that Ms. Rivero's motion was without merit.

At a subsequent hearing, the district court granted Mr. Rivero's motion for attorney fees, noting that Ms. Rivero's disqualification motion was without merit.

During the same hearing, the district court also addressed the custody timeshare arrangement because the parties had been unable to reach an agreement in mediation. Although the divorce decree provided Ms. Rivero with custody five days each week and Mr. Rivero with custody two days each week, the district court concluded that the parties actually intended an equal timeshare. The district court noted that it was ''just trying to find a middle ground'' between what the divorce decree provided and what the parties actually wanted regarding a custody timeshare. Further, the court found that the decree's order for joint physical custody was inconsistent with the decree's timeshare arrangement because the decree's five-day, two-day timeshare did not constitute joint physical custody. In its order, the district court concluded that the parties intended joint physical custody and ordered an equal timeshare.

The district court found that Ms. Rivero did not have de facto primary physical custody. Therefore, the court determined that an evidentiary hearing was unnecessary because it was not changing primary custody to joint custody, but was modifying a joint physical custody arrangement.

Ms. Rivero appeals, challenging the district court's order denying her motion for child support, the order denying her motion to disqualify the district court judge, and the order modifying the custody timeshare and awarding Mr. Rivero attorney fees.[1]

[1]Given the importance of the definition of joint physical custody, this court invited the Family Law Section of the Nevada State Bar (Family Law Section) to file an amicus curiae brief regarding the issue.

*DISCUSSION*

In order to clarify the definition of joint physical custody, we first address the definition of legal custody. Physical and legal custody involve separate legal rights and control separate factual scenarios. Therefore, we discuss both legal and physical custody to clarify the distinctions.

After defining both joint physical custody and primary physical custody, we apply those definitions to the issues on appeal. These issues include the district court's custody modification and its denial of Ms. Rivero's motion to modify child support.

Finally, we address Ms. Rivero's motions for recusal and disqualification, and the district court's award of attorney fees to Mr. Rivero arising from those motions.

The Family Law Section requests that this court define all types of legal and physical custody to create a continuum in which it is clear where one type of custody ends and another begins. It argues that such definitions will provide much needed clarity and certainty in child custody law. Our discussion of child custody involves two distinct components of custody: legal custody and physical custody. The term ''custody'' is often used as a single legal concept, creating ambiguity. NRS 125.460, NRS 125.490 (using the term ''joint custody''). To emphasize the distinctions between these two types of custody and to provide clarity, we separately define legal custody, including joint and sole legal custody, and then we define physical custody, including joint physical and primary physical custody.

I. *Legal custody*

[Headnotes 2-4]

Legal custody involves having basic legal responsibility for a child and making major decisions regarding the child, including the child's health, education, and religious upbringing. *Mack v. Ashlock*, 112 Nev. 1062, 1067, 921 P.2d 1258, 1262 (1996) (SHEARING, J., concurring); Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981). Sole legal custody vests this right with one parent, while joint legal custody vests this right with both parents. *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (SHEARING, J., concurring); Cal. Fam. Code §§ 3003, 3006 (West 2004)[2] (defining sole and joint legal custody). Joint legal custody requires that the parents be able to cooperate, communicate, and compromise to act in the best interest of the child. *See Mosley v. Figli-*

[2]The Nevada Legislature relied on California family law statutes in adopting NRS 125.460 and 125.490, regarding joint custody. Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981). Although out-of-state law is not controlling, we look to it as instructive and persuasive. As always, even if this court relies on out-of-state law, Nevada law still controls in interpreting the decisions of this court.

*uzzi*, 113 Nev. 51, 60-61, 930 P.2d 1110, 1116 (1997) (stating that if disagreement between parents affects the welfare of the child, it could defeat the presumption that joint custody is in the best interest of the child and warrant modifying a joint physical custody order); Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (discussing that joint legal custody requires agreement between the parents). In a joint legal custody situation, the parents must consult with each other to make major decisions regarding the child's upbringing, while the parent with whom the child is residing at that time usually makes minor day-to-day decisions. *See Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (SHEARING, J., concurring) (discussing that the parents can bring unresolved disputes before the court); Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981) (comments of Senator Wagner and Senator Ashworth) (discussing that both parents are involved with making major decisions regarding the children, and if they cannot agree, the courts will settle their disputes); *Fenwick v. Fenwick*, 114 S.W.3d 767, 777-78 (Ky. 2003) (explaining that in a joint legal custody arrangement, the parents confer on all major decisions, but the parent with whom the child is residing makes the minor day-to-day decisions), *superseded by statute on other grounds as stated in Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky. Ct. App. 2004), *overruled on other grounds by Frances v. Frances*, 266 S.W.3d 754, 756-57 (Ky. 2008), *and Pennington v. Marcum*, 266 S.W.3d 759, 768 (Ky. 2008).

[Headnote 5]

Joint legal custody can exist regardless of the physical custody arrangements of the parties. NRS 125.490(2); *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (SHEARING, J., concurring). Also, the parents need not have equal decision-making power in a joint legal custody situation. *Fenwick*, 114 S.W.3d at 776. For example, one parent may have decision-making authority regarding certain areas or activities of the child's life, such as education or healthcare. *Id*. If the parents in a joint legal custody situation reach an impasse and are unable to agree on a decision, then the parties may appear before the court ''on an equal footing'' to have the court decide what is in the best interest of the child. *Mack*, 112 Nev. at 1067, 921 P.2d at 1262 (SHEARING, J., concurring); *Fenwick*, 114 S.W.3d at 777 n.24.

II. *Physical custody*

[Headnotes 6, 7]

Physical custody involves the time that a child physically spends in the care of a parent. During this time, the child resides with the parent and that parent provides supervision for the child and makes

the day-to-day decisions regarding the child.[3] Parents can share joint physical custody, or one parent may have primary physical custody while the other parent may have visitation rights. *See Ellis v. Carucci*, 123 Nev. 145, 147, 161 P.3d 239, 240 (2007) (describing the mother as having primary physical custody and the father as having liberal visitation); *Barbagallo v. Barbagallo*, 105 Nev. 546, 549, 779 P.2d 532, 534 (1989) (discussing primary and secondary custodians); Cal. Fam. Code §§ 3004, 3007 (West 2004) (defining joint and sole physical custody).

[Headnotes 8, 9]

The type of physical custody arrangement is particularly important in three situations. First, it determines the standard for modifying physical custody.[4] Second, it requires a specific procedure if a parent wants to move out of state with the child. *Potter v. Potter*, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). Third, the type of physical custody arrangement affects the child support award. *Barbagallo*, 105 Nev. at 549, 779 P.2d at 534. Because the physical custody arrangement is crucial in making these determinations, the district courts need clear custody definitions in order to evaluate the true nature of parties' agreements. Absent direction from the Legislature, we define joint physical custody and primary physical custody in light of existing Nevada law.

### A. *Joint physical custody*

Ms. Rivero and the Family Law Section assert that this court should clarify the definition of joint physical custody to determine whether it requires a specific timeshare agreement. The Family Law Section suggests that we define joint physical custody by requiring

[3]*See* Idaho Code Ann. § 32-717B(2) (2006) (discussing joint physical custody regarding the ''time in which a child resides with or is under the care and supervision of'' the parties); Iowa Code Ann. § 598.1(4) (West 2001) (discussing joint physical custody as involving shared parenting time, maintaining a home for the child, and physical care rights); *Taylor v. Taylor*, 508 A.2d 964, 967 (Md. 1986) (defining physical custody as involving providing a home and making day-to-day decisions regarding the child); Mass. Ann. Laws ch. 208, § 31 (LexisNexis 2003) (describing shared physical custody as involving the child residing with and being under the supervision of each parent); Mo. Ann. Stat. § 452.375(1)(3) (West 2003) (discussing residence and supervision in the context of joint legal custody); 23 Pa. Cons. Stat. Ann. § 5302 (West 2001) (defining physical custody as ''[t]he actual physical possession and control of a child'').

[4]The court may modify *joint* physical custody if it is in the best interest of the child. NRS 125.510(2); *Potter v. Potter*, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). However, to modify a *primary* physical custody arrangement, the court must find that it is in the best interest of the child and that there has been a substantial change in circumstances affecting the welfare of the child. *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

that each parent have physical custody of the child at least 40 percent of the time. In accordance with this suggestion, and for the reasons set forth below, we clarify Nevada's definition of joint physical custody pursuant to Nevada statutes and caselaw and create parameters to clarify which timeshare arrangements qualify as joint physical custody.

Although Nevada law suggests that joint physical custody approximates an equal timeshare, to date, neither the Nevada Legislature nor this court have explicitly defined joint physical custody or specified whether a specific timeshare is required for a joint physical custody arrangement. *See Potter*, 121 Nev. at 619 n.16, 119 P.3d at 1250 n.16 (declining to address the issue of whether joint physical custody requires a particular timeshare); *Barbagallo*, 105 Nev. at 548, 779 P.2d at 534 (noting that, in 1987, when it enacted the child support formula, the Legislature declined to define primary physical custody according to a particular timeshare). In fact, even the terminology is inconsistent. This court has used the following phrases to describe situations where both parents have physical custody: shared custodial arrangements, joint physical custody, equal physical custody, shared physical custody, and joint and shared custody. *See Wesley v. Foster*, 119 Nev. 110, 113, 65 P.3d 251, 253 (2003) (discussing shared custodial arrangements); *Wright v. Osburn*, 114 Nev. 1367, 1368, 970 P.2d 1071, 1072 (1998) (using the terms joint physical custody, equal physical custody, and shared physical custody); *Barbagallo*, 105 Nev. at 547-48, 779 P.2d at 533-34 (utilizing the terms joint or shared custody). Given the various terms used to describe joint physical custody and the lack of a precise definition and timeshare requirement, we now define joint physical custody and the timeshare required for such arrangements.

1. *Defining joint physical custody*

''In determining custody of a minor child . . . the sole consideration of the court is the best interest of the child.'' NRS 125.480(1). The Legislature created a presumption that joint legal and joint physical custody are in the best interest of the child if the parents so agree. NRS 125.490(1). The policy of Nevada is to advance the child's best interest by ensuring that after divorce ''minor children have frequent associations and a continuing relationship with both parents . . . and [t]o encourage such parents to share the rights and responsibilities of child rearing.'' NRS 125.460. To further this policy, the Legislature adopted the statutes that now comprise NRS Chapter 125 to educate and encourage parents regarding joint custody arrangements, encourage parents to cooperate and work out a custody arrangement before going to court to finalize the divorce, ensure the healthiest psychological arrangement for children, and minimize the adversarial, winner-take-all approach to custody dis-

putes. *Mosley*, 113 Nev. at 63-64, 930 P.2d at 1118; Hearing on S.B. 188 Before the Senate Judiciary Comm., 61st Leg. (Nev., Feb. 12, 1981) (Senator Wagner's comments) (discussing parents reaching an agreement before coming to court); Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (summary of supporting information) (enumerating flaws in the old statute).

Although NRS Chapter 125 does not contain a definition of joint physical custody, the legislative history regarding NRS 125.490 reveals the Legislature's understanding of its meaning. Joint physical custody is ''[a]warding custody of the minor child or children to BOTH PARENTS and providing that physical custody shall be shared by the parents in such a way to ensure the child or children of frequent associations and a continuing relationship with both parents.''[5] Hearing on S.B. 188 Before the Assembly Judiciary Comm., 61st Leg. (Nev., Apr. 2, 1981) (summary of supporting information). This does not include divided or alternating custody, where each parent acts as a sole custodial parent at different times, or split custody, where one parent is awarded sole custody of one or more of the children and the other parent is awarded sole custody of one or more of the children. *Id*.

### 2. *The timeshare required for joint physical custody*

[Headnotes 10, 11]

The question then remains, what constitutes joint physical custody to ensure the child frequent associations and a continuing relationship with both parents? Our law presumes that joint physical custody approximates a 50/50 timeshare. *See Wesley*, 119 Nev. at 112-13, 65 P.3d at 252-53 (discussing shared custody arrangements and equal timeshare); *Wright*, 114 Nev. at 1368, 970 P.2d at 1071-72 (discussing joint physical custody and equal timeshare). This court has noted that the public policy, as stated in NRS 125.490, is that joint custody is presumably in the best interest of the child if the parents agree to it and that this policy encourages *equally* shared parental responsibilities. *Mosley*, 113 Nev. at 60-61 & n.4, 930 P.2d at 1116 & n.4.

[Headnote 12]

Although joint physical custody must approximate an equal timeshare, given the variations inherent in child rearing, such as school

[5]Other states define joint physical custody similarly, focusing on the child's continuing contact and relationship with both parents. Cal. Fam. Code § 3004 (West 2004); Haw. Rev. Stat. § 571-46.1 (2006); Idaho Code Ann. § 32-717B(2) (2006); Mass. Ann. Laws ch. 208, § 31 (LexisNexis 2003); Miss. Code Ann. § 93-5-24(5)(c) (2004); Mo. Ann. Stat. § 452.375(1)(3) (West 2003); 23 Pa. Cons. Stat. Ann. § 5302 (West 2001); *Mamolen v. Mamolen*, 788 A.2d 795, 799 (N.J. Super. Ct. App. Div. 2002).

schedules, sports, vacations, and parents' work schedules, to name a few, an exactly equal timeshare is not always possible. Therefore, there must be some flexibility in the timeshare requirement. The question then becomes, when does a timeshare become so unequal that it is no longer joint physical custody? Courts have grappled with this question and come to different conclusions. For example, this court has described a situation where the children live with one parent and the other parent has every-other-weekend visitation as primary physical custody with visitation, even when primary custody was changed for one month out of the year and the other parent would revert back to weekend visitations. *Metz v. Metz*, 120 Nev. 786, 788-89, 101 P.3d 779, 781 (2004). In *Wright*, 114 Nev. at 1368, 970 P.2d at 1071, this court described an arrangement where the parents had the children on a rotating weekly basis as joint physical custody.

