MICHAEL BOWER; ROBERT GARCIA; NOI LEWIS; KATHY PACE FULLER; STEVEN MARK FULLER; ANDREA DANIELS; AND DEAN DANIELS, APPELLANTS, *v.* HARRAH'S LAUGHLIN, INC., A NEVADA CORPORATION, DBA HARRAH'S LAUGHLIN HOTEL AND CASINO, RESPONDENT.

No. 49783

MICHAEL BOWER; ROBERT GARCIA; NOI LEWIS; KATHY PACE FULLER; STEVEN MARK FULLER; ANDREA DANIELS; AND DEAN DANIELS, APPELLANTS, *v.* HARRAH'S LAUGHLIN, INC., A NEVADA CORPORATION, DBA HARRAH'S LAUGHLIN HOTEL AND CASINO, RESPONDENT.

No. 50298

September 10, 2009 215 P.3d 709

Consolidated appeals from a district court summary judgment in consolidated tort actions and from post-judgment orders awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Bystanders to brawl between biker gangs brought negligence actions against casino. After the actions were consolidated, the district court granted casino summary judgment, and bystanders appealed. The supreme court, GIBBONS, J., held that: (1) district court had authority to rehear casino's summary judgment motion made on grounds of issue preclusion; (2) members of biker gangs and/or their family did not adequately represent bystanders' interests in federal action in which jury returned a verdict for casino, as required for nonparty issue preclusion under federal law to bar bystanders' negligence claims; (3) gang members in federal action in which court applied issue preclusion against gang members did not adequately represent bystanders' interests; (4) casino guests in federal action did not adequately represent bystanders' interests, though guests were represented by same attorney as bystanders; (5) gang members in California action in which jury returned verdict for casino were not in privity with bystanders, as required in order for issue preclusion to bar bystanders' claims under state law; (6) plaintiffs in state negligence actions in which courts applied issue preclusion against plaintiffs were not in privity with bystanders, as required in order for issue preclusion to bar bystanders' claims under state law; and (7) arrest by police of two of the bystanders, during which police exposed breast of female bystander to the public and refused the other bystander seizure medication, was a superseding intervening cause of such bystanders' injuries.

Affirmed in part, reversed in part, and remanded.

E. Brent Bryson, Ltd., and *E. Brent Bryson* and *John Thayer Clark*, Las Vegas, for Appellants.

Olson, Cannon, Gormley & Desruisseaux and *James R. Olson, David M. Jones*, and *Felicia Galati*, Las Vegas, for Respondent.

1. JUDGMENT.
   District court had authority to rehear casino's summary judgment motion made on grounds of issue preclusion in consolidated negligence actions brought by bystanders against casino arising out of brawl between biker gangs, though identical motion was denied in one of the bystander's actions before actions were consolidated, as in a case involving multiple parties, a district court could revise a judgment that adjudicated the rights of less than all the parties until it entered judgment adjudicating the rights of all the parties. NRCP 54(b).
2. APPEAL AND ERROR.
   Supreme court can affirm a district court's summary judgment decision on alternate grounds.
3. APPEAL AND ERROR.
   Bystander, who prevailed on casino's motion seeking summary judgment on issue preclusion grounds in his negligence action arising out of brawl between biker gangs at casino, did not preserve for appeal assertion that district court lacked authority to rehear casino's summary judgment motion after his action was consolidated with negligence actions brought by other bystanders, where such bystander after actions were consolidated orally moved the district court to reconsider casino's prior summary judgment motion and bystander did not object to the rehearing.
4. APPEAL AND ERROR.
   A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.
5. APPEAL AND ERROR.
   Supreme court reviews a district court's grant of summary judgment de novo.
6. JUDGMENT.
   Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
7. JUDGMENT.
   Issue preclusion is a proper basis for summary judgment.
8. APPEAL AND ERROR.
   Although whether issue preclusion applies is a mixed question of law and fact, legal issues predominate, and therefore, the supreme court reviews de novo the availability of issue preclusion.
9. JUDGMENT.
   To establish the preclusive effect of a previous federal decision, a party must demonstrate that the issue he seeks to preclude is: (1) identical to the one alleged in the prior litigation, (2) has been actually litigated in the prior litigation, and (3) that the resolution of the issue was a critical and necessary part of the earlier judgment.

10. JUDGMENT.
Issue preclusion under federal law is generally prohibited in cases where a party is seeking to assert a judgment against a person who was not a party in the prior case; however, there are exceptions where issue preclusion may be applied to nonparties, one of which is adequate representation.

11. JUDGMENT.
Adequate representation, for purposes of issue preclusion being applied to a nonparty under federal law, only exists when the nonparty was adequately represented by someone with the same interests who was a party to the suit.

12. JUDGMENT.
Adequate representation is a narrow exception under federal law to the general rule prohibiting the application of issue preclusion to nonparties.

13. JUDGMENT.
Under Nevada law, issue preclusion requires that: (1) an issue be identical, (2) the initial ruling was final and on the merits, (3) the party against whom the judgment is asserted was a party or in privity with a party in the prior case, and (4) the issue was actually and necessarily litigated.

14. JUDGMENT.
Issue preclusion under Nevada law is based upon the sound public policy of limiting litigation by preventing a party who had one full and fair opportunity to litigate an issue from again drawing it into controversy.

15. JUDGMENT.
The doctrine of issue preclusion under Nevada law ends litigation and lends stability to judgments, thus inspiring confidence in the judicial system.

16. JUDGMENT.
A party seeking to assert a judgment against another under Nevada law has the burden of proving the preclusive effect of the judgment.

17. JUDGMENT.
Issue preclusion can under Nevada law only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation. U.S. CONST. amend. 14.

18. JUDGMENT.
To be in privity for purposes of issue preclusion under Nevada law, the person against whom preclusion is asserted must have acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase.

19. COURTS.
To determine the preclusive effect of a federal decision, supreme court applies federal law.

20. COURTS.
To determine the issue preclusive effect of a state decision, supreme court applies Nevada issue preclusion law.

21. COURTS.
When the United States Supreme Court applies a rule of law to the parties before it, every court must then give retroactive effect to that decision.

22. JUDGMENT.
Members of one of the biker gangs and/or their relatives who were plaintiffs in federal negligence action against casino in which jury returned

a verdict finding that brawl between biker gangs was not foreseeable to casino did not adequately represent bystanders' interests, as required in order for nonparty issue preclusion under federal law to bar bystanders' consolidated state negligence actions against casino arising out of the same brawl, where there was no evidence that bystanders had notice of such plaintiffs' action, that such plaintiffs knew they were representing bystanders' interests, or that the court in such action took care to protect bystanders' interests.

23. JUDGMENT.

An issue decided on summary judgment motion has a preclusive effect for issue preclusion purposes.

24. JUDGMENT.

Plaintiffs in federal negligence and premises liability action against casino in which the trial court granted summary judgment for casino on the ground that plaintiffs failed to establish a standard of care did not adequately represent bystanders' interests, as required in order for nonparty issue preclusion under federal law to bar bystanders' consolidated state negligence actions against casino arising out of brawl between biker gangs, where there was no evidence that bystanders had notice of such plaintiffs' action, that such plaintiffs knew they were representing bystanders' interests, or that the court in such action took care to protect bystanders' interests.