Similarly, the California Court of Appeal has held that ''[physical] custody one day per week and alternate weekends constitutes liberal visitation, not joint [physical] custody.'' *People v. Mehaisin*, 124 Cal. Rptr. 2d 683, 687 (Ct. App. 2002). Likewise, when the mother has temporary custody and the father has visitation for a one-month period, the parties do not have joint physical custody. *Id.* at 685, 687. Rather, the father has a period of visitation, and the mother has sole physical custody thereafter. *Id.* at 687. Just as Nevada has defined joint physical custody as requiring an equal timeshare, the California Court of Appeal noted that joint physical custody includes situations in which the children split their time living with each parent and spend nearly equal time with each parent. *Id.* Some jurisdictions have adopted bright-line rules regarding the timeshare requirements for joint physical custody so that anything too far removed from a 50/50 timeshare cannot be considered joint physical custody.[6]

[Headnotes 13, 14]

We conclude that, consistent with legislative intent and our caselaw, in joint physical custody arrangements, the timeshare must be approximately 50/50. However, absent legislative direction regarding how far removed from 50/50 a timeshare may be and still constitute joint physical custody, the law remains unclear. Therefore, to approximate an equal timeshare but allow for necessary flexibility, we hold that each parent must have physical custody of the child

[6]*See, e.g.*, Okla. Stat. Ann. tit. 43, § 118(10) (West 2001) (requiring each parent to have physical custody for more than 120 nights each year for shared physical custody); Tenn. Code Ann. § 36-6-402(4) (2005) (defining ''primary residential parent'' as ''the parent with whom the child resides more than 50 percent (50%) of the time''); *Miller v. Miller*, 568 S.E.2d 914, 918 (N.C. Ct. App. 2002) (explaining that joint physical custody requires that each parent have custody for at least one-third of the year).

at least 40 percent of the time to constitute joint physical custody. We acknowledge that the Legislature is free to alter the timeshare required for joint physical custody, but we adopt this guideline to provide needed clarity for the district courts. This guideline ensures frequent associations and a continuing relationship with both parents. If a parent does not have physical custody of the child at least 40 percent of the time, then the arrangement is one of primary physical custody with visitation. We now address how the courts should calculate the 40-percent timeshare.

We note that our dissenting colleague's reliance on *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 534 (1989), for the proposition that this court should not adopt the 40-percent timeshare requirement, is misplaced. In *Barbagallo*, this court noted that the Legislature had considered adopting specific timeshare requirements for determining which parent would pay child support in a joint physical custody arrangement but declined to do so. *Id*. at 548, 779 P.2d at 534. Thus, *Barbagallo* was declining to mathematically define child custody for the purpose of creating new child support calculations. Notably, this opinion does not alter or adopt any child support formulas, but rather reaffirms the child support calculations in *Barbagallo*, 105 Nev. 546, 779 P.2d 534, and *Wright*, 114 Nev. 1367, 970 P.2d 1071, which were in effect before this case. Prior to this opinion, *Barbagallo*, 105 Nev. at 549, 779 P.2d at 534-35, established how to calculate child support when one parent has primary physical custody, and *Wright*, 114 Nev. at 1368-69, 970 P.2d at 1072, established the calculation when the parents share joint physical custody. This opinion clarifies what arrangements constitute primary and joint physical custody so that parties, attorneys, and district courts readily know which child support calculation to apply. Thus, this opinion does not adopt new custody definitions for the purpose of formulating new child support calculations. Rather, it is based on this court's precedent and clarifies custody definitions so that courts can fairly and consistently apply the *Barbagallo* and *Wright* formulas that predated this opinion.

Our dissenting colleague also argues that the Legislature should be creating the custody definitions set out in this opinion. The issues in this case and the Family Law Section's amicus curiae brief demonstrate that there are gaps in the law. However, despite these gaps, attorneys must still advise their clients, public policy still favors settlement, and parties are still entitled to consistent and fair resolution of their disputes. To resolve the issues on appeal and ensure consistent and fair application of the law by district courts, this court has attempted to fill some of these gaps by defining the various types of child custody.

This court has previously created predictability for litigants to fill such a gap in the law in *Malmquist v. Malmquist*, 106 Nev. 231, 792

P.2d 372 (1990). In *Malmquist*, this court adopted a standard formula for district courts to apply ''to apportion the community and separate property shares in the *appreciation* of a separate property residence obtained with a separate property loan prior to marriage.'' *Id*. at 238, 792 P.2d at 376. This court noted that although the district courts can make equitable determinations in individual cases, ''the aggregate result becomes unfair when similarly situated persons receive disparate returns on their home investments.'' *Id*. The same reasoning applies here. District courts can use their discretion to make fair determinations in individual child custody cases. However, this becomes unfair when different parties similarly situated obtain different results. Such unreliable outcomes also make it difficult for attorneys to advise their clients and for parties to settle their disputes. Therefore, the timeshare requirement that this opinion establishes is both necessary to ensure consistent and fair application of the law and proper under this court's precedent.

3. *Calculating the timeshare*

[Headnote 15]

The district court should calculate the time during which a party has physical custody of a child over one calendar year. Each parent must have physical custody of the child at least 40 percent of the time, which is 146 days per year. Calculating the timeshare over a one-year period allows the court to consider weekly arrangements as well as any deviations from those arrangements such as emergencies, holidays, and summer vacation. In calculating the time during which a party has physical custody of the child, the district court should look at the number of days during which a party provided supervision of the child, the child resided with the party, and during which the party made the day-to-day decisions regarding the child. The district court should not focus on, for example, the exact number of hours the child was in the care of the parent, whether the child was sleeping, or whether the child was in the care of a third-party caregiver or spent time with a friend or relative during the period of time in question.

Therefore, absent evidence that joint physical custody is not in the best interest of the child, if each parent has physical custody of the child at least 40 percent of the time, then the arrangement is one of joint physical custody.

B. *Defining primary physical custody*

[Headnotes 16-18]

We now discuss primary physical custody to contrast it with joint physical custody and to clarify its definition. A parent has primary physical custody when he or she has physical custody of the child subject to the district court's power to award the other parent visi-

tation rights. *See, e.g.*, *Ellis*, 123 Nev. at 147, 161 P.3d at 240. The focus of primary physical custody is the child's residence. The party with primary physical custody is the party that has the primary responsibility for maintaining a home for the child and providing for the child's basic needs. *See Barbagallo*, 105 Nev. at 549, 779 P.2d at 534 (discussing primary custodians and custodial parents in the context of child support); *see* Tenn. Code Ann. § 36-6-402(4) (2005) (defining ''primary residential parent'' as the parent with whom the child resides for more than 50 percent of the time). This focus on residency is consistent with NRS 125C.010, which requires that a court, when ordering visitation, specify the ''habitual residence'' of the child. Thus, the determination of who has primary physical custody revolves around where the child resides.

Primary physical custody arrangements may encompass a wide array of circumstances. As discussed above, if a parent has physical custody less than 40 percent of the time, then that parent has visitation rights and the other parent has primary physical custody. Likewise, a primary physical custody arrangement could also encompass a situation where one party has primary physical custody and the other party has limited or no visitation. *See Metz*, 120 Nev. at 788-89, 101 P.3d at 781 (describing a primary physical custody situation where the nonprimary physical custodian had visitation every other weekend).

## III. *Custody modification*

Having determined what constitutes joint physical custody and primary physical custody, we now consider whether the district court abused its discretion in determining that the parties had joint physical custody when their divorce decree described a 5/2 custodial timeshare but labeled the arrangement as joint physical custody.

[Headnotes 19-21]

This court reviews the district court's decisions regarding custody, including visitation schedules, for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). District courts have broad discretion in child custody matters, but substantial evidence must support the court's findings. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. Substantial evidence ''is evidence that a reasonable person may accept as adequate to sustain a judgment.'' *Id.* at 149, 161 P.3d at 242.

Ms. Rivero contends that the district court abused its discretion by construing the term ''joint physical custody'' in the divorce decree to mean an equal timeshare, when the parties defined joint physical custody in the divorce decree as a 5/2 timeshare. She also argues that the district court abused its discretion in finding that she and

Mr. Rivero had joint physical custody of their child because she asserts that she had de facto primary physical custody of the child.

We conclude that the district court properly disregarded the parties' definition of joint physical custody because the district court must apply Nevada's physical custody definition—not the parties' definition. We also conclude that the district court abused its discretion by not making specific findings of fact to support its decision that the custody arrangement constituted joint physical custody and that modification of the divorce decree was in the best interest of the child.

### A. *Custody agreements*

[Headnotes 22, 23]

We now address the modification of custody agreements. We conclude that the terms of the parties' custody agreement will control except when the parties move the court to modify the custody arrangement. In custody modification cases, the court must use the terms and definitions provided under Nevada law.[7]

[Headnotes 24, 25]

Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy. *See D.R. Horton, Inc. v. Green*, 120 Nev. 549, 558, 96 P.3d 1159, 1165 (2004) (citing unconscionablility as a limitation on enforceability of a contract); *NAD, Inc. v. Dist. Ct.*, 115 Nev. 71, 77, 976 P.2d 994, 997 (1999) (stating ''parties are free to contract in any lawful matter''); *Miller v. A & R Joint Venture*, 97 Nev. 580, 582, 636 P.2d 277, 278 (1981) (discussing public policy as a limitation on enforceability of a contract). Therefore, parties are free to agree to child custody arrangements and those agreements are enforceable if they are not unconscionable, illegal, or in violation of public policy. However, when modifying child custody, the district courts must apply Nevada child custody law, including NRS Chapter 125C and caselaw. NRS 125.510(2) (discussing modification of a joint physical custody order); *Ellis*, 123 Nev. at 150, 161 P.3d at 242 (discussing modification of a primary physical custody order). Therefore, once parties move the court to modify an existing child custody agreement, the court must use the terms and definitions provided under Nevada law, and the parties' definitions no longer control. In this case, Ms. Rivero moved the district court to modify the decree. Therefore, the district court properly disregarded the parties' definition of joint physical custody.

[7]Ms. Rivero also challenges the district court's decision not to hold an evidentiary hearing regarding child custody. Because we reverse and remand on the custody issue on other grounds, we do not reach this argument.

B. *The district court's determination that the parties' custody arrangement was joint physical custody and its modification of the custody arrangement*

[Headnote 26]

When considering whether to modify a physical custody agreement, the district court must first determine what type of physical custody arrangement exists because different tests apply depending on the district court's determination. A modification to a joint physical custody arrangement is appropriate if it is in the child's best interest. NRS 125.510(2). In contrast, a modification to a primary physical custody arrangement is appropriate when there is a substantial change in the circumstances affecting the child and the modification serves the child's best interest. *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

Under the definition of joint physical custody discussed above, each parent must have physical custody of the child at least 40 percent of the time. This would be approximately three days each week. Therefore, the district court properly found that the 5/2 timeshare included in the parties' divorce decree does not constitute joint physical custody. The district court must then look at the actual physical custody timeshare that the parties were exercising to determine what custody arrangement is in effect.

The district court summarily determined that Mr. and Ms. Rivero shared custody on approximately an equal time basis. Based on this finding, the district court determined that it was modifying a joint physical custody arrangement, and therefore, Ms. Rivero, as the moving party, had the burden to show that modifying the custody arrangement was in the child's best interest. NRS 125.510(2); *Truax v. Truax*, 110 Nev. 437, 438-39, 874 P.2d 10, 11 (1994). However, the district court did not make findings of fact supported by substantial evidence to support its determination that the custody arrangement was, in fact, joint physical custody. *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. Therefore, this decision was an abuse of discretion.

Moreover, the district court abused its discretion by modifying the custody agreement to reflect a 50/50 timeshare without making specific findings of fact demonstrating that the modification was in the best interest of the child.

Specific factual findings are crucial to enforce or modify a custody order and for appellate review. Accordingly, on remand, the district court must evaluate the true nature of the custodial arrangement, pursuant to the definition of joint physical custody described above, by evaluating the arrangement the parties are exercising in practice, regardless of any contrary language in the divorce decree. The district court shall then apply the appropriate test for determining whether to modify the custody arrangement and make express findings supporting its determination.

## IV. *Child support*

Ms. Rivero argues that the district court erred in denying her motion for child support by not reviewing the parties' affidavits of financial condition and noting the discrepancies in the parties' incomes.[8] We conclude that the district court abused its discretion in denying Ms. Rivero's motion for child support because it did not make specific findings of fact supported by substantial evidence. In reaching our conclusion, we first address the circumstances under which the district court may modify a child support order and discuss the calculation of child support in primary physical custody and joint physical custody arrangements.

### A. *Modifying a child support order*

An ambiguity has arisen in our caselaw regarding when the district court has the authority to modify a child support order. Therefore, we take this opportunity to clarify that the district court only has authority to modify a child support order upon finding that there has been a change in circumstances since the entry of the order and the modification is in the best interest of the child. In so doing, we look to NRS Chapter 125B and our caselaw.

#### 1. *Modification of a child support order requires a change in circumstances*

[Headnotes 27, 28]

As with custody cases, the requirement of changed circumstances in child support cases prevents parties ''[from filing] immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts.'' *Ellis*, 123 Nev. at 151, 161 P.3d at 243 (internal quotations omitted). Therefore, a court cannot modify a child support order if the predicate facts upon which the court issued the order are substantially unchanged. *Mosley v. Figliuzzi*, 113 Nev. 51, 58-59, 930 P.2d 1110, 1114-15 (1997) (discussing custody orders). Also, the modification must be in the best interest of the child. NRS 125B.145(2)(b).

[Headnotes 29, 30]

The Legislature has specified when a court will review a child support order. A court must review a support order, if requested by a party or legal guardian, every three years. NRS 125B.145(1)(b). The court may also review a support order upon a showing of changed circumstances. NRS 125B.145. Because the term ''may'' is discretionary, the district court has discretion to review a support

[8]Ms. Rivero also challenges the district court's denial of her discovery of Mr. Rivero's employment records for purposes of calculating child support. Because we reverse and remand on the support issue on other grounds, we do not reach this argument.

order based on changed circumstances but is not required to do so. *Fourchier v. McNeil Const. Co.*, 68 Nev. 109, 122, 227 P.2d 429, 435 (1951). However, a change of 20 percent or more in the obligor parent's gross monthly income requires the court to review the support order. NRS 125B.145(4). Although these provisions indicate when the review of a support order is mandatory or discretionary, they do not require the court to modify the order upon the basis of these mandatory or discretionary reviews.

[Headnotes 31, 32]

The district court has authority to modify a support order if there has been a factual or legal change in circumstances since it entered the order. Since its enactment of the statutes that today comprise NRS Chapter 125B, the Legislature has allowed modification of child support orders upon changed circumstances. 1987 Nev. Stat., ch. 813, § 3, at 2267. Nevada law also requires the district court, when adjusting the child support amount, to consider the factors in NRS 125B.070 and NRS 125B.080(9). 1987 Nev. Stat., ch. 813, § 3, at 2268. We have specified that even equitable adjustments to support awards must be based on the NRS 125B.080(9) factors. *Khaldy v. Khaldy*, 111 Nev. 374, 376-77, 892 P.2d 584, 585 (1995). Therefore, when considering a modification motion, the district court will always consider the same factual circumstances—those specified in NRS 125B.070 and 125B.080(9). In evaluating whether the factual circumstances have changed, the district court may consider facts that were previously unknown to the court or a party, even if the facts predate the support order at issue. *See Castle v. Simmons*, 120 Nev. 98, 103-06, 86 P.3d 1042, 1046-48 (2004) (holding that a parent may present evidence of child abuse that occurred before the entry of the last child custody order because of the presumption that physical custody with an abusive parent is not in the best interest of the child). Thus, modification is not warranted unless a change has occurred regarding the factual considerations under NRS 125B.070 or 125B.080(9). *See Mosley*, 113 Nev. at 58, 930 P.2d at 1114 (requiring a substantial change in circumstances to modify a joint custody order).

The Legislature has specified other scenarios under which a court may modify a support order. These scenarios are examples of changes in circumstances that warrant modification of a support order. For example, inaccurate or falsified financial information that results in an inappropriate support award is a ground for modification of the award. NRS 125B.080(2). After a child support order has been entered, any subsequent modification must be based on changed circumstances except (1) pursuant to a three-year review under NRS 125B.145(1), (2) pursuant to mandatory annual adjustments of the statutory maximums under NRS 125B.070(3), or (3) pursuant to adjustments by the Division of Welfare and Supportive Services under NRS 425.450. NRS 125B.080(3).

[Headnote 33]

Under NRS 125B.145(1), the district court must review the support order if three years have passed since its entry. The district court must then consider the best interests of the child and determine whether it is appropriate to modify the order. NRS 125B.145(2)(b). Modification is appropriate if there has been a factual or legal change in circumstances since the district court entered the support order. Upon a finding of such a change, the district court can then modify the order consistent with NRS 125B.070 and 125B.080. *Id.* Therefore, although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order.

Each of these three situations, which the Legislature has specified as warranting modification of a support order, is grounded in a change in a party's factual circumstances. NRS 125B.145(4) expressly states that the district court may review a child support order ''at any time on the basis of changed circumstances.'' Specifically, the new child support order must be supported by factual findings that a change in support is in the child's best interest and the modification or adjustment of the award must comply with the requirements of NRS 125B.070 and NRS 125B.080. *See* NRS 125B.145(2)(b). Moreover, under NRS 125B.080(9), the court is mandated to consider 12 different factors when considering whether to adjust a child support award, thereby requiring the moving party to show a change in factual circumstances that may justify a modification or adjustment to an existing child support order.

2. *Scott v. Scott*

Ms. Rivero cites to *Scott v. Scott*, 107 Nev. 837, 840, 822 P.2d 654, 656 (1991), for the proposition that a court can modify a child support order according to the statutory formula without a finding of changed circumstances. In *Scott*, this court stated that ''[a] child support award can be modified in accordance with the statutory formula, regardless of a finding of changed circumstances.'' 107 Nev. at 840, 822 P.2d at 656 (relying on *Parkinson v. Parkinson*, 106 Nev. 481, 483 & n.1, 796 P.2d 229, 231 & n.1 (1990)). As shown above, a change in circumstances is required to modify an existing child support order. Thus, the statement made in *Scott*, that changed circumstances is not required, is incorrect. Therefore, to the extent that *Scott* conflicts with this clarification, we disaffirm that case on that point for two reasons.

First, *Scott*'s holding was based on changed factual circumstances. In *Scott*, the custodial parent moved the district court for modification of the child support order in accordance with NRS 125B.070, seeking the statutory maximum of the noncustodial parent's gross monthly income, including any overtime pay. 107 Nev. at 839, 822

P.2d at 655. Six months later, the district court modified the child support order, finding that the custodial parent's loss of a roommate constituted a ''substantial change of circumstances.'' *Id*. The district court, however, deviated down from the statutory maximum based on the fact that the noncustodial parent had remarried and was responsible for two additional children. *Id*. at 840, 822 P.2d at 656. The noncustodial parent appealed on the basis that there was not a ''substantial change of circumstances justifying modification of the child support award.'' *Id*. at 840, 822 P.2d at 656.

Without explaining that a custodial parent has the right to obtain child support in accordance with the statutory formula, as noted in footnote 1 in *Parkinson*, 106 Nev. at 483, 796 P.2d at 231, the *Scott* court expanded this rule to suggest that any child support award can be modified regardless of a change in circumstances. 107 Nev. at 840, 822 P.2d at 656. The *Scott* court, however, went on to consider whether the district court abused its discretion when it deviated from the statutory formula when it considered several factors enumerated in NRS 125B.080(9) to reduce the noncustodial parent's support obligation. *Id*. at 840-41, 822 P.2d at 656. The *Scott* court concluded that the district court did not abuse its discretion, but the rationale is unclear. *Id*. It is unclear whether the *Scott* court determined that the district court properly found a change in circumstances or properly determined child support under NRS 125B.070 and NRS 125B.080(9). However, regardless of the rationale, to the extent that *Scott* suggests that changed circumstances are not necessary to modify a support order, it misstates the law.

Second, in relying on *Parkinson*, the *Scott* court erroneously expanded the comment made in footnote 1 in *Parkinson*, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1. In that footnote, the *Parkinson* court mischaracterized the holding in *Perri v. Gubler*, 105 Nev. 687, 782 P.2d 1312 (1989). *Parkinson*, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1. In *Perri*, the father had custody of the children and the parties agreed that the mother would not pay child support to the father. 105 Nev. at 688, 782 P.2d 1313. Upon the father's motion, the district court modified the decree to require the mother to pay child support to the father. *Id*. The *Perri* court reversed, concluding that because the father provided inaccurate financial information to the district court, the district court would be unable to find that the father's circumstances had changed to warrant a modification of the support order. *Id*. This court's decision was correct under Nevada caselaw and under the newly amended NRS 125B.080(3), requiring changed circumstances to modify a support order when the parties did not stipulate to the support. 1989 Nev. Stat., ch. 405, § 14, at 859; *see Harris v. Harris*, 95 Nev. 214, 216 & n.2, 591 P.2d 1147, 1148 & n.2 (1979) (interpreting former NRS 125.140(2) as allowing courts to modify child custody and support awards to accommodate changes in circumstances after entry of the order). Although the

*Perri* court did not cite to NRS 125B.080(3), it properly reasoned that because the father had provided inaccurate financial information, he had not adequately proven any changed circumstances warranting modification of the support decree. *Perri*, 105 Nev. at 688, 782 P.2d at 1313.

However, the *Parkinson* court disavowed *Perri* insofar as it required a showing of changed circumstances to modify a support order. *Parkinson*, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1. The *Parkinson* court cited to NRS 125B.080(1)(b) and (3) to support this proposition. *Id*. We conclude that the *Parkinson* court misread NRS 125B.080(1)(b) and (3). At the time of the *Parkinson* decision, as it does now, NRS 125B.080(1)(b) required courts to apply the statutory formula regarding any motion to modify child support filed after July 1, 1987. 1989 Nev. Stat., ch. 405, § 14, at 859. NRS 125B.080(3) stated that once a court had established a support order pursuant to the statutory formula, ''any subsequent modification of that support must be based upon changed circumstances.'' 1989 Nev. Stat., ch. 405, § 14, at 859. The plain language of the statute at the time required changed circumstances to modify an existing support order that was properly ordered pursuant to the statutory formula. Thus, we now disaffirm the footnote in *Parkinson*, 106 Nev. at 483 & n.1, 796 P.2d at 231 & n.1, which states a party may seek modification of a support order without changed circumstances. Accordingly, *Scott*'s reliance on this proposition is also erroneous. 107 Nev. at 840, 822 P.2d at 656.

In conclusion, we retreat from *Parkinson* and *Scott* to the extent that they may be read to allow a court to modify an existing child support order without a change in circumstances since the court issued the order.

Having clarified the circumstances under which a district court may modify a child support order, we note that this case is an example of the immediate and repetitive motions that can plague the district court, even after the parties have stipulated to child support. Less than two months after the district court entered the parties' divorce decree, in which they agreed that neither party would receive child support, Ms. Rivero moved the court for child support. Then she did so again, 11 months later. Such constant relitigation of a court order, especially one to which the parties stipulate, is pointless absent a change in the circumstances underlying the initial order.

B. *Calculating child support*

The Family Law Section suggests that we reformulate the *Rivero* child support formula set forth in our prior opinion in this case. It notes that the formula assumes a parent contributes to the financial support of the child by merely spending time with the child and shifts the focus of custody disputes to child support rather than the best interest of the child. Consistent with these points, we withdraw

the *Rivero* formula and reaffirm the statutory formulas and the formulas under *Barbagallo* and *Wright*. Because joint physical custody requires a near-equal timeshare, we conclude it is unnecessary to utilize a third formula for cases of joint physical custody with an unequal timeshare.

1. *Calculating child support in cases of primary physical custody*

[Headnote 34]

In cases where one party has primary physical custody and the other has visitation rights, *Barbagallo v. Barbagallo*, 105 Nev. 546, 779 P.2d 532 (1989), controls. Under these circumstances, the court applies the statutory formulas and the noncustodial parent pays the custodial parent support. *Id.* at 548, 779 P.2d at 534. The court may use the factors under NRS 125B.080(9) to deviate from the formulas. The *Barbagallo* court cited ''standard of living and circumstances of the parents'' and the ''earning capacity of the parents'' as the most important of these factors.[9] *Id.* at 551, 779 P.2d at 536. Under the current version of NRS 125B.080, this focus on the financial circumstances of the parties is reflected in several factors, including: ''the relative income of both parents,'' the cost of health care and child care, ''[a]ny public assistance paid to support the child,'' ''expenses related to the mother's pregnancy and confinement,'' visitation transportation costs in some circumstances, and ''[a]ny other necessary expenses for the benefit of the child.'' NRS 125B.080(9). All the other statutory factors, such as the amount of time a parent spends with a child, are of lesser weight. *Barbagallo*, 105 Nev. at 551, 779 P.2d at 536.

[Headnote 35]

We have noted that joint physical custody increases the total cost of raising the child. *Id.* at 549-50, 779 P.2d at 535. As the Family Law Section notes, the amount of time that a parent spends with a child might, but does not necessarily, reduce the cost of raising the child to the custodial parent. *Id.* The amount of time spent with the child, along with the other lesser-weighted factors in 125B.080(9), can serve as a basis for the district court to modify a support award, upon a showing by the secondary custodian that payment of the statutory formula amount would be unfair or unjust given his or her ''substantial contributions of a financial or equivalent nature to the support of the child.'' *Id.* at 552, 779 P.2d at 536. This approach re-

[9]While the *Barbagallo* court cited to the NRS 125B.080(8) factors, NRS 125B.080 has since been renumbered such that these factors are now located in NRS 125B.080(9). 1989 Nev. Stat., ch. 405, § 14, at 860.

mains unchanged by the adoption of the new definition of joint physical custody because it only applies to situations in which one party has primary physical custody and the other has visitation rights.

2. *Calculating child support in cases of joint physical custody*

In cases where the parties have joint physical custody, the *Wright v. Osburn* formula determines which parent should receive child support. 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). We take this opportunity to note that *Wright* overrules *Barbagallo*'s application of the statutory child support formulas in joint physical custody cases. *Barbagallo* directs the court to identify a primary and secondary custodian and order the secondary custodian to pay the primary custodian child support in accordance with the appropriate formula. 105 Nev. at 549, 779 P.2d at 534-35. This is no longer the law.

[Headnotes 36, 37]

Rather, under *Wright*, child support in joint physical custody arrangements is calculated based on the parents' gross incomes. *Id.* at 1368-69, 970 P.2d at 1072. Each parent is obligated to pay a percentage of their income, according to the number of children, as determined by NRS 125B.070(1)(b). The difference between the two support amounts is calculated, and the higher-income parent is obligated to pay the lower-income parent the difference. *Id.* The district court may adjust the resulting amount of child support using the NRS 125B.080(9) factors. *Id.* The purposes of the *Wright* formula are to adjust child support to equalize the child's standard of living between parents and to provide a formula for consistent decisions in similar cases. *Id.*

[Headnotes 38, 39]

The *Wright* formula also remains unchanged by the new definition of joint physical custody. When the parties have joint physical custody, as defined above, the *Wright* formula applies, subject to adjustments pursuant to the statutory factors in NRS 125B.080(9). Under the new definition of joint physical custody, there could be a slight disparity in the timeshare. The biggest disparity would be a case in which one party has physical custody of the child 60 percent of the time and the other has physical custody of the child 40 percent of the time. Still, maintaining the lifestyle of the child between the parties' households is the goal of the *Wright* formula, and the financial circumstances of the parties remain the most important factors under NRS 125B.080(9). *Wright*, 114 Nev. at 1368, 970 P.2d at

1072; *Wesley v. Foster*, 119 Nev. 110, 113, 65 P.3d 251, 253 (2003); *Barbagallo*, 105 Nev. at 551, 779 P.2d at 536. Thus, in a joint physical custody situation, if a party seeks a reduction in child support based on the amount of time spent with the child, the party must prove that payment of the full statutory amount of child support is unfair or unjust, given that party's substantial contributions to the child's support. *Barbagallo*, 105 Nev. at 552, 779 P.2d at 536.