25. JUDGMENT.

Plaintiff in federal negligence action against casino in which trial court granted summary judgment for casino after plaintiff's counsel failed to appear did not adequately represent bystanders' interests, as required in order for nonparty issue preclusion under federal law to bar bystanders' consolidated state negligence actions against casino arising out of brawl between biker gangs.

26. JUDGMENT.

Members of one of the biker gangs and/or their relatives who were plaintiffs in federal negligence action against casino arising out of brawl between biker gangs in which court granted summary judgment for casino based on issue preclusion pursuant to a virtual representation analysis did not adequately represent bystanders' interests, as required in order for nonparty issue preclusion under federal law to bar bystanders' consolidated state negligence actions against casino arising out of the same brawl; issue preclusion was applied against plaintiffs in such action based on jury verdicts for casino in another federal action and a state action brought by other gang members and their relatives, the plaintiffs in all three actions were represented by the same attorneys, bystanders were not members of the biker gang or relatives of members, and bystanders were not represented by the same attorney.

27. JUDGMENT.

Casino guests who were plaintiffs in federal negligence action against casino arising out of a brawl between biker gangs in which court granted summary judgment for casino based on issue preclusion pursuant to a virtual representation analysis did not adequately represent bystanders' interests, as required in order for nonparty issue preclusion under federal law to bar bystanders' consolidated state negligence actions against casino arising out of the same brawl; though casino guests and bystanders were represented by the same attorney and discovery in the actions was consolidated, the action that the federal court found precluded the guests was brought by biker gang members and their relatives, gang members and their relatives were not represented by the same attorney as casino guests and bystanders, guests' federal action was not a class action, and there was no indication

that casino guests in federal action were aware they were acting as representatives for bystanders. 28 U.S.C.; FRCP 23.

28. COURTS.

Regarding the issue preclusive effect of a Nevada or out-of-state judgment, Nevada courts apply Nevada's issue preclusion law.

29. JUDGMENT.

Biker gang members who were plaintiffs in California negligence action brought against casino arising out of brawl between two rival biker gangs, in which jury returned a verdict for casino, were not in privity with bystanders, as required in order for nonparty issue preclusion under state law to bar bystanders' consolidated state negligence actions against casino arising out of the same brawl, where bystanders did not have a legal or private relationship with gang members, California action was not consolidated with other actions against casino arising out of the brawl, and there was no evidence that bystanders were aware of the California action.

30. JUDGMENT.

Nevada's privity requirement for issue preclusion protects nonparties' due process rights. U.S. CONST. amend. 14.

31. JUDGMENT.

Plaintiffs, in state negligence actions brought against casino arising out of a brawl between two biker gangs in which trial courts granted casino summary judgment based on jury verdict for casino in a federal negligence action and a California negligence which were brought by gang members were not in privity with bystanders, as required in order for nonparty issue preclusion under state law to bar bystanders' consolidated state negligence actions against casino arising out of the same brawl, where bystanders did not have a legal or private relationship with either the gang members or the plaintiffs in the other state negligent actions, and there was no evidence that bystanders were aware of the other state negligence actions.

32. PUBLIC AMUSEMENT AND ENTERTAINMENT.

Arrest by police, following brawl between two biker gangs at casino, of two bystanders during which police exposed one of the bystander's breasts to the public, struck the second bystander when he complained and refused second bystander's request to return to his room for seizure medication after which he suffered two seizures, were unforeseeable intentional torts and thus a superseding intervening cause of such bystanders' injuries, precluding casino's liability in bystanders' negligence action against casino, as the police actions were not the type of harm expected from casino's negligence in failing to protect its patrons from the criminal acts of the gangs.

33. JUDGMENT.

On a motion for summary judgment, the substantive law determines which facts are material, and an issue is genuine when a rational trier of fact could return a verdict for the nonmoving party.

34. NEGLIGENCE.

To prevail on a negligence theory, a plaintiff generally must show that: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injury, and (4) the plaintiff suffered damages.

35. NEGLIGENCE.

A defendant's acts are the actual cause of a plaintiff's harm, for purposes of a negligence claim, if its acts were a substantial factor in bringing about his or her injury.

36. NEGLIGENCE.

Foreseeability, for purposes of proximate cause in a negligence action, is a policy concern that limits a defendant's liability to only those harms with a reasonably close connection to its breach.

37. NEGLIGENCE.

To determine whether an intervening cause is foreseeable for purposes of a negligence claim, supreme court considers several factors, including whether: (1) the intervention causes the kind of harm expected to result from the actor's negligence, (2) the intervening event is normal or extraordinary in the circumstances, (3) the intervening source is independent or a normal result of the actor's negligence, (4) the intervening act or omission is that of a third party, (5) the intervening act is a wrongful act of a third party that would subject him to liability, and (6) the culpability of the third person's intervening act. Restatement (Second) of Torts § 442.

38. NEGLIGENCE.

When a third party commits an intentional tort or a crime, the act is a superseding cause for purposes of a negligence claim, even when the negligent party created a situation affording the third party an opportunity to commit the tort or crime, and, in such a situation, the negligent party will only be liable if he knew or should have known at the time of the negligent conduct that he was creating such a situation and that a third party might avail himself of the opportunity to commit such a tort or crime. Restatement (Second) of Torts § 448.

39. APPEAL AND ERROR.

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

40. COSTS.

Although a district court has discretion to award attorney fees against a party for unreasonably maintaining a lawsuit, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass. NRS 18.010(2)(b).

41. COSTS.

Trial court's award of attorney fees to casino on the ground that bystanders unreasonably maintained their lawsuits, in bystanders' consolidated negligence actions against casino arising out of a brawl between two biker gangs, was premature and an abuse of discretion, though similar cases with different plaintiffs arising out the brawl were resolved in casino's favor, as a decision in a factually similar case with different plaintiffs did not necessarily support issue preclusion. NRS 18.010(2)(b).

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, J.:

This case arises out of a brawl between two biker gangs, the Hell's Angels and the Mongols. The gangs brawled at Harrah's casino in Laughlin, Nevada, during its annual River Run event in 2002. Several people were killed, and many were injured. As a result, several groups of plaintiffs, who were not directly involved in the brawl, sued Harrah's under various negligence theories. These suits proceeded in California state court, Nevada state court, and Nevada federal court.

[1]THE HONORABLE KRISTINA PICKERING, Justice, did not participate in the decision of this matter.

Appellant Michael Bower sued in Nevada state court. While his suit was pending, federal and state courts entered judgment on two jury verdicts and several summary judgment motions in favor of Harrah's. In Bower's case, Judge Denton, a state district court judge, denied Harrah's summary judgment motion based on issue preclusion. Bower's case was then consolidated with several other plaintiffs, including Robert Garcia, Noi Lewis, Kathy and Steven Fuller, and Andrea and Dean Daniels (collectively, appellants). The consolidated cases were assigned to a separate state district court judge, Judge Johnson. Judge Johnson then reheard Harrah's summary judgment motion regarding Bower and found in favor of Harrah's based on issue preclusion. The district court also granted Harrah's summary judgment motion regarding issue preclusion as to all plaintiffs and entered final judgment. Then, the district court granted Harrah's summary judgment motion regarding plaintiffs Lewis and Garcia based on the merits of their case. Appellants now appeal.