C. *The district court's denial of Ms. Rivero's motion for child support*

[Headnote 40]

Here, in denying Ms. Rivero child support, the district court relied on the divorce decree, in which the parties agreed that neither would receive child support.

[Headnotes 41, 42]

This court reviews the district court's decisions regarding child support for an abuse of discretion. *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Parents have a duty to support their children. NRS 125B.020. When a district court deviates from the statutory child support formula, it must set forth specific findings of fact stating the basis for the deviation and what the support would have been absent the deviation. NRS 125B.080(6). Even if the record reveals the district court's reasoning for the deviation, the court must expressly set forth its findings of fact to support its decision. *Jackson v. Jackson*, 111 Nev. 1551, 1553, 907 P.2d 990, 992 (1995).

In this case, the district court erred by not making specific findings of fact regarding whether Ms. Rivero was entitled to receive child support under NRS Chapter 125B and explaining any deviations from the statutory formulas. Therefore, we reverse the district court's denial of Ms. Rivero's motion for child support. On remand, as discussed above, the district court may only modify the divorce decree upon finding a change in circumstances since the entry of the decree, and must calculate child support pursuant to either *Barbagallo* or *Wright*, as appropriate.

V. *Ms. Rivero's motions for recusal and disqualification*

[Headnote 43]

Ms. Rivero asserts that the district court abused its discretion when the district court judge refused to recuse herself and when the chief judge denied Ms. Rivero's motion to disqualify the judge. According to Ms. Rivero, the district court abused its discretion in not allowing her to file a reply to Mr. Rivero's opposition to the motion to disqualify and by not permitting her to argue the merits at a hearing. We disagree because Ms. Rivero did not prove legally cogniz-

able grounds supporting an inference of bias, and therefore, summary dismissal of the motion was proper.

[Headnotes 44-47]

This court gives substantial weight to a judge's decision not to recuse herself and will not overturn such a decision absent a clear abuse of discretion. *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), *abrogated on other grounds by Halverson v. Hardcastle*, 123 Nev. 245, 266, 163 P.3d 428, 443 (2007). A judge is presumed to be unbiased, and ''the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.'' *Id*. at 649, 764 P.2d at 1299. A judge cannot preside over an action or proceeding if he or she is biased or prejudiced against one of the parties to the action. NRS 1.230(1). To disqualify a judge based on personal bias, the moving party must allege bias that '' 'stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' '' *In re Petition to Recall Dunleavy*, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971)). ''[W]here the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice,'' a court should summarily dismiss a motion to disqualify a judge. *Id*. at 789, 769 P.2d at 1274.

In this case, Ms. Rivero alleged that the district court judge was biased in favor of Mr. Rivero because he is an attractive man and was biased against Ms. Rivero because she is an attractive woman. Ms. Rivero also alleged that the judge was determined to rule only for Mr. Rivero and that the judge was not interested in hearing the case on the merits. The only evidence of these allegations are statements in Ms. Rivero's motion to disqualify and her attorney's affidavit. The hearing transcripts do not reveal any bias on the district court judge's part. Thus, Ms. Rivero has not established legally cognizable grounds for disqualification. *Id*. Accordingly, we conclude that the district court judge did not abuse her discretion when she refused to recuse herself. We also conclude that the chief judge properly denied Ms. Rivero's motion to disqualify the district court judge without considering a reply from Ms. Rivero or holding a hearing on the motion because Ms. Rivero did not establish legally cognizable grounds for an inference of bias. Therefore, summary dismissal of the motion was proper.[10] *Id*.

[10]Ms. Rivero argues that the chief judge abused her discretion because she prevented her from filing a reply brief. However, Ms. Rivero provides no citations to the record indicating that the chief judge refused to allow Ms. Rivero to file a reply brief, nor does Ms. Rivero cite to any authority requiring the chief judge to allow her to file a reply brief. NRAP 28(a)(8)(A); NRAP 28(e)(1).

VI. *The district court's award of attorney fees to Mr. Rivero*

In addition to denying Ms. Rivero's disqualification motion, the district court awarded Mr. Rivero attorney fees arising from defending against the motion. Ms. Rivero argues that the district court abused its discretion when it awarded Mr. Rivero attorney fees because Ms. Rivero had a reasonable basis to move for the district court judge's disqualification. Ms. Rivero also contends that NRS 1.230, which prohibits punishment for contempt if a party alleges that a judge should be disqualified, prohibits an award of attorney fees under NRS 18.010 and sanctions under EDCR 7.60 and NRCP 11. We disagree that the contempt prohibition of NRS 1.230(4) prohibits attorney fees as a sanction for filing a frivolous motion to disqualify a judge. However, we conclude that the district court abused its discretion in awarding attorney fees because substantial evidence does not support the sanction.

A. *Contempt prohibition of NRS 1.230(4)*

[Headnotes 48-50]

Under NRS 1.230(4), ''[a] judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case.'' Contempt preserves the authority of the court, punishes, enforces parties' rights, and coerces. *Warner v. District Court*, 111 Nev. 1379, 1382-83, 906 P.2d 707, 709 (1995). On the other hand, the district court's discretion to award attorney fees as a sanction under NRS 18.010(2)(b), for bringing a frivolous motion, promotes the efficient administration of justice without undue delay and compensates a party for having to defend a frivolous motion.

In this case, the district court did not state the basis for the attorney fees sanction but found that Ms. Rivero's motion to disqualify was meritless. It appears that the district court sanctioned Ms. Rivero to compensate Mr. Rivero for having to defend a frivolous motion, which is explicitly allowed under NRS 18.010(2)(b). This is not akin to the district court holding Ms. Rivero in contempt for simply requesting a change of judge, which is prohibited under NRS 1.230(4). Therefore, the contempt prohibition of NRS 1.230(4) does not apply. Although the contempt provision of NRS 1.230(4) does not prevent the district court from awarding attorney fees as a sanction pursuant to NRS 18.010(2)(b), we conclude that the district court abused its discretion in awarding attorney fees in this case for the reasons discussed below.

B. *Attorney fees sanction for filing a frivolous motion*

[Headnotes 51-54]

This court reviews the district court's award of attorney fees for an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d

727, 729 (2005). The district court may award attorney fees as a sanction under NRS 18.010(2)(b), NRCP 11, and EDCR 7.60(b) if it concludes that a party brought a frivolous claim. The district court must determine if there was any credible evidence or reasonable basis for the claim at the time of filing. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995) (discussing NRS 18.010(2)(b)). Although a district court has discretion to award attorney fees as a sanction, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass. *Id*.

Here, the district court did not explain in its order the basis for awarding Mr. Rivero attorney fees and only noted in its summary order that Ms. Rivero's motion to disqualify the district court judge was without merit. Although Ms. Rivero did not prevail on the motion, and it may have been without merit, that alone is insufficient for a determination that the motion was frivolous, warranting sanctions. Nothing in the record indicates that the district court attempted to determine if there was any credible evidence or a reasonable basis for Ms. Rivero's motion to disqualify. Because the chief judge did not hold a hearing or make findings of fact, no evidence demonstrates that Ms. Rivero's motion was unreasonable or brought to harass. Therefore, we conclude that the district court abused its discretion in sanctioning Ms. Rivero with attorney fees for her motion to disqualify. Thus, we reverse and remand the district court's order granting an award of attorney fees to Mr. Rivero to the district court for further proceedings consistent with this opinion.

## *CONCLUSION*

We conclude that the district court abused its discretion when it determined, without making specific findings of fact, that the parties had joint physical custody and when it modified the custody arrangement set forth in the divorce decree. We therefore reverse and remand this matter to the district court for further proceedings, including a new custody determination pursuant to the definition of joint physical custody clarified in this opinion.

We further conclude that the district court abused its discretion in denying Ms. Rivero's motion to modify child support because it did not set forth specific findings of fact to justify deviating from the statutory child support formulas. We therefore reverse and remand this matter to the district court for further proceedings to calculate child support and modify the decree if modification is proper under the standard set forth in this opinion.

We further conclude that the district court judge properly refused to recuse herself, and the chief judge properly denied Ms. Rivero's motion for disqualification. We therefore affirm the district court's orders regarding the recusal and disqualification.

Finally, we conclude that the district court abused its discretion when it awarded Mr. Rivero attorney fees in relation to Ms. Rivero's motion to disqualify the district court judge. We therefore reverse and remand this matter to the district court for further proceedings consistent with this opinion.

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

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

I respectfully dissent. While I agree that this case presents an opportunity to establish helpful precedent, I disagree with the majority's assessment of the record facts and the law that should apply to them.

This appeal grows out of a stipulated divorce decree. Two family court judges upheld the decree's stipulation for joint physical custody. The only modification either judge made was to adjust the child's residential timeshare arrangement slightly. After taking testimony from the parents, both of whom work, the second judge determined that the parents' days off differed perfectly. Thus, each parent could have the child while the other was at work, minimizing the time the child had to spend in day care, if a one-day adjustment to the residential timeshare was made.

I do not find in the original stipulated decree the inflexible 5/2 timeshare the majority does. After providing for ''joint legal custody and joint physical care, custody and control'' of the parties' daughter, the original decree provided for the father to have the child ''each Sunday at 7 p.m. until Tuesday at 9:00 p.m. *in addition to any time agreed on by the Parties*.'' (Emphasis added.) The residential timeshare, as adjusted, provided for the father to have the child from ''Sunday at 1 p.m. until Wednesday at 2 p.m.''—thus adding a day to the father's allotted two days and two hours per week but deleting the provision giving him such additional ''time agreed on by the Parties'' (who were having trouble agreeing to anything). The second family court judge made an express, on-the-record finding that, as adjusted, the residential timeshare arrangement was consistent with the stipulated decree's provision for joint physical custody—and in the child's best interest. The timeshare adjustment also obviated the mother's argument that the court should not have approved the stipulated decree's provision for a *Wright*-based offset, by which the parties had voluntarily agreed neither would pay child support to the other.

This strikes me as a sensible, maybe even Solomon-like solution. Instead of upholding the family court's exercise of sound discretion, however, the majority reverses and remands these parents to the family court for more litigation. On remand, the family court is directed to establish the exact percentage of time the child has spent with

each parent over the course of the past year;[1] to then apply a newly announced 40-percent formula on which joint physical custody and future child support will depend; and thereafter to enter formal findings, beyond those stated in the decree and in open court, respecting these and other matters.

I submit that this result and the underlying formula the majority adopts are contrary to statute and case precedent. The family court interpreted its decree in a way that was fair, supported by the record, and consistent with applicable law. A sounder result would be to recognize the distinction other courts have drawn between true custody modification and residential timeshare adjustments and support the family court's sound exercise of discretion as to the latter in this case.

## *DISCUSSION*

### *The formulaic approach is inconsistent with Nevada law*

I have a threshold concern with court-mandated formulas, in general, and with the 40-percent joint physical custody formula the majority adopts in this case, in particular, to determine child support and relocation disputes. A legislature has the capacity to debate social policy and to enact, amend, and repeal laws as experience and society dictate. Courts do not. The law courts apply is precedent-driven, or has its origin in statute or constitutional mandate. It is not only that judges tend to be innumerate, or that court-adopted formulas are of suspect provenance—though both are so—it is that laws adopted by judges are difficult to change if they do not work out. Because courts decide individual questions in individual cases, a bad rule of law can take a long time to return to a court; meanwhile, reliance interests counseling against changing that law are built. As the controversy over the original opinion and its withdrawal and replacement in this case suggest, establishing formulas is ordinarily best left to the Legislature.

More specifically troubling, the formulaic approach the majority adopts in this case is inconsistent with the approach the Nevada Legislature in fact chose to take. Thus, in 1987 the Nevada Legislature considered and rejected a proposal that would have established a 40-percent ''joint physical custody'' timeshare test and tied it to a corollary child support formula. A.B. 424, 64th Leg. (Nev. 1987), *discussed in Barbagallo v. Barbagallo*, 105 Nev. 546, 548, 779 P.2d

[1]The formulaic approach is especially problematic where, as here, the family court directs a highly specific timeshare. If the parties have abided by the timeshare directed, they will meet the court's formula and joint physical custody will be established under the formula. If they haven't, we will be incentivizing disregard of a court order and argument over whose fault the departure was. The family court's approach seems preferable, in that it encourages self-determination by enforcing the parties' agreed-upon decree and attempting to interpret it consistently with applicable law and the child's best interest.

532, 534 (1989). Instead of a mathematical formula, the 1987 Legislature adopted the multifactored approach to determining support found in today's NRS 125B.080. *Id*. Based on this history, in 1989 this court held that it is ''inappropriate for the courts to adopt their own formulas when the mathematical approach to adjusting the formula in joint custody cases has been considered and rejected by the legislature.'' *Barbagallo*, 105 Nev. at 550 n.2, 779 P.2d at 535 n.2 (as amended by 786 P.2d 673 (1990)).

The point is not whether a formulaic approach is good policy, providing helpful bright-line rules; or bad policy, creating a hostile ''on the clock'' mentality inconsistent with truly cooperative joint parenting. On this, reasonable policymakers differ, as the foreign state statutes catalogued, *ante* at 424 n.5, 425 n.6, reflect. The point is that percentage time/support formulas are for the Legislature to evaluate, not for the court to establish by fiat.

The 40-percent joint physical custody test the majority adopts today, when tied, as intended, to eligibility for a child support offset under *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998), creates law indistinguishable from that *Barbagallo* says courts should abjure.[2] As a near-contemporaneous judicial interpretation of a controlling statutory scheme, *Barbagallo* should control. *See Neal v. United States*, 516 U.S. 284, 294-95 (1996) (giving ''great weight to stare decisis in the area of statutory construction'' because the legislature ''is free to change this Court's interpretation of its legislation''; the Legislature, not the courts, ''has the responsibility for revising its statutes''; and ''[w]ere we to alter our statutory interpretations from case to case, [the Legislature] would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair'' (internal quotation omitted)).

*The family court's interpretation of its decree was sound*

*The stipulated decree was not irreconcilably inconsistent with joint physical custody*

At its heart, this case asks how we should interpret the parties' stipulated divorce decree. Historically, this court defers to a trial court's interpretation of its own decrees. ''It is the province of the

[2]The majority justifies its adoption of a 40-percent test for joint physical custody as providing needed clarity in parental relocation as well as child support offset cases. *Ante* at 422, citing *Potter v. Potter*, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). Relocation is not an issue here because the stipulated decree provided that if either party moved away from Las Vegas, joint legal custody would continue but primary physical custody would shift to the mother, with liberal visitation, including full summers, for the father. If anything, the decree's relocation provision shows that the parties knew how to distinguish between joint and primary physical custody and meant what they said—an assumption that finds further support in the fact that each had experienced counsel in fashioning the stipulated decree.

trial court to construe its judgments and decrees.'' *Grenz v. Grenz*, 78 Nev. 394, 401, 374 P.2d 891, 895 (1962). Further, ''[w]here a judgment is susceptible of two interpretations, that one will be adopted which renders it the more reasonable, effective and conclusive, and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered.'' *Aseltine v. District Court*, 57 Nev. 269, 273, 62 P.2d 701, 702 (1936) (internal quotation omitted).

Both family court judges acknowledged the tension between the stipulated decree's joint physical custody provision and its original residential timeshare provision. They resolved the tension by giving priority to the parties' overarching agreement to share joint legal and physical custody. The elasticity in the original timeshare provision, which gave the father such additional time ''as agreed to by the Parties'' beyond his specifically allotted time, makes this reading fair. It gives effect to all of the stipulated decree's provisions, and it is consistent with the parties' apparent intent and their frank, on-the-record admissions that neither believed the other was a bad parent, their dispute being mainly over money and scheduling.

The family court judges' reading of the stipulated decree also comports with NRS 125.490, which states: ''There is a presumption, affecting the burden of proof, that joint custody would be in the best interest of a minor child if the parents have agreed to an award of joint custody.'' *See* NRS 125.480(1) and (3)(a) (stating preference for orders awarding joint custody and providing that ''[i]f it appears to the court that joint custody would be in the best interest of the child, the court may grant custody to the parties jointly''; statement of reasons required only if joint custody denied). The parents here ''agreed to an award of joint custody'' and the family court judge specifically stated on the record that she found that the timeshare, as adjusted, was in the child's best interest because it maximized the child's time with each parent instead of at day care. Remanding for further findings regarding custody thus seems unnecessary.

*The mother did not establish a basis to modify child support*

Nor do I find a basis in the record to remand for further findings as to support. While not elaborate, the decree specified the applicable statutory percentage and stipulated that the parties were agreeing to a downward deviation and the basis therefor. It read:

> The parties' respective obligation of child support for the parties' said minor child should are [sic] hereby offset and neither party is ordered to pay to the other child support; that this represents a deviation from the statutory child support formula as set forth in NRS 125B.070 (which states that child support for one child shall be eighteen percent (18%) of the non-custodial

> parent's income), based on the parties' joint legal and physical custody arrangement, pursuant to NRS 125B.080, subsection (9)(j). Each party shall jointly pay for the support and care of the parties' minor child.

In addition, the stipulated decree obligated the father to pay for the child's health insurance at a cost of $80 per month and to contribute $50 per month to an education fund for her, controlled by the child's mother.

As the majority notes, the mother filed successive motions to modify support. In connection with the first motion to modify support, the court minutes reflect that the mother reaffirmed what was represented in the stipulated decree—that ''the parties [stipulated to] share joint custody,'' and that ''the parties' incomes are similar.'' Both motions to modify relied on the alleged inconsistency between the agreement for joint physical custody and the timeshare provision. But read in conformity with the presumption in NRS 125.490, the stipulated decree was not irreconcilably inconsistent with joint physical custody. Further, any theoretical inconsistency was eliminated when the second judge modified the residential timeshare by substituting ''Wednesday'' for such additional time ''as agreed on by the Parties,'' establishing a 4/3 timeshare that falls within the majority's 40-percent rule. Because neither of the underlying motions in this case identified a basis for modifying support besides the asserted lack of true joint physical custody timeshare agreement, further proceedings and findings, beyond those the original decree stated to justify its downward deviation, are unwarranted.[3]

*Adjusting a residential timeshare in a joint physical custody arrangement is appropriate when in the child's best interest*

An agreement to share joint physical custody, interpreted in light of the child's best interest, should determine the appropriate residential timeshare, not the reverse. Citing *Wright*, 114 Nev. at 1368, 970 P.2d at 1071-72, and *Wesley v. Foster*, 119 Nev. 110, 112-13, 65 P.3d 251, 252-53 (2003), the majority states that ''[o]ur law presumes that joint physical custody approximates a 50/50 timeshare.'' I do not read these cases as that definitive—much less as supporting the majority's holding that a residential timeshare arrangement that works out to a child spending less than 40 percent of his or her time

[3]In her reply in support of the motion to disqualify, the mother argued that the father had enjoyed an increase in income that independently justified modifying child support. While this would have been a proper basis to modify support, NRS 125B.145(4), the family court could not consider it since this basis was not raised in either motion to modify, both of which predated the motion to disqualify and the reply in support thereof, where these arguments first emerged. *Cf. Mosley v. Figliuzzi*, 113 Nev. 51, 61, 930 P.2d 1110, 1116 (1997) (holding

with one parent over the course of a year automatically invalidates a presumptively valid agreement for joint physical custody. As we recognized in *Mosley*, 113 Nev. at 54, 930 P.2d at 1112, a decree can validly establish joint physical custody even though the timeshare contemplated at the outset is not a 50/50 (or even a 60/40) arrangement, but one that will require fine-tuning over time.

Joint physical custody may ideally signify something approaching a 50/50 timeshare. However, I am concerned that our judicially mandated 40-percent formula will prove unsatisfactory, especially when used, as intended, to determine support and relocation disputes. Lives change and a child's time is divided, not just between his or her parents, but among friends, school or day care, extended family, sports, and other pursuits. Practical questions seem certain to scuff the bright-line rule—questions like how to count hours the child spends with people besides either parent, or which parent to credit for time the child spends pursuing activities both parents support. Of greater concern, making child support, relocation, and custody determinations depend on parents keeping logs of the number of hours each year a child spends with one parent or the other (leaving aside the calculation and credit questions) detracts from the type of true co-parenting our statutes try to promote. *See* NRS 125.460; NRS 125.490; *see also In re Marriage of Birnbaum*, 260 Cal. Rptr. 210, 214-15 (Ct. App. 1989) (dismissing as a ''popular misconception'' the idea ''that joint physical custody means the children spend exactly one-half their time with each parent''; noting that ''[p]arents' demands for equal amounts of a child's time [can] constitute a disservice to the child''; and that, while ''[i]n some cases the nature of the relationship between the parents may necessitate this kind of inflexibility[ u]sually it is temporary, and when the former spouses have adjusted to their new and limited relationship . . . mathematical exactitude of time is no longer necessary''); Rutter's, *California Practice Guide to Family Law* § 7:358 (2009) (noting that ''[a] joint custody order does *not* mean the child must equally split all of his or her time between the parents''); *see also Mosley*, 113 Nev. at 60, 930 P.2d at 1116 (noting that ''NRS 125.460 dictates the public policy of this state in child custody matters [which is] that the best interests of children are served by frequent associations and a continuing relationship with both parents and by a sharing of parental rights and responsibilities of child rearing'' (internal quotations omitted)).

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parties entitled to a written motion and advance notice of the alleged grounds before a custody modification order is entered). Now that the original decree is more than three years old, the mother is entitled to have its provisions respecting child support reviewed in any event, NRS 125B.145(1), but that is not the basis for reversal and remand.

This case invites us to distinguish between adjusting parents' residential timeshare and formal proceedings to modify custody in the stipulated joint physical custody setting. California Family Code section 3011, like NRS 125.490(1), states a ''presumption affecting the burden of proof'' that agreements providing for joint custody are in a child's best interest. Addressing joint physical custody agreements, several intermediate California courts have exhorted ''parents [to] understand that successful joint physical custody depends upon the quality of the parenting relationship, not the allocation of time.'' *In re Marriage of Birnbaum*, 260 Cal. Rptr. 210, 216 (Ct. App. 1989); *see Enrique M. v. Angelina V.*, 18 Cal. Rptr. 3d 306, 313 (Ct. App. 2004).

Both *Birnbaum* and *Enrique M.* recognize that disputes over the details of residential timeshare arrangements in cases involving joint physical custody are best settled by the parents, not the courts. *Enrique M.*, 18 Cal. Rptr. 3d at 314 (noting that such adjustments are ''not on a par with a request to change physical custody from sole to joint custody, or vice versa''). Thus, they refuse to fuel these disputes by expanding them into full blown custody proceedings, or reviewing them on appeal as if that is what they involve. If the parents cannot agree on the child's schedule, the family court should be held to ''possess[ ] the broadest possible discretion in adjusting coparenting residential arrangements involved in joint physical custody.'' *Birnbaum*, 260 Cal. Rptr. at 216. This rule fosters the policy presuming joint custody to be in a child's best interests and may even ''obviate the need for costly and time-consuming litigation to change custody, which may itself be detrimental to the welfare of minor children because of the uncertainty, stress, and even ill will that such litigation tends to generate.'' *Enrique M.*, 18 Cal. Rptr. 3d at 313 (internal quotation omitted).

The dispute underlying this case is not identical to those presented in *Birnbaum* and *Enrique M.*, since it concerned time spent in day care, and child support, not school choice and residence during the school year. But the underlying principle is similar: When parties have agreed to joint physical custody, absent a showing that some other arrangement is in the child's best interest, courts should try to make that agreement succeed. In my estimation, we do the parties and their child a disservice by remanding this case for more litigation, instead of affirming the family court.

## *CONCLUSION*

In sum, I would uphold the district court's order as consistent with Nevada statutes that presumptively favor joint custody, especially agreed-upon joint custody, and require that before a joint custody decree is modified, it must be shown that the child's best interest requires the modification. As district courts have broad discretion in deciding custody and support, so long as the policies

set by statute are applied, the district court properly adjusted the parties' timeshare agreement and declined to modify the child support obligation to which the parties agreed.

With the exception of the portion of the opinion affirming the order denying disqualification of the family court judge, therefore, I respectfully dissent.

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D.R. HORTON, INC., A DELAWARE CORPORATION, AND RCR COMPANIES, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ALLAN R. EARL, DISTRICT JUDGE, RESPONDENTS, AND FIRST LIGHT HOMEOWNERS ASSOCIATION, A NEVADA NONPROFIT CORPORATION, FOR ITSELF AND FOR ALL OTHERS SIMILARLY SITUATED, REAL PARTY IN INTEREST.

No. 52684

September 3, 2009 215 P.3d 697

Original petition for a writ of mandamus or prohibition challenging a district court order denying partial summary judgment in a constructional defect matter.

The supreme court, HARDESTY, C.J., held that: (1) nonmember developer may challenge whether a homeowners' association may properly institute a constructional defect action in a representative capacity; (2) association has standing to file a representative action on behalf of its members; (3) when association asserts constructional defect claims in a representative capacity, the action must fulfill the requirements of rule governing class action lawsuits; and (4) developer may challenge whether the association's claims are subject to class certification.

**Petition denied.**

[Rehearing denied November 17, 2009]

*Wolfenzon, Schulman & Ryan* and *Bruno Wolfenzon*, Las Vegas; *Koeller Nebeker Carlson & Haluck, LLP*, and *Robert C. Carlson* and *Megan K. Dorsey*, Las Vegas, for Petitioner D.R. Horton, Inc.

*Hansen Rasmussen* and *R. Scott Rasmussen* and *Vadim Veksler*, Las Vegas, for Petitioner RCR Companies.

*Quon Bruce Christensen* and *Nancy E. Quon*, Las Vegas; *Law Office of James R. Christensen, P.C.*, and *James R. Christensen*, Las Vegas; *Maddox, Isaacson & Cisneros, LLP*, and *Troy L. Isaacson* and *Norberto J. Cisneros*, Las Vegas, for Real Party in Interest.

1. MANDAMUS; PROHIBITION.
   Supreme court would exercise its discretion to address merits of developer's petition for writ of mandamus or, alternatively, writ of prohibition regarding trial court's order that denied developer's motion for partial summary judgment in constructional defect action that was brought by homeowners' association on behalf of itself and owners of units in common-interest community; order was not independently appealable, and petition raised important issue of law and public policy regarding standing of association to raise claims on behalf of unit owners. Const. art. 6, § 4; NRS 34.170, 34.330, 116.3102(1)(d).
2. COURTS.
   Supreme court has original jurisdiction to issue writs of prohibition and mandamus. Const. art. 6, § 4.
3. MANDAMUS.
   A writ of mandamus serves to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion.
4. PROHIBITION.
   A writ of prohibition serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction.
5. MANDAMUS; PROHIBITION.
   Ordinarily, supreme court will not consider petitions for extraordinary writ relief where the petitioner challenges a district court order denying a motion for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.
6. ASSOCIATIONS; CONDOMINIUM.
   A nonmember developer may challenge whether a homeowners' association may properly institute against the developer a constructional defect action in a representative capacity on behalf of owners of units in a common-interest community but cannot challenge the internal procedures followed by a homeowners' association in determining to institute the civil action. NRS 116.31088(3); Restatement (Third) of Property: Servitudes § 6.11.
7. ASSOCIATIONS; CONDOMINIUM.
   Under provision of Uniform Common-Interest Ownership Act (UCIOA) governing powers of homeowners' association, association has standing to file a representative action on behalf of its members for constructional defects in individual units of the common-interest community. NRS 116.017(1), 116.093, 116.3102(1)(d); Restatement (Third) of Property: Servitudes § 6.11.
8. ASSOCIATIONS; CONDOMINIUM.
   In the absence of an express statutory grant, a common-interest community's homeowners' association does not have standing to bring suit on behalf of its member owners. NRCP 17(a).
9. STATUTES.
   If a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, supreme court will construe the statute by considering reason and public policy to determine legislative intent.
10. STATUTES.
    Supreme court assumes that, when enacting a statute, the Legislature is aware of related statutes.
11. PARTIES.
    When a common-interest community's homeowners' association asserts constructional defect claims in a representative capacity on behalf of unit

owners, the action must fulfill the requirements of rule governing class action lawsuits. NRS 116.3102(1)(d); NRCP 23.