We first address the district court's rehearing of Harrah's summary judgment motion regarding Bower. We conclude that the district court properly reheard the motion pursuant to NRCP 54(b), and Bower consented to the rehearing, thereby failing to preserve the issue for appeal.

Second, we discuss federal and state issue preclusion. We highlight the difference between the adequate representation exception to federal issue preclusion and the privity requirement of Nevada issue preclusion. Also, we explain that we must analyze federal issue preclusion under *Taylor v. Sturgell*, 553 U.S. 880 (2008), which changed federal issue preclusion law after the district court rendered its decision in this case.

Third, we review the district court's decision granting Harrah's summary judgment, which determined that issue preclusion barred appellants' claims based on prior federal decisions. Applying federal issue preclusion law, we conclude that the district court inappropriately granted Harrah's summary judgment based on issue preclusion because the plaintiffs in the prior federal cases did not adequately represent appellants' interests.

Fourth, we review the district court's decision granting Harrah's summary judgment, which determined that issue preclusion barred appellants' claims based on prior state decisions. Applying Nevada issue preclusion law, we conclude that the district court inappropriately granted Harrah's summary judgment based on issue preclusion because the plaintiffs in the prior state cases were not in privity with appellants.

Fifth, we address the district court's decision granting Harrah's summary judgment regarding plaintiffs Garcia and Lewis based on the merits of their case. We conclude that the district court properly granted Harrah's summary judgment because the Las Vegas Metropolitan Police Department (Metro) was a superseding intervening

cause of Garcia's and Lewis' harm, and therefore, Harrah's is not liable.

Finally, we address the district court's awarding Harrah's attorney fees for defending against appellants' meritless claims and its awarding Harrah's costs as the prevailing party. We hold that the district court erred in granting Harrah's attorney fees because appellants did not unreasonably maintain their claims. Given our decision in this appeal, Harrah's only prevailed against Garcia and Lewis, and therefore, we vacate the costs award against all appellants except Garcia and Lewis.

FACTS AND PROCEDURAL HISTORY

Two biker gangs, the Hell's Angels and the Mongols, brawled at Harrah's Laughlin Hotel and Casino in Laughlin, Nevada, on April 27, 2002. As a result of that brawl, several plaintiffs filed separate lawsuits in Nevada federal court and state courts in Nevada and California.

Appellants Michael Bower, Robert Garcia, Noi Lewis, Kathy and Steven Fuller, and Andrea and Dean Daniels were not members of either biker gang and were bystanders when the brawl occurred. Appellants brought various negligence claims in Nevada state district court, arising out of physical and emotional harms suffered as a result of the brawl. Specifically, Bower filed claims for premises liability, negligence, fraud, negligent representation, and unfair and deceptive trade practices. Garcia, Lewis, the Fullers, and the Danielses all claimed premises liability, negligent training, negligent supervision, negligence, and negligent infliction of emotional distress.

Bower's case was initially assigned to a Nevada state district court judge, Judge Denton. Harrah's filed a summary judgment motion, which the district court denied. Harrah's then petitioned this court for a writ of mandamus or prohibition, which we denied. *Harrah's Laughlin, Inc. v. Dist. Ct.*, Docket No. 47593 (Order Denying Petition for Writ of Mandamus or Prohibition, October 26, 2006). Subsequently, Bower's case was reassigned to Judge Johnson and consolidated with the other appellants' cases.

While appellants' case was pending in Nevada state district court, Harrah's prevailed in other cases arising out of the same events in both state and federal court. A Nevada federal district court jury and a California superior court jury both returned verdicts for Harrah's. *Yvette Barreras v. Harrah's Laughlin, Inc.*, No. CV-S-03-0661-RLH-PAL (D. Nev. Mar. 18, 2005); *Ramirez v. Harrah's Entertainment, Inc.*, No. 1-02 CV810665 (Cal. Super. Ct. Apr. 28, 2005). The United States district court for the district of Nevada granted Harrah's summary judgment in four separate cases. *Sweers v. Harrah's Laughlin, Inc.*, No. CV-S-04-0378-RCJ-RJJ (D. Nev. Dec. 22, 2004); *Nolan v. Harrah's Laughlin, Inc.*, No. CV-S-02-1611-PMP (LRL) (D. Nev. Jan. 14, 2005); *Alcantar v. Harrah's*

Laughlin, Inc., No. CV-S-03-1195-HDM (RJJ) (D. Nev. June 14, 2005); *Schoenleber v. Harrah's Laughlin, Inc.*, 423 F. Supp. 2d 1109 (D. Nev. 2006). Also, the Nevada state district court granted Harrah's summary judgment in two other cases. *Salvador Barreras v. Harrah's Laughlin, Inc.*, No. A484654 (Nev. Dist. Ct. June 13, 2005); *Collins v. Harrah's Laughlin, Inc.*, No. A472232 (Nev. Dist. Ct. Nov. 21, 2005).

At a hearing, Bower suggested that Harrah's orally move the court to reconsider Harrah's summary judgment motion against Bower, which Judge Denton had previously denied. Bower suggested this after the district court had granted Harrah's summary judgment against all the other plaintiffs to avoid wasting time preparing for trial if summary judgment against him was inevitable. At the hearing, the district court made three rulings. It granted: (1) Harrah's motion to reconsider summary judgment regarding Bower, (2) Harrah's summary judgment motion against all plaintiffs based on issue preclusion, and (3) Harrah's summary judgment motion regarding Garcia and Lewis on the merits of their case. Later, the district court also granted Harrah's post-judgment motion for attorney fees in the amount of $317,621.98, and awarded it costs in the amount of $30,788.55.

DISCUSSION

I. *The district court properly reheard Harrah's summary judgment motion regarding Bower*

Judge Denton denied Harrah's summary judgment motion, based solely on issue preclusion, against Bower. Although Judge Denton made no specific findings in the order, during the hearing, he indicated that Bower was not in privity with other plaintiffs in separate cases and that Harrah's standard of care might be different for gang members and nongang members. Bower's case was then consolidated with the other appellants' cases and assigned to Judge Johnson, who reheard the motion. Judge Johnson granted Harrah's rehearing because she concluded it was warranted and because additional facts or events had developed since Judge Denton decided the motion. Upon rehearing, Judge Johnson granted Harrah's summary judgment motion.

Appellants argue that the district court did not have a sufficient basis to rehear Harrah's identical summary judgment motion, which Judge Denton previously decided. Harrah's argues that because Bower requested that Harrah's make the rehearing motion, he is barred from challenging the district court's rehearing of the motion. We agree with Harrah's for two reasons. First, we conclude that Judge Johnson was authorized to rehear the motion under NRCP 54(b), and second, we conclude that Bower consented to the rehearing. We now address each of these issues in turn.

[Headnotes 1, 2]

The district court had the authority to rehear the motion under NRCP 54(b). Although the district court did not base its decision on NRCP 54(b) and neither party raised it in their briefs, this court can affirm the district court's decision on alternate grounds. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981). Under NRCP 54(b), in a case involving multiple parties, a district court may revise a judgment that adjudicates the rights of less than all the parties until it enters judgment adjudicating the rights of all the parties. *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990) (holding that consolidated cases are one case for appellate purposes and an order resolving less than all the consolidated claims is not a final, appealable order). In this case, Judge Denton's denial of Harrah's summary judgment motion against Bower adjudicated only Bower's rights. We conclude that when the case was consolidated before Judge Johnson, NRCP 54(b) permitted her to review and revise the judgment before she entered final judgment as to all the parties. Therefore, under NRCP 54(b), the district court properly reheard Harrah's summary judgment motion regarding Bower.

[Headnotes 3, 4]

Further, we conclude that Bower consented to the rehearing and cannot now complain of error. ''A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'' *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). At a hearing, Bower suggested that Harrah's orally move the district court to reconsider Harrah's prior summary judgment motion against Bower, which Judge Denton had previously denied. Thus, Bower did not object to the rehearing, and did not preserve the issue for appeal. Although Bower argues that this was a strategic decision, to prevent wasting time preparing for trial if summary judgment against him was inevitable, his consent to the rehearing prevents him from now complaining of the district court's reconsideration.

II. *Federal and state issue preclusion*

[Headnotes 5-8]

In this case, the district court granted Harrah's summary judgment motion as to all plaintiffs, based on issue preclusion. ''This court reviews a district court's grant of summary judgment de novo.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. Issue preclusion is a proper basis

for summary judgment. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 474, 117 P.3d 227, 234 (2005). Although whether issue preclusion applies is a mixed question of law and fact, legal issues predominate, and therefore, this court reviews de novo the availability of issue preclusion. *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004).

Both federal and state law attempts to restrict the application of issue preclusion to parties whose due process rights have been met, such that it is fair to apply a prior decision in a separate case to their claims. Federal law does this by generally prohibiting the application of issue preclusion to those who were not parties in the prior litigation, but allowing its application if the party's interests were adequately represented in the prior litigation. *Taylor v. Sturgell*, 553 U.S. 880, 892-94 (2008). Nevada ensures due process by limiting the application of issue preclusion to those who were a party in the prior case or who were in privity with a party in the prior case. *Paradise Palms v. Paradise Homes*, 89 Nev. 27, 30-31, 505 P.2d 596, 598-99 (1973). Although both federal and state doctrines of issue preclusion seek to protect parties' due process rights, the terminology and analyses differ. Therefore, we separately discuss the preclusive effect of the prior federal and state decisions.

A. *Federal issue preclusion*

[Headnote 9]

To establish the preclusive effect of a previous federal decision, a party must demonstrate that the issue he seeks to preclude is (1) ''identical to the one alleged in the prior litigation,'' (2) has ''been actually litigated in the prior litigation,'' and (3) that the resolution of the issue was ''a critical and necessary part'' of the earlier judgment. *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992); *Taylor*, 553 U.S. at 906-07 (noting that the party asserting issue preclusion bears the burden of establishing the elements).

[Headnotes 10, 11]

Preclusion is generally prohibited in cases where a party is seeking to assert a judgment against a person who was not a party in the prior case. *Taylor*, 553 U.S. at 892-93. However, there are exceptions where issue preclusion may be applied to nonparties, one of which is adequate representation. *Id.* at 894. Adequate representation only exists when a nonparty was '' 'adequately represented by someone with the same interests who [wa]s a party' to the suit.'' *Id.* (alteration in original) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). In the instant case, appellants were nonparties in the federal cases relied upon by the district court to apply issue preclusion. Adequate representation is the only exception to the

general rule prohibiting the application of issue preclusion to nonparties that is at issue in this case. *Id.*

[Headnote 12]

Adequate representation is a narrow exception to the general rule prohibiting the application of issue preclusion to nonparties. Recently, in *Taylor v. Sturgell*, the United States Supreme Court clarified the law regarding the circumstances in which issue preclusion applies to persons who were nonparties to the prior case and specifically addressed adequate representation. *Id.* at 892-95. The Court noted that the adequate representation exception only applies if ''(1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.'' *Id.* at 900 (internal citations omitted). In addition, the Court indicated that it sometimes also requires that (3) the nonparty had notice of the original suit. *Id.*

B. *State issue preclusion*

[Headnotes 13-16]

In Nevada, issue preclusion requires that (1) an issue be identical, (2) the initial ruling was final and on the merits, (3) ''the party against whom the judgment is asserted'' was a party or in privity with a party in the prior case, and (4) ''the issue was actually and necessarily litigated.'' *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). Issue preclusion ''is based upon the sound public policy of limiting litigation by preventing a party who had one full and fair opportunity to litigate an issue from again drawing it into controversy.'' *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439-40, 833 P.2d 1132, 1134-35 (1992). This doctrine ends litigation and lends stability to judgments, thus inspiring confidence in the judicial system. *Willerton v. Bassham*, 111 Nev. 10, 19, 889 P.2d 823, 828 (1995). The party seeking to assert a judgment against another has the burden of proving the preclusive effect of the judgment. *Bennett v. Fidelity & Deposit Co.*, 98 Nev. 449, 452, 652 P.2d 1178, 1180 (1982).

[Headnotes 17, 18]

Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation. *Paradise Palms*, 89 Nev. at 30-31, 505 P.2d at 598-99. To be in privity, the person must have ''acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase.'' *Id.* at 31, 505 P.2d at 599; *accord* Restatement (Second) of Judgments § 41(1) (1982) (enumerating rep-

resentatives to include: trustees of an interest to which the person is a beneficiary, someone who the person invested with authority to represent him, a fiduciary to the person, an official or agency legally authorized to represent the person's interests, and a class representative in a certified class action).

C. *Federal and state issue preclusion in this case*

In determining that issue preclusion barred appellants' claims, the district court employed the federal ''virtual representation'' analysis under *Irwin v. Mascott*, 370 F.3d 924 (9th Cir. 2004), which was the law at the time of the district court's decision. Appellants argue that Nevada issue preclusion law governs this case and that the district court erred because appellants are not in privity with any of the plaintiffs in the prior cases. Alternatively, appellants argue that should this court apply the federal adequate representation analysis, appellants were not adequately represented by the plaintiffs in the prior cases. On the other hand, Harrah's argues that this court should apply only the federal adequate representation analysis and that prior plaintiffs did adequately represent appellants, such that the district court properly determined that issue preclusion bars appellants' claims. We agree with appellants that issue preclusion does not bar their claims. However, our analysis departs from that of both parties and the district court. Our analysis differs from that of the district court in two respects.

[Headnotes 19, 20]

First, the district court erred in applying federal issue preclusion to both state and federal decisions. To determine the preclusive effect of a federal decision, we apply federal law. *Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001). To determine the issue preclusive effect of a state decision, we apply Nevada issue preclusion law. *Clark v. Clark*, 80 Nev. 52, 57, 389 P.2d 69, 72 (1964).

[Headnote 21]

Second, we are applying different law in analyzing the preclusive effect of prior federal decisions because federal issue preclusion law has changed since the district court entered its order. The district court entered its order regarding issue preclusion in 2007. In 2008, the United States Supreme Court issued an opinion in *Taylor*, 553 U.S. 880, which clarified federal issue preclusion law. When the United States Supreme Court applies a rule of law to the parties before it, every court must then give retroactive effect to that decision. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89 (1993). Therefore, although *Taylor* was not decided until 2008, it states the rule of law regarding federal issue preclusion and is the law we must apply in deciding this appeal.