12. PARTIES.
Though single-family residence constructional defect cases will rarely be appropriate for class action treatment, in some cases, a representative may properly bring a class action lawsuit. NRCP 23.

13. PARTIES.
If common defects predominate over individual claims, constructional defect action involving several residences may be suitable for class action treatment. NRCP 23.

14. PARTIES.
Because rule governing class actions allows a district court to grant conditional class action certification, a court may later revoke class action certification if it determines that certification is problematic and requires individual trials. NRCP 23(c)(1).

15. PARTIES.
Where a common-interest community's homeowners' association brings constructional defect action against developer on behalf of its members, a developer may challenge whether the association's claims are subject to class certification. NRS 116.3102(1)(d); NRCP 23.

16. PARTIES.
When a developer challenges whether constructional defect claims that are brought by common-interest community's homeowners' association on behalf of unit owners are subject to class certification, court must conduct and document a thorough analysis under rule governing class actions; analysis will require the court to consider whether the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy, and whether common questions of law or fact predominate over individual questions, or whether action satisfies one of other two options set forth in the rule. NRS 116.3102(1)(d); NRCP 23.

17. PARTIES.
In a constructional defect case that is brought on behalf of unit owners by a common-interest community's homeowners' association, a shared experience alone does not satisfy the threshold requirements under rule governing class actions; instead, the court must determine, among other issues, which units have experienced constructional defects, the types of alleged defects, the various theories of liability, and the damages necessary to compensate individual unit owners. NRS 116.3102(1)(d); NRCP 23.

18. PARTIES.
District court may classify and distinguish claims that are suitable for class action certification from those requiring individualized proof. NRCP 23(c)(4).

Before the Court EN BANC.

## OPINION

By the Court, HARDESTY, C.J.:

In this petition for extraordinary writ relief, we resolve whether a homeowners' association has standing to pursue constructional defect claims on behalf of its members with respect to alleged defects in individual units in a common-interest community. Because

the provisions of NRS Chapter 116, among other sources, demonstrate that a common-interest community includes individual units, we conclude that under NRS 116.3102(1)(d), a homeowners' association has standing to file a representative action on behalf of its members for constructional defects in individual units of a common-interest community. However, because such actions are filed by a homeowners' association in a representative capacity for individual units, the claims must be analyzed according to class action principles set forth in NRCP 23 and *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 854-57, 124 P.3d 530, 542-44 (2005).

*FACTS AND PROCEDURAL HISTORY*

First Light is a planned, common-interest community that is located in Clark County, Nevada. Real party in interest First Light Homeowners Association (First Light HOA) oversees the community and owns the common areas of the First Light community, and its members own the individual units located within the community. First Light HOA is governed, in part, by First Light HOA's Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements (CC&Rs). The CC&Rs govern, for example, the owners' property and voting rights, the organization of First Light HOA, and the HOA's duties and powers.

In February 2005, First Light HOA filed a complaint in its own name on behalf of itself and the unit owners against petitioner D.R. Horton, the developer of the community. Although individual homeowners were not named as parties to the complaint, First Light HOA alleged various causes of action claiming, in part, that both the individual units and the common areas of the community have constructional defects and deficiencies to, for example, the design and manufacturing of the stucco, drainage, and roofing.

In August 2008, D.R. Horton filed a motion for partial summary judgment with the district court, arguing that First Light HOA lacked standing to assert the majority of the claims because the claims related to individual units and not common areas. Specifically, D.R. Horton argued that NRS 116.3102(1)(d), which permits a homeowners' association to institute litigation ''on behalf of itself or two or more units' owners on matters affecting the common-interest community,'' does not confer standing on the homeowners' association to assert constructional defect claims in individual units.

First Light HOA opposed D.R. Horton's motion for partial summary judgment, arguing, in part, that D.R. Horton lacked standing to challenge First Light HOA's ability to represent individual homeowners on claims related to their units. Additionally, First Light HOA maintained that NRS 116.3102(1)(d) authorizes a homeowners' association to maintain constructional defect claims on behalf of individual units because owners' units are considered a part of the common-interest community.

The district court denied D.R. Horton's motion for partial summary judgment, concluding that NRS 116.3102(1)(d) allows a homeowners' association to file suit on behalf of its members for constructional defects affecting individual units. D.R. Horton filed this petition for a writ of mandamus or, in the alternative, a writ of prohibition, challenging the district court's denial of its partial motion for summary judgment.

## *DISCUSSION*

Before addressing whether NRS 116.3102(1)(d) confers standing upon a homeowners' association to file suit on behalf of its members against a developer for damages caused by constructional defects in individual units, we first consider whether a developer lacks standing to challenge an association's ability to raise claims on behalf of its members.

We conclude that under NRS 116.3102(1)(d), a homeowners' association has standing to assert constructional defect claims in a representative capacity on behalf of individual units. However, because damages are awarded for claims within individual owner units, such actions are subject to class action principles discussed in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 854-57, 124 P.3d 530, 542-44 (2005).

Thus, we conclude that a nonmember developer has standing to challenge whether a homeowners' association may properly assert claims in a representative capacity on behalf of its members. However, a nonmember developer is barred from challenging the adequacy of the internal procedures that a homeowners' association follows before commencing a civil action on behalf of its members.

### *Standard of review*

[Headnotes 1-5]

This court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const. art. 6, § 4. A writ of mandamus serves ''to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion.'' *We the People Nevada v. Secretary of State*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008). A writ of prohibition serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction. *Harvey L. Lerer, Inc. v. District Court*, 111 Nev. 1165, 1168, 901 P.2d 643, 645 (1995). Ordinarily, this court will not consider petitions for extraordinary writ relief where the petitioner challenges a district court order denying a motion for summary judgment, ''unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.'' *ANSE, Inc. v. Dist. Ct.*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008). In addition, these extraordinary remedies may only be issued in cases ''where there is

not a plain, speedy and adequate remedy'' at law. NRS 34.170; NRS 34.330.

Because a district court's order denying summary judgment is not independently appealable, *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001), and D.R. Horton's petition raises an important issue of law and public policy, we exercise our discretion to address the merits of the petition.

*A nonmember developer may challenge whether a homeowners' association may properly institute a constructional defect action in a representative capacity, but cannot challenge the internal procedures followed by a homeowners' association in determining to institute the civil action*

[Headnote 6]

First Light HOA argues that a developer lacks standing to challenge an association's ability to raise claims on behalf of its members, relying on NRS 116.31088(3) and section 6.11 of the Restatement (Third) of Property and its commentary. NRS 116.31088 governs the management of common-interest communities and sets forth the meeting and voting requirements that an association must fulfill before it files a civil action. First Light HOA argues that NRS 116.31088(3), which provides that ''[n]o person other than a unit's owner may request the dismissal of a civil action commenced by the association on the ground that the association failed to comply with any provision of this section,'' precludes a developer from challenging a homeowners' association's ability to file an action in a representative capacity.

We conclude that NRS 116.31088(3) prohibits a nonmember from challenging the adequacy of the procedure underlying the commencement of a civil action. However, nothing in NRS 116.31088 precludes a developer from challenging whether the homeowners' association may properly assert claims in a representative capacity on behalf of its members.[1] Similarly, we conclude that section 6.11 of the Restatement (Third) of Property and its commentary indicate that a nonmember developer is only barred from challenging the adequacy of the internal procedures that a homeowners' association follows before commencing a civil action on behalf of its members.

*A homeowners' association has standing under NRS 116.3102(1)(d) to assert causes of action for constructional defects on behalf of its members*

[Headnote 7]

D.R. Horton argues that First Light HOA does not have standing to assert constructional defect claims on behalf of its members be-

[1]The Restatement reads: ''Except as limited by statute or the governing documents, the association has the power to institute . . . litigation . . . in its own name, on behalf of itself, or on behalf of the member property owners in

cause NRS 116.3102(1)(d) only allows a homeowners' association to assert claims on behalf of the common-interest community, and individual units are statutorily excluded from the definition of the common-interest community. In contrast, First Light HOA argues that it has standing to assert claims affecting individual units because, as defined in NRS 116.093, a unit is considered a part of the common-interest community.

[Headnote 8]

NRS Chapter 116, also known as the Uniform Common-Interest Ownership Act (UCIOA), applies to all common-interest, planned communities. The purpose of the UCIOA is to ''make uniform the law with respect to the subject of this chapter among states enacting it.'' NRS 116.1109(2). The parties dispute whether, under NRS Chapter 116, a homeowners' association has standing to institute an action on behalf of its members for constructional defect claims in individual units. We recognize that in the absence of an express statutory grant, an association does not have standing to bring suit on behalf of its member owners. NRCP 17(a); *Deal v. 999 Lakeshore Association*, 94 Nev. 301, 304, 579 P.2d 775, 777 (1978). Therefore, the question presented by this writ proceeding is whether NRS Chapter 116 provides an express statutory grant of standing on First Light HOA to assert claims affecting individual units within the common-interest community.

NRS 116.3102(1) provides, in pertinent part:

> Except as otherwise provided in subsection 2, and *subject to the provisions of the declaration*, the association may do any or all of the following:
>
> . . . .
>
> (d) Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more units' owners *on matters affecting the common-interest community*.

(Emphases added.) D.R. Horton concedes that NRS 116.3102(1) provides an express statutory grant of standing on a homeowners' association; however, D.R. Horton argues that individual units are not matters that affect the common-interest community, and thus, First Light HOA does not have standing to assert constructional defect

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a common-interest community on matters affecting the community.'' Restatement (Third) of Prop.: Servitudes § 6.11 (2000). The commentary following section 6.11 of the Restatement provides:

> If either the members on behalf of whom the association sues or the association meets normal standing requirements, the question whether the association has the right to bring a suit on behalf of the members is an internal question, which can be raised only by a member of the association.

*Id.* cmt. a.

claims in individual units. Therefore, to resolve this issue, we must determine whether the definition of a common-interest community includes individual units.[2]

[Headnotes 9, 10]

This court has previously held that when the issue presented in an original writ proceeding is a question of statutory interpretation, this court will review the district court's decision de novo. *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). This court has also established that when a statute is facially clear, it will give effect to the statute's plain meaning. *Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). If, on the other hand, a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, this court will construe a statute by considering reason and public policy to determine legislative intent. *Cable v. EICON*, 122 Nev. 120, 124-25, 127 P.3d 528, 531 (2006). This court also assumes that, when enacting a statute, the Legislature is aware of related statutes. *Id.* at 125, 127 P.3d at 531.

We conclude that NRS 116.3102(1) is ambiguous because the statute is susceptible to two reasonable interpretations—either a ''common-interest community'' includes individual units, or it does not. Therefore, we turn to other provisions and definitions contained in NRS Chapter 116, along with the Restatement (Third) of Property and its commentary, to determine the Legislature's intent.

First, we turn to the definitions of ''common-interest community,'' NRS 116.021, ''unit,'' NRS 116.093, and ''common elements,'' NRS 116.017, to determine whether a common-interest community includes individual units. A ''common-interest community'' is defined by NRS 116.021 as ''real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit.'' D.R. Horton argues that the phrase, ''other than that unit'' excludes units from the definition of the common-interest community. However, after reviewing the definitions of ''unit'' and ''common elements,'' we conclude that the phrase, ''other than that unit'' does not exclude units from the common-interest community; rather, it simply expands the definition to require an owner to pay for realty other than *that* unit that he or she owns. A ''unit,'' for example, is defined as ''a physical portion of the common-interest community,'' NRS 116.093, and ''common elements'' include ''all portions of the common-interest community

[2]NRS 116.3102(1) includes a provision to determine whether First Light HOA's CC&Rs limit its standing to assert claims on behalf of individual unit owners. But because the CC&Rs are nearly identical to the provisions of NRS 116.3102(1) and its corresponding definitions, it is not necessary to engage in a separate analysis to determine whether the CC&Rs limit First Light's standing.

other than the units.'' NRS 116.017(1).[3] In other words, by owning property in a ''common-interest community,'' a property owner is obligated to pay certain expenses attached to real estate in addition to the unit he or she owns. The unit, however, is nonetheless part and parcel of the ''common-interest community.'' Thus, we conclude that the collaboration of the definitions of ''common-interest community,'' NRS 116.021, ''unit,'' NRS 116.093, and ''common elements,'' NRS 116.017, lead to the conclusion that units are considered a part of the common-interest community.

Accordingly, we conclude that where NRS 116.3102(1)(d) confers standing on a homeowners' association to assert claims ''on matters affecting the common-interest community,'' a homeowners' association has standing to assert claims that affect individual units.

Our conclusion is further supported by section 6.11 of the Restatement (Third) of Property and its commentary. The Restatement provides that ''[e]xcept as limited by statute or the governing documents, the association has the power to institute . . . litigation . . . in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.'' Restatement (Third) of Prop.: Servitudes § 6.11 (2000). Notably, section 6.11 of the Restatement mirrors the UCIOA section 3-102(a)(4), which grants power to the association to bring suit on behalf of its owners, and after which NRS 116.3102(1)(d) is modeled. *See* Unif. Common Interest Ownership Act § 3-102(a)(4), 7 U.L.A. 934 (1994); Hearing on A.B. 221 Before the Assembly Comm. on Judiciary, 66th Leg., Ex. D (Nev., March 20, 1991); Hearing on A.B. 221 Before the Senate Judiciary Comm., 66th Leg., Ex. C (Nev., May 23, 1991). Comment a to section 6.11 of the Restatement explains:

> If either the members on behalf of whom the association sues or the association meets normal standing requirements, the question whether the association has the right to bring a suit on behalf of the members is an internal question, which can be raised only by a member of the association.