III. *The district court erred in granting Harrah's summary judgment motion based on issue preclusion regarding prior federal decisions*

The district court based its decision to grant Harrah's summary judgment motion, in part, on judgments in several prior federal cases. Appellants argue that they were not adequately represented by the plaintiffs in these prior cases, and therefore, issue preclusion is inapplicable. Harrah's argues that the district court properly granted it summary judgment because the prior federal plaintiffs adequately represented appellants' interests. We agree with appellants' argument because we conclude that the prior federal plaintiffs did not adequately represent appellants.

In this case, the district court relied on five prior federal decisions in determining that issue preclusion barred appellants' claims. In *Yvette Barreras v. Harrah's Laughlin, Inc.*, No. CV-S-03-0661-RLH-PAL (D. Nev. Mar. 18, 2005), the jury returned a verdict for Harrah's on similar claims but against different plaintiffs. In four other cases, federal district courts granted Harrah's summary judgment on similar claims but against different plaintiffs. *Sweers v. Harrah's Laughlin, Inc.*, No. CV-S-04-0378-RCJ-RJJ (D. Nev. Dec. 22, 2004); *Nolan v. Harrah's Laughlin, Inc.*, No. CV-S-02-1611-PMP (LRL) (D. Nev. Jan. 14, 2005); *Alcantar v. Harrah's Laughlin, Inc.*, No. CV-S-03-1195-HDM (RJJ) (D. Nev. June 14, 2005); *Schoenleber v. Harrah's Laughlin, Inc.*, 423 F. Supp. 2d 1109 (D. Nev. 2006). We analyze these cases and conclude that none of the plaintiffs in these prior federal cases adequately represented appellants, and the district court erred in determining that these cases barred appellants' claims based on issue preclusion.

A. *The district court erred in finding that issue preclusion barred appellants' claims based on the Yvette Barreras case*

[Headnote 22]

The district court found that the March 2005 decision in the *Yvette Barreras* case barred appellants' claims based on issue preclusion because Yvette Barreras' claims were identical to appellants' claims, and the jury returned a verdict in favor of Harrah's, specifically finding that the brawl was not foreseeable to Harrah's. Appellants argue that Yvette Barreras did not adequately represent their interests, and therefore issue preclusion does not bar their claims. We agree with appellants' argument. We conclude that Yvette Barreras did not adequately represent appellants because she did not know she was representing appellants' interests, the court did not protect appellants' interests, and appellants had no notice of Yvette Barreras' suit.

Harrah's failed to cite to any evidence in the record to establish that Yvette Barreras knew she was representing the appellants' interests. Regarding whether the *Yvette Barreras* court took care to protect appellants' interests, Harrah's argues that discovery in the federal and state cases was consolidated, appellants' attorney was involved in discovery since January 2004, and the cases were essentially treated as a class action. However, Harrah's points to no evidence in the record that appellants' case was consolidated with the *Yvette Barreras* case or that appellants' attorney was involved with discovery in the *Yvette Barreras* case. Also, Harrah's points to no evidence in the record indicating that appellants had notice of Yvette Barreras' suit, and therefore, failed to prove this element of adequate representation.

Thus, Harrah's has failed to establish that Yvette Barreras knew she was representing appellants' interests, that the court took care to protect appellants' interests, or that appellants had notice of her suit. *Taylor*, 553 U.S. at 900. Therefore, Harrah's has not met its burden to establish adequate representation, and nonparty issue preclusion based on the *Yvette Barreras* case does not bar appellants' claims.

B. *The district court erred in finding that issue preclusion barred appellants' claims based on the prior federal summary judgments*

The district court also based its decision, in part, to grant Harrah's summary judgment motion on several federal cases arising out of the same brawl, in which Harrah's prevailed on summary judgment motions. These cases included *Sweers*, *Nolan*, *Alcantar*, and *Schoenleber*.

[Headnote 23]

An issue decided on summary judgment motion has a preclusive effect for issue preclusion purposes. *Scripps Clinic and Res. Found. v. Baxter Travenol*, 729 F. Supp. 1473, 1475 (D. Del. 1990). We discuss each of these prior federal summary judgment decisions separately. Applying the same analysis used above regarding the *Yvette Barreras* case, nonparty issue preclusion was not appropriate regarding the federal summary judgments because the plaintiffs did not adequately represent appellants' interests.

1. *Sweers*

[Headnote 24]

In *Sweers*, the plaintiff sued for negligence and premises liability arising out of the brawl. The district court granted Harrah's summary judgment because it concluded that Sweers failed to prove the standard of care that Harrah's owed its guests and that Harrah's breached that standard of care. Harrah's failed to establish that the plaintiffs in the *Sweers* case adequately represented appellants be-

cause the *Sweers* plaintiffs did not know they were representing appellants' interests, the court did not take care to protect appellants' interests, and appellants did not have notice of the *Sweers* case. *Taylor*, 553 U.S. at 900. Thus, the district court erred by applying nonparty issue preclusion to bar appellants' claims based on the *Sweers* case.

2. *Nolan*

[Headnote 25]

The federal court in *Nolan* granted Harrah's summary judgment based on issue preclusion. However, the record is unclear as to the basis for the *Nolan* court's decision. In January 2005, the federal district court in *Nolan* denied Harrah's motion for summary judgment on the merits because there were material facts in dispute, including foreseeability, proximate cause, and whether Nolan committed any wrong. Then in May 2005, the *Nolan* court granted Harrah's renewed motion for summary judgment when Nolan's counsel failed to appear at the hearing. Harrah's states in its answering brief that the *Nolan* court granted Harrah's summary judgment based on issue preclusion, and the district court's order granting Harrah's summary judgment states the same. This contradicts the record, which shows that the *Nolan* court denied Harrah's initial summary judgment motion based on the merits of Nolan's case, and then entered a default judgment against Nolan based on his counsel's failure to appear. Therefore, neither decision appears to be based on issue preclusion. Also, the record does not contain Harrah's initial or renewed summary judgment motion, making it unclear if Harrah's raised issue preclusion below. Therefore, the Nolan case is postured very differently from this case because the district court ultimately entered a default judgment for Harrah's; whereas here, the district court granted Harrah's summary judgment motion based solely on issue preclusion.

Also, Harrah's did not establish that the *Nolan* plaintiffs adequately represented appellants' interests. Therefore, the district court erred in determining that nonparty issue preclusion barred appellants' claims.

3. *Alcantar*

[Headnote 26]

The district court also relied on the *Alcantar* case, in which a federal district court granted Harrah's summary judgment motion based on issue preclusion. The *Alcantar* court relied on the prior jury verdicts for Harrah's in the *Yvette Barreras* and *Ramirez* cases in determining that issue preclusion barred Alcantar's claims. However, the *Alcantar* case is both factually and legally distinguishable from this case.

Factually, the *Alcantar* case is distinguishable from this case for four reasons. First, the *Alcantar* plaintiffs and the plaintiffs in *Yvette Barreras* and *Ramirez* were all either members of the Mongols or related to members of the Mongols. Here, none of the appellants were members of or related to members of either biker gang. Second, several of the *Alcantar* plaintiffs testified in the *Yvette Barreras* and *Ramirez* cases. In contrast, none of the appellants testified in prior trials. Third, the same attorney represented the *Alcantar* plaintiffs and the *Yvette Barreras* and *Ramirez* plaintiffs. Here, appellants were not represented by the same attorney as the *Alcantar* plaintiffs. Fourth, the *Alcantar*, *Yvette Barreras*, and *Ramirez* cases were consolidated for discovery purposes; whereas the *Bower* case was not consolidated with the *Alcantar* case. Thus, there are many more factual and procedural connections between the *Alcantar* and *Yvette Barreras* and *Ramirez* cases than there are between the *Alcantar* case and appellants' case.

Legally, the *Alcantar* court's analysis is distinguishable from this case because it applied the ''virtual representation'' analysis set forth in *Irwin v. Mascott*, 370 F.3d 924 (9th Cir. 2004), and determined that issue preclusion was appropriate because: (1) the plaintiffs in *Alcantar* and *Yvette Barreras* and *Ramirez* had a close relationship because they were all members or relatives of the Mongols; (2) the *Alcantar* plaintiffs substantially participated in the prior cases because several of them testified in those cases; (3) the plaintiffs in all three cases participated in tactical maneuvering because they were represented by the same counsel and the cases were consolidated for discovery purposes; (4) all of the plaintiffs had a commonality of interest because they all sought to establish that the brawl was foreseeable, Harrah's owed them a duty, Harrah's breached that duty, the cases arose out of the same nucleus of facts, and the evidence was the same in all the cases; and (5) the *Yvette Barreras* and *Ramirez* plaintiffs adequately represented the *Alcantar* plaintiffs' interests because they were all represented by the same attorney who controlled the discovery and decision making.

In contrast, as discussed above, this court must apply the adequate representation analysis set forth in *Taylor*, 553 U.S. at 900. In this case, Harrah's presents no evidence that the *Alcantar* plaintiffs understood that they were representing appellants or that the *Alcantar* court knew of appellants' cases so that it could protect their interests. The record is also void of any indication that appellants had notice of the *Alcantar* case. Therefore, although the *Alcantar* court found that issue preclusion barred the *Alcantar* plaintiffs' claims, because of the distinguishable facts in the *Alcantar* case and because this court is applying *Taylor*, we conclude that issue preclusion does not bar appellants' claims.

4. *Schoenleber*

[Headnote 27]

The district court also relied on *Schoenleber*, 423 F. Supp. 2d 1109, as a basis for issue preclusion of appellants' claims. The *Schoenleber* court granted Harrah's summary judgment based on issue preclusion. *Id*. at 1113-14. Appellants argue that, like in the other cases, the *Schoenleber* plaintiffs did not adequately represent appellants' interests, and the district court erred in barring appellants' claims based on issue preclusion. Harrah's argues that appellants' interests were especially aligned with the *Schoenleber* plaintiffs because the same attorney represented appellants and the *Schoenleber* plaintiffs. Harrah's also argues that the district court took special care to protect appellants' interests because discovery was consolidated in the appellants' and *Schoenleber* cases, appellants' attorney was involved in the discovery process, and the two cases were essentially treated as a class action. We conclude that Harrah's arguments lack merit because representation by the same attorney and the court's alleged treatment of the case as a class action are insufficient to establish adequate representation.

The *Schoenleber* court, like the *Alcantar* court, applied the ''virtual representation'' analysis under *Irwin*, 370 F.3d 924, and determined that Yvette Barreras virtually represented the *Schoenleber* plaintiffs because both were guests at Harrah's who suffered damage because of the brawl, and they shared a common interest in arguing that Harrah's had a duty to protect its guest and that the brawl was reasonably foreseeable. *Schoenleber*, 423 F. Supp. 2d at 1113. Although this may have been an adequate basis for applying nonparty issue preclusion under *Irwin*, we conclude that it is insufficient to demonstrate the adequate representation exception as clarified in *Taylor*.

Although the same attorney represented the appellants and the *Schoenleber* plaintiffs, the record is void of any indication that the *Schoenleber* plaintiffs knew they were acting as representatives for appellants. In fact, they likely believed the contrary if they knew their attorney was representing appellants but pursuing appellants' claims in a separate state case. Representation by the same attorney does not establish that the *Schoenleber* plaintiffs were representing appellants' interests, that the court protected appellants' interests, or that appellants had notice of the *Schoenleber* case. *Taylor*, 553 U.S. at 900. Therefore, representation by the same attorney is insufficient to establish adequate representation.

Similarly, although discovery was consolidated in the two cases, this is insufficient to prove that the district court was protecting appellants' interests. In fact, in analyzing whether the adequate representation exception applies, the United States Supreme Court has

specifically rejected the ''common law kind of class action'' concept, holding that class actions are an exception to the general rule against nonparty preclusion because of the due process protections afforded by FRCP 23. *Taylor*, 553 U.S. at 900-01. For a class action to be certified, FRCP 23(a) requires that: (1) the class is so large that joinder is impracticable, (2) there be common questions of law or fact among the class members, (3) the claims and defenses of the representatives must be typical of the class, and (4) the representative parties must be able to fairly and adequately protect the interests of the class. It also provides protections for class members throughout the litigation. FRCP 23. The Supreme Court concluded that a class action not certified under FRCP 23 would not provide the necessary due process protections and would be an expansive application of nonparty preclusion. *Taylor*, 553 U.S. at 900-01. Because appellants' case was not part of a certified class action with the *Schoenleber* plaintiffs, the *Schoenleber* plaintiffs did not adequately represent appellants' interests, and the *Schoenleber* case does not provide an adequate basis for issue preclusion to bar appellants' claims.

IV. *The district court erred in granting Harrah's summary judgment motion based on issue preclusion regarding the prior state decisions*

The district court also based its issue preclusion decision on several state decisions, including a California superior court jury verdict and several Nevada state district court summary judgments in favor of Harrah's. We conclude that the plaintiffs in the other state cases were not in privity with appellants, and therefore, issue preclusion is inapplicable and does not bar appellants' claims.

[Headnote 28]

Regarding the issue preclusive effect of a Nevada or out-of-state judgment, Nevada courts apply Nevada's issue preclusion law. *Clark v. Clark*, 80 Nev. 52, 57, 389 P.2d 69, 71-72 (1964). Thus, Nevada law will determine the preclusive effect of the California superior court jury verdict for Harrah's in *Ramirez v. Harrah's Entertainment, Inc.*, Case No. 1-02 CV810665 (Cal. Super. Ct. Apr. 28, 2005).

A. *The California superior court judgment in Ramirez*

[Headnote 29]

The district court found that the California superior court's jury verdict for Harrah's in the *Ramirez* case barred appellants' claims based on issue preclusion. The district court determined that the claims were almost identical, including negligence and premises li-

ability resulting from injuries and damages sustained in the brawl, and the jury specifically found that Harrah's was not negligent. We conclude that appellants were not in privity with the *Ramirez* plaintiffs, and therefore, issue preclusion is not applicable.

Appellants argue that they were not in privity with Mel Ramirez because he was a member of the Mongols and there is a divergence of interests between an outlaw biker and innocent bystanders. We agree with appellants' argument because Harrah's erroneously relies on federal issue preclusion law in its answering brief, and it failed to prove privity between appellants and Ramirez.