We conclude that the commentary following section 6.11 of the Restatement is persuasive and supports our conclusion that a home-

[3]Other statutory provisions in NRS Chapter 116 support the conclusion that units are a part of the common-interest community. *See, e.g.*, NRS 116.4103(1)(c) (requiring that a public offering statement fully disclose ''[t]he estimated number of units in the common-interest community''); NRS 116.41035 (providing a limitation to the requirements of a public offering statement for ''a common-interest community composed of not more than 12 units''); NRS 116.2107(3) (requiring that a declaration state the method to reallocate interest ''[i]f units may be added to or withdrawn from the common-interest community''); NRS 116.41095 (describing the rights and responsibilities for potential investors who ''enter into a purchase agreement to buy a home or a unit in a common-interest community'').

owners' association may assert claims on behalf of its members. *See Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 583, 97 P.3d 1132, 1137 (2004) (noting that this court will look to the commentary of a model act where a Nevada statute is patterned after the act).

[Headnote 11]

Nevertheless, we recognize that because NRS 116.3102(1)(d) and section 6.11 of the Restatement permit a homeowners' association to file an action in a representative capacity, the statutory grant must be reconciled with the principles and analysis of class action lawsuits and the concerns related to constructional defect class actions, which this court addressed in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). Indeed, the commentary to Restatement (Third) of Property section 6.11, which reaffirms that a homeowners' association has standing to assert claims affecting individual units, also provides, ''[i]n suits where no common property is involved, the association functions much like the plaintiff in a class-action litigation, and questions about the rights and duties between the association and the members with respect to the suit will normally be determined by the principles used in class-action litigation.'' Restatement (Third) of Prop.: Servitudes § 6.11 cmt. a (2000).

Therefore, because a homeowners' association functions much like a plaintiff in a class action, we conclude that when an association asserts claims in a representative capacity, the action must fulfill the requirements of NRCP 23, which governs class action lawsuits in Nevada. And we turn to both NRCP 23 and the principles expressed in *Shuette* to determine how ''questions about the rights and duties between the association and the members,'' Restatement (Third) of Prop.: Servitudes § 6.11 cmt. a, shall be resolved. When describing the policy behind class action lawsuits, this court has declared that ''class actions promote efficiency and justice in the legal system by reducing the possibilities that courts will be asked to adjudicate many separate suits arising from a single wrong.'' *Shuette*, 121 Nev. at 846, 124 P.3d at 537. However, in *Shuette*, this court announced that because a fundamental tenet of property law is that land is unique, ''as a practical matter, single-family residence constructional defect cases will rarely be appropriate for class action treatment.'' *Id.* at 854, 124 P.3d at 542. In other words, because constructional defect cases relate to multiple properties and will typically involve different types of constructional damages, issues concerning causation, defenses, and compensation are widely disparate and cannot be determined through the use of generalized proof. *Id.* at 855, 124 P.3d at 543. Rather, individual parties must substantiate their own claims and class action certification is not appropriate. *Id.*

[Headnotes 12-14]

However, in some constructional defect cases, a representative may properly bring a class action lawsuit. *Id*. at 856, 124 P.3d at 544. If, for example, common defects predominate over individual claims, the action may be suitable for class action treatment. *Id*. at 857, 124 P.3d at 544. Because constructional defect actions may be complex, it is particularly important for the district court to thoroughly analyze NRCP 23's requirements and document its findings. *Id*. In addition, because NRCP 23(c)(1) allows a district court to grant conditional class action certification, a court may later revoke class action certification if it determines that certification is problematic and requires individual trials. *Id*. at 857-58, 124 P.3d at 544.

[Headnotes 15-18]

We conclude that representative actions filed by homeowners' associations are amenable to the same treatment as class action lawsuits brought by individual homeowners, which we discussed in *Shuette*. Therefore, where a homeowners' association brings suit on behalf of its members, a developer may, under *Shuette*, challenge whether the associations' claims are subject to class certification. In doing so, the district court must conduct and document a thorough NRCP 23 analysis. This analysis will require the court to consider whether the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy, and, as in *Shuette*, whether ''common questions of law or fact predominate over individual questions,'' or whether the action satisfies one of the other two options set forth in NRCP 23(b).[4] *See id*. at 846, 850, 124 P.3d at 537, 539. Indeed, we emphasize that a shared experience alone does not satisfy the threshold requirements under NRCP 23. *See id*. at 858, 124 P.3d at 545. Instead, the court must determine, among other issues, which units have experienced constructional defects, the types of alleged defects, the various theories of liability, and the damages necessary to compensate individual unit owners. And if necessary, NRCP 23(c)(4) allows the district court to certify a class action with respect to certain issues or subclasses. To that end, the district court may classify and distinguish claims that are suitable for class action certification from those requiring individualized proof.

In sum, a homeowners' association filing a suit on behalf of its members will be treated much the same as a plaintiff in class action

[4]Specifically, in addition to considering whether common questions of law or fact predominate over claims concerning individual units, the district court, upon determining that the prerequisites enumerated in NRCP 23(a) are satisfied, could also consider whether the class action satisfies NRCP 23(b)(1) or (2).

litigation. Although an association has standing to assert claims on behalf of its members, the suit must fulfill the requirements of NRCP 23 and the principles and concerns discussed in *Shuette*.

*CONCLUSION*

D.R. Horton's petition raises important issues of law and public policy related to a developer's standing to challenge a homeowners' association's right to bring an action, and a homeowners' association's standing to assert causes of action on behalf of individual unit owners within a common-interest community. We conclude that because a common-interest community includes both common elements and units, a homeowners' association has standing under NRS 116.3102(1)(d) to assert a cause of action against a developer for constructional defects within individual units. Additionally, although a developer may not challenge the internal procedures that an association uses before filing an action, the developer has standing to challenge the nature of the alleged damages and whether an association may, in accordance with NRCP 23, file a representative action on behalf of individual homeowners.

In this case, First Light HOA alleged various causes of action against D.R. Horton, claiming, in part, that both the individual units and the common areas of the community have defects and deficiencies pertaining to, for example, the design and manufacturing of the community, stucco, drainage, and roofing. In accordance with our analysis, we direct the district court to review the claims asserted by First Light HOA to determine whether the claims conform with class action principles, and thus, whether First Light HOA may file suit in a representative capacity for constructional defect claims within individual units. Accordingly, we deny the petition and instruct the district court to conduct further proceedings consistent with this opinion.

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

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THOMAS DOBRON, INDIVIDUALLY, APPELLANT, *v.* DEL BUNCH, JR., AND ERNESTINE L. BUNCH, RESPONDENTS.

No. 48730

September 10, 2009 215 P.3d 35

Appeal from a district court judgment awarding attorney fees as damages in a contract action. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

After creditor successfully defended against debtors' claims of usury, creditor brought action against guarantor to loans, seeking attorney fees and costs that were incurred during the usury lawsuit. The district court entered judgment in favor of guarantor. The supreme court remanded, concluding that attorney fees were potentially recoverable in an independent action based on the guaranty agreement. On remand, the district court found that creditor was entitled to attorney fees as damages under the guaranty agreement because defending the usury action directly affected its ability to collect the full amount of the loans, and that sufficient proof had been presented to support the amount of attorney fees awarded. Guarantor appealed. The supreme court, HARDESTY, C.J., held that guarantor was not liable under guaranty agreement for attorney fees incurred by creditor in defending against usury action brought by debtors.

**Reversed.**

*Wingert Grebing Brubaker & Goodwin LLP* and *Stephen C. Grebing*, Henderson; *John S. Addams*, San Diego, California, for Appellant.

*Ellsworth, Moody & Bennion* and *Charles W. Bennion*, Las Vegas, for Respondents.

1. GUARANTY.
   Guarantor was not liable for attorney fees incurred by creditor in defending against usury action brought by debtors, which action did not include any affirmative effort on creditor's part to collect any of the underlying loans; creditor's defense of the usury action did not fall within the attorney fees provision of the guaranty agreement because it was not an action to collect or compromise the loan.
2. APPEAL AND ERROR.
   The supreme court reviews the interpretation of a contract de novo.
3. GUARANTY.
   General contract interpretation principles apply to interpret guaranty agreements.
4. COSTS.
   Where a contract provision purports to allow attorney fees in an action arising out of the terms of the instrument, the court will not construe the provision to have broader application.

Before the Court EN BANC.

## OPINION

By the Court, HARDESTY, C.J.:

This appeal raises the issue of whether a guarantor to a loan may be held liable for attorney fees incurred by the lender in defending

a usury action brought by the borrowers. We have previously held that a guarantor's obligation to a lender under a guaranty agreement should be strictly construed and will not require a guarantor to be responsible for obligations beyond those specified in the guaranty agreement. But we have also recognized a distinction between a surety who is compensated and one who is not and eliminated the strict construction rule in favor of the surety when the surety is compensated. While our prior precedent is unclear as to the application of this distinction to guaranty agreements, we nevertheless conclude that such a distinction is no longer necessary. Consequently, when interpreting a guaranty agreement, whether a guarantor is compensated is not relevant, and rather than apply a strict rule of construction, we will apply general contract construction rules.

In this case, the guaranty agreements stated that an obligation to pay attorney fees exists only in ''collecting or compromising any such indebtedness'' or in the enforcement of the guaranty agreement against the guarantor. Under general contract rules, specifically the rule that an attorney fees provision will not be interpreted more broadly than written, we conclude that the guarantor was not liable for attorney fees incurred by the lender in defending a usury action that did not include any affirmative effort on the part of the lender to collect any of the underlying loans. Accordingly, we reverse the district court's judgment awarding attorney fees to respondents.

## *FACTS*

Appellant Thomas Dobron owned a number of companies that borrowed money from respondents Del Bunch, Jr., and Ernestine L. Bunch and their company. The transactions were incorporated into five different loan agreements. In connection with these loans, Dobron signed guaranty agreements with the Bunches, in which he promised to repay the loans if the companies failed to do so. All of the guaranty agreements contained identical language, except for the identification of which loan was guaranteed.

Shortly after entering into the loans, the Dobron companies filed a usury action against the Bunches in California, claiming that the interest rate on the loans was usurious and therefore illegal. Dobron, personally, was not a party to that action. Under California's usury law, if a loan's interest rate is usurious, the borrower can recover three times the amount of interest paid in damages. The Bunches successfully removed the case to federal court and then transferred it to Nevada. The Nevada federal district court held that Nevada law applied to the loans, and as Nevada does not have a usury law, ruled in favor of the Bunches. The Ninth Circuit Court of Appeals affirmed. In the Ninth Circuit, the Bunches requested that the case be remanded to the Nevada federal district court for a determination of attorney fees and costs. This request was granted, however, the

Bunches never sought the attorney fees or costs in the federal district court.

Approximately one year later, the Bunches filed suit in the Nevada state district court against Dobron personally, seeking attorney fees and costs that were incurred during the usury lawsuit. The Bunches based their claim on section 8 of the guaranty agreement, which states in relevant part that the ''Guarantor [Dobron] shall also pay Lender's [the Bunches'] reasonable attorneys' fees and all costs and other expenses which Lender expends or incurs in collecting or compromising any such indebtedness or in enforcing this Guarantee against Guarantor.'' Following a short bench trial, the district court found in favor of the Bunches, and Dobron appealed.

After concluding that attorney fees were potentially recoverable in an independent action based on the guaranty agreement, this court remanded the case to the district court and directed the court to make specific findings as to whether the guaranty agreement provided for attorney fees for the Bunches' defense of the usury action and whether the amount of attorney fees was properly proved as damages based on the guaranty agreement. On remand, the district court found that the Bunches were entitled to attorney fees as damages under the guaranty agreement because defending the usury action directly affected their ability to collect the full amount of the loans, and that sufficient proof had been presented to support the amount of attorney fees awarded. The present appeal ensued.

## *DISCUSSION*

### *Determining the appropriate standard of review*

[Headnotes 1-3]

We review the interpretation of a contract de novo. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Previously, this court has held that the obligation of a guarantor will be strictly construed, *Adelson v. Wilson & Co.*, 81 Nev. 15, 21, 398 P.2d 106, 109 (1965), and we will not require the guarantor to be responsible for anything beyond what it clearly agreed to pay. *Homewood Inv. Co. v. Wilt*, 97 Nev. 378, 381, 632 P.2d 1140, 1143 (1981). This court has also held, however, in the context of interpreting a surety agreement, that the strict construction rule in favor of the surety does not apply when there is a compensated surety. *Zuni Constr. Co. v. Great Am. Ins. Co.*, 86 Nev. 364, 367, 468 P.2d 980, 982 (1970). While it is unclear how our prior precedent has applied this compensated/uncompensated distinction to guaranty contracts, we conclude that there is no sound reason to continue to use such distinctions, and thus, we reject any further use of different treatment based on whether the guarantor is compensated. In connection with removing the distinction of whether a guarantor is compensated, we

eliminate the construction rule that a guaranty agreement be strictly construed in any party's favor. Instead, general contract interpretation principles apply to interpret guaranty agreements.

This conforms with the modern trend stated in Restatement (Third) of Suretyship and Guaranty, section 14, comment c (1996). *See also WXI/Z Southwest Malls v. Mueller*, 110 P.3d 1080, 1083 (N.M. Ct. App. 2005). The elimination of determining whether a party is compensated and the special interpretation rule provides a clearer, less mechanical approach to the interpretation of guaranty agreements and, as recognized by the Restatement, the policy behind the strict interpretation rule to protect an accommodating guarantor who is not in the guaranty business and derives no compensation from entering into the guaranty agreement is still covered by other general contract interpretation rules and substantive law protections.