[Headnote 30]

First, Harrah's erroneously relies on federal law in its answering brief, in particular, the Supreme Court's decision in *Taylor*, 553 U.S. 880. As discussed above, it is well established Nevada law that state law applies in determining the preclusive effect of prior state decisions. Although federal law allows nonparty issue preclusion under the adequate representation exception, Nevada requires privity to ensure due process to nonparty plaintiffs. *Paradise Palms*, 89 Nev. at 30-31, 505 P.2d at 599. Nevada has no exception analogous to the federal adequate representation exception. However, much like federal preclusion and the adequate representation exception, Nevada's privity requirement protects nonparties' due process rights.

Second, Harrah's failed to demonstrate privity between appellants and Ramirez. In this case, appellants had no legal or private relationship with Ramirez such that they were in privity with him. In fact, the record is void of any evidence demonstrating that either Ramirez or appellants knew of each other's cases or had any relationship. *See Marine Midland Bank v. Monroe*, 104 Nev. 307, 307-08, 756 P.2d 1193, 1194 (1988) (holding a creditor of a husband and wife was not bound by divorce decree assigning debt to husband because it was not a party to the proceeding). Thus, we conclude that the district court erred when it determined that the *Ramirez* case had a preclusive effect.

Moreover, in Nevada, the negligence issue hinged on foreseeability pursuant to NRS 651.015(1)(a), because to prove Harrah's owed a duty, breached the duty, and caused appellants' harm, appellants had to prove the wrongful act was foreseeable to Harrah's. However, Harrah's provides no evidence regarding what law the California court applied and whether foreseeability was as central to the *Ramirez* case as it was in appellants' case. Further, although discovery was consolidated for liability purposes in several federal and state cases, nothing in the record indicates that the *Ramirez* case was consolidated with these other cases. Therefore, we are convinced that under Nevada law appellants were not in privity with Ramirez.

B. *The Nevada state district court summary judgments in the Salvador Barreras and Collins cases*

[Headnote 31]

The district court cites two Nevada district court decisions in granting Harrah's summary judgment motion based on issue preclusion. It cites to *Salvador Barreras v. Harrah's Laughlin, Inc.*, No. A484654 (Nev. Dist. Ct. June 13, 2005), in which the district court granted Harrah's summary judgment and found that issue preclusion barred Salvador Barrera's claim based on the jury verdict in the *Yvette Barreras* case. It also cites to the decision in *Collins v. Harrah's Laughlin, Inc.*, No. A472232 (Nev. Dist. Ct. Nov. 21, 2005), granting Harrah's summary judgment based on issue preclusion. In *Collins*, the district court found that the issue of foreseeability had been fully litigated in the *Yvette Barreras* case, where a jury found that the criminal acts of the biker gangs were not foreseeable to Harrah's. The *Collins* court also found that all the Harrah's patrons were business invitees of Harrah's and were ''sufficiently aligned and related in their common interests'' to apply the same foreseeability finding to them. The *Collins* court also noted that two juries, in the *Yvette Barreras* and *Ramirez* cases, found that Harrah's was not negligent.

For the same reasons discussed above regarding the lack of privity between the *Ramirez* plaintiffs and appellants, the appellants were not in privity with the *Salvador Barreras* or *Collins* plaintiffs. Therefore, neither case provides a basis for the application of issue preclusion.

V. *The district court properly granted Harrah's summary judgment motion regarding Garcia and Lewis based on the merits of their case*

After filing its final summary judgment against all plaintiffs based on issue preclusion, the district court then granted Harrah's summary judgment motion regarding plaintiffs Garcia and Lewis based on the merits of their case. Harrah's argued that Metro was a superseding intervening cause of Garcia's and Lewis' harm, and therefore, Garcia and Lewis could not establish proximate cause. The district court did not make any findings of fact or conclusions of law regarding its decision. However, it noted on the record that Metro treated Garcia and Lewis badly, they had settled their federal case against Metro, and it had nothing to do with Harrah's. We conclude that the district court properly granted Harrah's summary judgment because Metro was a superseding intervening cause of Garcia's and Lewis' harm.

A. *Facts of the Garcia and Lewis claims*

Garcia and Lewis were guests at Harrah's, attending the River Run event. They were not involved in the brawl and were not aware

it had occurred when they encountered Metro. Outside the casino, police officers pointed their guns at Garcia and Lewis, told them to put their hands up, and handcuffed both of them. To handcuff Lewis, an officer took her by the arm and pushed her to the ground. During this process, the shoulder straps on her blouse and her bra slipped down her arm, exposing her breast. The officer then walked her to another area with her breast exposed. When Garcia commented to the officers about their rough treatment of Lewis, an officer struck him. The police detained Garcia and Lewis for hours, during which police denied Garcia's requests to return to his room for his evening dose of seizure medication. Garcia then suffered two seizures before an ambulance took him to the hospital. Garcia and Lewis sued Harrah's for premises liability, negligent training, negligent supervision, negligence, and negligent infliction of emotional distress.

B. *Metro was a superseding intervening cause of Garcia's and Lewis' harm*

[Headnote 32]

Harrah's argues that appellants cannot establish causation because Metro was solely responsible for appellants' harm and was a superseding intervening force regarding any duty Harrah's owed to appellants. We agree.

[Headnotes 33, 34]

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The substantive law determines which facts are material, and an issue is genuine when ''a rational trier of fact could return a verdict for the nonmoving party.'' *Id.* at 731, 121 P.3d at 1031. ''To prevail on a negligence theory, a plaintiff generally must show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages.'' *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993). Here, there is no genuine issue of material fact regarding causation, and Harrah's is entitled to judgment as a matter of law.

[Headnotes 35, 36]

To prevail on their negligence claims, Garcia and Lewis must prove that Harrah's was the cause in fact and the foreseeable cause of their harm. *Doud*, 109 Nev. at 1105, 864 P.2d at 801. Harrah's was the actual cause of appellants' harm if its actions were a substantial factor in bringing about their injury. *Id.* On the other hand, foreseeability is a policy concern that limits Harrah's liability to only those harms with a reasonably close connection to its breach. *Id.* An

intervening act will only be superseding and cut off liability if it is unforeseeable. *Id*. Thus, under *Doud*, we must examine whether Metro's acts were foreseeable, such that they were not superseding intervening events that would preclude Harrah's liability. *See id*. at 1106, 864 P.2d at 801-02.

[Headnotes 37, 38]

To determine whether an intervening cause is foreseeable, we consider several factors. These include whether (1) the intervention causes the kind of harm expected to result from the actor's negligence, (2) the intervening event is normal or extraordinary in the circumstances, (3) the intervening source is independent or a normal result of the actor's negligence, (4) the intervening act or omission is that of a third party, (5) the intervening act is a wrongful act of a third party that would subject him to liability, and (6) the culpability of the third person's intervening act. Restatement (Second) of Torts § 442 (1965). When a third party commits an intentional tort or a crime, the act is a superseding cause, even when the negligent party created a situation affording the third party an opportunity to commit the tort or crime. *Id*. § 448. In such a scenario, the negligent party will only be liable if he knew or should have known at the time of the negligent conduct that he was creating such a situation and that a third party ''might avail himself of the opportunity to commit such a tort or crime.'' *Id*.