Following this new approach in the present case, the applicable general contract interpretation rule concerns the interpretation of attorney fees provisions. This court has held that ''[w]here a contract provision purports to allow attorney's fees in an action arising out of the terms of the instrument, we will not construe the provision to have broader application.'' *Campbell v. Nocilla*, 101 Nev. 9, 12, 692 P.2d 491, 493 (1985). Such a rule has been applied on more than one occasion to determine that an attorney fees provision in a guaranty agreement that relates to collecting on the underlying note or loan, but that does not expressly state that it applies to enforcement of the guaranty agreement itself, results in no recovery for attorney fees by a lender when bringing suit against the guarantor to enforce the guaranty agreement. *See Servaites v. Lowden*, 99 Nev. 240, 246, 660 P.2d 1008, 1012 (1983); *Securities Investment Co. v. Donnelley*, 89 Nev. 341, 349, 513 P.2d 1238, 1243 (1973).

*The guaranty agreement's attorney fees and costs provision*

The main issue raised in this appeal concerns whether the guaranty agreement provides for the recovery of attorney fees and costs incurred in defending the usury action. The attorney fees provision in the guaranty agreement provides two bases for recovery of attorney fees from the guarantor—the lender's attempts to ''collect or compromise'' the loan and the enforcement of the guarantee agreement:

> Guarantor [Dobron] shall also pay Lender's [the Bunches'] reasonable attorneys' fees and all costs and other expenses which Lender expends or incurs in collecting or compromising any such indebtedness or in enforcing this Guarantee against Guarantor, whether or not suit is filed, including, without limitation, all such fees, costs and expenses incurred in connection with any insolvency, bankruptcy, reorganization, arrangement or other similar proceedings involving Guarantor which in any way

> affect the exercise by Lender of its rights and remedies hereunder.

The attorney fees at issue here were incurred in the defense of the usury action and did not involve an action to enforce the guaranty agreement, especially in light of the fact that Dobron, the guarantor, was not even a party to the usury action. Thus, the only issue before us for resolution is whether the defense of the usury action falls under the ''collecting or compromising'' language of the guaranty agreement as a basis for the recovery of attorney fees and costs. We conclude that it does not.

Dobron argues that defending the usury action does not fit within the meaning of ''collecting or compromising'' on the loan, and therefore, he cannot be held liable for the attorney fees and costs incurred. He points to the fact that the Bunches instituted separate actions to collect on the debts to support his assertion that the defense in the usury action was not a collection or compromise.

The Bunches contend that their defense in the usury action meets the requirement of ''collecting or compromising'' the loan because if they had not defended the suit they would have lost the ability to collect a large amount of the loans. The Bunches note that California's usury laws allow for treble damages, and in the usury case, the Dobron companies sought recovery of damages in excess of $2,700,000, while the loans were for $5,708,000. Thus, according to the Bunches, if they failed to defend the action, their ability to collect the loans would have been reduced substantially.

The district court held that the defense in the usury action fell under the guaranty agreement because the Bunches had to defend it in order to be able to collect the full amount of the loans given to the companies. Therefore, the court determined that the defense was sufficient to meet the requirement that the fees be incurred in ''collecting'' the loans.

[Headnote 4]

As stated above, we apply general contract interpretation rules to determine whether the clause at issue provides for the recovery of attorney fees. The applicable contract interpretation rule in this case is that ''[w]here a contract provision purports to allow attorney's fees in an action arising out of the terms of the instrument, we will not construe the provision to have broader application.'' *Campbell v. Nocilla*, 101 Nev. 9, 12, 692 P.2d 491, 493 (1985). Applying this rule to the present case, we conclude that the Bunches' defense of the usury action did not fall within the attorney fees provision of the guaranty agreement because it was not an action to collect or compromise the loan. There was no affirmative effort on the part of the Bunches to recover the debt from either the borrowers or the guarantor Dobron in the usury action. In fact, the Bunches elected in-

stead to file separate actions to collect the debts, in which they were entitled to recover attorney fees pursuant to the guaranty agreement. The language of the guarantee agreement does not provide, however, for the recovery of attorney fees for defending the usury claim that did not also involve an attempt to collect under the loans.

*Additional authority supports the conclusion that the guaranty agreement's attorney fees provision does not allow for the recovery of attorney fees when there is no affirmative attempt to collect or compromise the loans*

Our conclusion is supported by this court's holding in *Campbell v. Nocilla*, 101 Nev. 9, 692 P.2d 491 (1985). In *Campbell*, the owners of real property brought a declaratory relief action against their real estate agent, seeking indemnification for damages from breach of contract claims brought by potential buyers of the property. *Id*. at 10, 692 P.2d at 492. Judgment was entered in favor of the real estate agent, along with attorney fees pursuant to the real estate listing agreement, which stated that the real estate agent was entitled to fees if suit was brought to enforce the contract. *Id*. at 10-12, 692 P.2d at 492-93. This court reversed the attorney fees award and determined that the property owner's declaratory relief action did not involve enforcement of the contract, and therefore, the real estate agent was not entitled to attorney fees for defending the indemnification claim. *Id*. at 12, 692 P.2d at 493. The present case is comparable to the *Campbell* case, in that the usury action, similar to the declaratory relief action in *Campbell*, was not brought specifically to collect or enforce the underlying debts, and as a result, attorney fees are not recoverable because the action does not fall under the specific provision in the contract allowing for recovery of fees.

Court decisions in other jurisdictions, which narrowly construe attorney fees obligations pursuant to guaranty agreements, are also consistent with our holding today. *See First Nat. Park Bank v. Johnson*, 553 F.2d 599, 602-03 (9th Cir. 1977) (holding that an attorney fees provision allowing for recovery of attorney fees for enforcing a note did not provide for recovery of attorney fees in an action against the guarantor to enforce the guaranty agreement); *In re LCO Enterprises, Inc.*, 180 B.R. 567, 570-71 (B.A.P. 9th Cir. 1995) (holding that attorney fees incurred by the lessor in defending a bankruptcy preference action by the lessee's bankruptcy trustee to recover money paid to the lessor were not recoverable under an attorney fees provision in a lease agreement because it was not an action to enforce the lease contract); *In re Wetzler*, 192 B.R. 109, 119-20 (Bankr. D. Md. 1996) (holding that one of several guarantors on a guaranty agreement who incurred attorney fees to settle a claim by the lender against the guarantors could not recover a portion of those attorney fees from another guarantor because the guaranty agree-

ment only provided for attorney fees for enforcing payment of the underlying note or performance of the guaranty, and the settlement agreement was not an action by the guarantor to enforce the note or the guaranty agreement). Particularly supportive of our conclusion is *Zimmerman v. First Production Credit Ass'n*, 412 N.E.2d 216 (Ill. App. Ct. 1980). In *Zimmerman*, the obligor on a note brought a declaratory relief action seeking a court order that the note was unenforceable. The note contained an attorney fees provision that required the obligor on the note to pay attorney fees if the note was given to an attorney or a lawsuit was instigated to collect on the note. *Id.* at 217. In resolving the appeal, the Illinois court addressed whether the obligor had to pay attorney fees to the payee on the note for the payee's defense of the declaratory relief action seeking to have the note invalidated. *Id.* The court concluded that, because the suit was not an attempt to collect on the note, attorney fees were not available pursuant to the attorney fees clause. *Id.* The defense of the declaratory relief action to invalidate the note directly affected the payee's ability to collect on the note. The court concluded, however, that because there was no affirmative effort to collect on the note, attorney fees were unavailable according to the language of the attorney fees clause. *Id.*

Likewise, in the present case, while the defense of the usury action may have had a potential impact on the lenders' ability to collect the debts, the absence of an affirmative action to recover the loans precludes recovery of attorney fees under section 8 of the guaranty agreement. While the *Zimmerman* court also relied on the contract construction rule that a contract will be construed against the drafter, which does not apply in the present case because the parties have not provided evidence or argument regarding which party drafted the guaranty agreement, the reasoning of the *Zimmerman* court regarding the interpretation of the attorney fees clause requiring an attempt to collect on the note to recover attorney fees is still persuasive and supports our conclusion in the present case.

*Dobron would not have necessarily benefited from the usury action*

In concluding that the guaranty agreement does not provide for the recovery of attorney fees in this case, we reject the Bunches' assertion that Dobron would have necessarily benefited from a successful usury action. Dobron did not initiate the action and was not a party to the usury suit. In addition, as guarantor, Dobron's obligation on the loans was contingent in the context of the usury action because he was not required to make any payments on the loans unless and until the borrower defaulted. As the usury action was instituted by the borrowers and neither the borrowers nor the Bunches sought to bring Dobron into the action under an argument that he was currently responsible for payment of the notes, the usury action

did not directly benefit Dobron.[1] Thus, there is no support for the argument that Dobron would necessarily have benefited from the usury action and therefore should be liable for the attorney fees.

*CONCLUSION*

Based on the language of the guaranty agreement, we conclude that Dobron was not liable for the Bunches' attorney fees in defending the usury action brought by the borrowers of the loans. The defense of the usury action did not constitute a recovery action by the Bunches. Therefore, since there was no affirmative attempt to collect or compromise the loans, the attorney fees provision in the guaranty agreement does not allow for the recovery of attorney fees. Accordingly, we reverse the judgment of the district court.

PARRAGUIRRE, DOUGLAS, SAITTA, and GIBBONS, JJ., concur.

PICKERING, J., with whom CHERRY, J., agrees, concurring:

I join the majority based on the particular attorney fees clause involved. The guaranty provided for the Bunches, as ''Lender,'' to recover fees the ''Lender expends or incurs in collecting or compromising [the] indebtedness . . . .''[1] Fees spent to defend the borrower's usury suit, which apparently did not involve any affirmative claims by the Bunches against the borrower, were not incurred by the Bunches ''in collecting or compromising [the] indebtedness.'' Unlike California, Cal. Civ. Code § 1717, Nevada permits one-sided attorney fees clauses, *see Trustees, Carpenters v. Better Building Co.*, 101 Nev. 742, 746-47, 710 P.2d 1379, 1382 (1985), but the one-sided clause in favor of the lender in this case ended up being too restrictive to cover fees incurred defensively.

I write separately to emphasize that the outcome depends on the fee clause involved. If the clause here had been worded more broadly, fees incurred defensively might well have been recoverable, even though incurred in a separate suit. *See Exchange Nat. Bank of Chicago v. Daniels*, 763 F.2d 286, 294 (7th Cir. 1985) (upholding award of fees incurred to defend separate suits and counterclaims be-

[1]In fact, it is possible that the usury action negatively affected Dobron, as he potentially could have raised a usury defense himself in a future collection action against him under the guaranty agreement. He could be precluded from raising such a defense based on the borrowers' usury action under issue preclusion principles. We need not address this issue, however, as the parties did not argue this point and it is unnecessary for resolution of this appeal.

[1]The language at the end of the fee clause saying it applies to a range of reorganization or insolvency proceedings doesn't help. It is self-limiting, applying to fees incurred in ''proceedings involving Guarantor which in any way affect the exercise by Lender of its rights and remedies hereunder.'' The guarantor is Dobron, who was not a party to the usury suit, and the reference to the lender's ''rights and remedies hereunder'' applies to the guaranty, not the note. The fees at issue here were incurred to defend the Bunches' rights against the borrower under the note, not rights against Dobron under the guaranty.

cause the fee clause ''authorize[d] fees for all work in both the 'collection' and the 'enforcement' of the note''); *Thunderbird Investment Corporation v. Rothschild*, 97 Cal. Rptr. 112, 118 (Ct. App. 1971) (upholding award of fees incurred to defend a note's interest provisions against a usury challenge where the fee clause provided for fees ''[i]f action be instituted on this note''); *see also Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 524-25 (2d Cir. 1990) (discussing differences among various fee clauses and their application to fees incurred defensively).

While I join the majority's sound opinion, including its recognition of the rule stated in the Restatement (Third) of Suretyship and Guaranty section 14 (1996), I except from my joinder its suggestion that we are adopting a special rule that requires us to ''narrowly construe attorney fees obligations pursuant to guaranty agreements.'' *Ante* at 466, citing *First Nat. Park Bank v. Johnson*, 553 F.2d 599, 602-03 (9th Cir. 1977); *In re LCO Enterprises, Inc.*, 180 B.R. 567, 570-71 (B.A.P. 9th Cir. 1995); *In re Wetzler*, 192 B.R. 109, 119-20 (Bankr. D. Md. 1996). It is not clear to me that the cases cited establish this proposition,[2] or that we need a special rule of construction to decide this appeal. But more importantly, by statute, Nevada allows agreements that require one party to pay the other party's attorney fees, NRS 18.010(4), with particular reference to commercial agreements involving ''money due or to become due on any contract.'' *See* NRS 99.050 (providing that ''parties may agree for the payment of any rate of interest on money due or to become due on any contract, for the compounding of interest if they choose, *and for any other charges or fees*'' (emphasis added)). Perhaps because agreements allowing one side to recover its fees from the other depart from the normal ''American Rule,'' the court has historically examined the language the parties used to establish their right to fees to be sure there was, in fact, an agreement to pay fees that applies. *Cf. First Commercial Title v. Holmes*, 92 Nev. 363, 550 P.2d 1271 (1976), *cited in Campbell v. Nocilla*, 101 Nev. 9, 12, 692 P.2d 491, 493 (1985). But I do not see this as a special rule of construction, and if it is, our cases have applied it to all fee-shifting agreements, not just those in guaranties.

[2]*First National Park Bank* involved a guaranty fee clause that only applied to suits to collect the note, not to suits arising under the guaranty, 553 F.2d at 602-03, which differs from the clause here, which specified that it applied to both. *LCO* involved a fee clause in a lease, not a guaranty. 180 B.R. at 568-69. And *Wetzler* involved a dispute between co-guarantors asserting indemnity claims against each other for fees one co-guarantor incurred dealing with litigation by the lender, which the court found were not covered by the fee clause in the guaranty, which only apply to litigation involving ''payment of any amount due under the Note or performance of the Guaranty.'' 192 B.R. at 119.