Here, Metro's acts were unforeseeable intentional torts and, therefore, were a superseding intervening cause, precluding Harrah's liability. Metro's intervention caused Lewis to be walked by police with her breast exposed, caused them both to be handcuffed and detained, and prevented Garcia from taking his medication, causing him to suffer seizures. This harm is not the type expected from Harrah's negligence in failing to protect its patrons from the criminal acts of the gangs. Harrah's negligence would cause harm such as patrons suffering injuries in the brawl or having their stay disrupted by the brawl. Metro's intentional mistreatment of Garcia and Lewis is extraordinary and outside the type of harm reasonably expected from Harrah's negligence. Also, although Metro's presence may be a normal result of Harrah's negligence, Metro's wrongful treatment of Garcia and Lewis was intentional and independent of Harrah's negligence. Further, Metro was a third party, and Harrah's itself was not involved in the altercation between Garcia and Lewis and Metro. Finally, Metro's treatment of Garcia and Lewis was wrongful and suggests a high degree of culpability. Thus, Metro's acts were unforeseeable because Harrah's could not have anticipated that Metro would take advantage of such an emergency to commit tortious acts against its patrons.

After analyzing these considerations, we are persuaded that there is no genuine issue of material fact regarding the foreseeability of

Metro's actions. Because Metro was a superseding intervening cause of Garcia's and Lewis' harm, they cannot establish causation against Harrah's. Therefore, a reasonable trier of fact could not find for Garcia and Lewis regarding their negligence claims against Harrah's, and Harrah's is therefore entitled to judgment as a matter of law. Thus, the district court properly granted Harrah's summary judgment motion against Garcia and Lewis on the merits of their case.

VI. *The district court abused its discretion by awarding Harrah's attorney fees and costs*

The district court awarded Harrah's a portion of its attorney fees under NRS 18.010(2)(b) because appellants unreasonably maintained their lawsuit. It also awarded Harrah's a portion of its costs under NRS 18.020 as the prevailing party. Appellants argue that the district court abused its discretion by awarding Harrah's attorney fees and costs. Harrah's argues that the district court properly awarded it attorney fees under NRS 18.010(2)(b) because appellants' claims were groundless, and the district court properly awarded it costs as the prevailing party under NRS 18.020. We agree with the appellants' argument regarding attorney fees because we conclude that they did not unreasonably maintain their claims, and therefore, the district court abused its discretion in awarding Harrah's attorney fees. Also, given our decision in this appeal, Harrah's only prevailed against Garcia and Lewis, and therefore, it is only entitled to costs for prevailing against Garcia and Lewis.

A. *Attorney fees*

[Headnotes 39, 40]

This court reviews a district court's award of attorney fees for abuse of discretion. *Barozzi v. Benna*, 112 Nev. 635, 638, 918 P.2d 301, 303 (1996). Under NRS 18.010(2)(b), a district court can award attorney fees if a claim or defense is ''brought or maintained without reasonable ground or to harass the prevailing party.'' Although a district court has discretion to award attorney fees under NRS 18.010(2)(b), there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

The case of *Kahn v. Morse & Mowbray*, 121 Nev. 464, 117 P.3d 227 (2005), is instructive here. In *Kahn*, the appellants sued their prior attorney and his firm for legal malpractice. *Id.* at 467, 117 P.3d at 230. The district court granted the respondent's summary judgment motion based on claim preclusion and later awarded them attorney fees under NRS 18.010(2)(b). *Id.* On appeal, this court affirmed in part, reversed in part, and remanded. *Id.* at 479-80, 117 P.3d at 238. This court concluded that claim preclusion did not bar

some of the claims and reversed the district court's grant of summary judgment. *Id.* at 474, 117 P.3d at 234. Therefore, we held that the district court's decision to award respondents their attorney fees was premature and an abuse of discretion. *Id.* at 479, 117 P.3d at 238.

[Headnote 41]

In this case, the district court awarded Harrah's attorney fees because it found that it was unreasonable for appellants to maintain their claims after other factually similar cases were decided in favor of Harrah's. The district court found that the March 2005 *Yvette Barreras* decision in favor of Harrah's made appellants' claims unreasonable. It determined that appellants should have had notice of the *Yvette Barreras* decision by May 1, 2005, and it was unreasonable for them to maintain their claims after that. Therefore, it awarded Harrah's a portion of its attorney fees from May 1, 2005, forward, totaling $317,621.98.

Like in *Kahn*, we conclude that the district court's award of attorney fees was premature and an abuse of discretion. As discussed above, a decision in a factually similar case with different plaintiffs does not necessarily support issue preclusion. Therefore, appellants had no reason to think that their claims were unreasonable because a jury found in favor of Harrah's in the *Yvette Barreras* case. Further, Judge Denton's denial of Harrah's summary judgment motion against Bower based on issue preclusion supports our conclusion that reasonable minds could disagree as to whether issue preclusion barred appellants' claims. Also, although Garcia and Lewis' claims do not survive summary judgment based on the merits, no evidence suggests that their claims were unreasonable or brought to harass. In conclusion, the decision in the *Yvette Barreras* case had no effect on the reasonableness of appellants' claims. They were reasonable when appellants brought them and remained so despite decisions in favor of Harrah's in factually similar cases with different plaintiffs. Therefore, the district court abused its discretion in awarding Harrah's attorney fees under NRS 18.010(2)(b).

B. *Costs*

The district court awarded Harrah's costs under NRS 18.020(3) because Harrah's was the prevailing party. We conclude that the district court abused its discretion in awarding Harrah's its costs as to all appellants except Garcia and Lewis because the award was based on the erroneous conclusion that Harrah's was the prevailing party.

This court reviews the district court's determination of allowable costs for abuse of discretion. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005). Notably, if we reverse the underlying decision of the district court that made the

recipient of the costs the prevailing party, we will also reverse the costs award. *Doud*, 109 Nev. at 1106, 864 P.2d at 802.

Because we determine that issue preclusion does not bar appellants' claims, Harrah's is no longer the prevailing party under NRS 18.020(3) as to all appellants except Garcia and Lewis. We are affirming the district court's grant of summary judgment for Harrah's against Garcia and Lewis based on the merits of their claims, and therefore, Harrah's remains the prevailing party against Garcia and Lewis. We therefore vacate the district court's award of costs to Harrah's as to all appellants except Garcia and Lewis.

CONCLUSION

We conclude that the district court properly reheard Harrah's summary judgment motion regarding Bower. We also conclude that issue preclusion does not bar appellants' claims based on federal or state law. Further, the district court properly granted Harrah's summary judgment regarding the merits of Garcia and Lewis' claims. Finally, the district court erred in granting Harrah's attorney fees and erred in awarding Harrah's costs as to all appellants except Garcia and Lewis. Accordingly, we reverse and remand to the district court for proceedings consistent with this opinion.

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

SONIA F., AS PARENT AND GUARDIAN AD LITEM OF J.M., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELISSA F. CADISH, DISTRICT JUDGE, RESPONDENTS, AND AMIR AHMAD, AKA AMIR AMAD; AZIZ AHMAD; AND LAURA AHMAD, REAL PARTIES IN INTEREST.

No. 51956

September 10, 2009 215 P.3d 705

Original petition for a writ of mandamus or prohibition challenging a district court order affirming a discovery commissioner's report and recommendations.

The supreme court, HARDESTY, C.J., held that: (1) rape shield statute applies to criminal prosecutions and not to civil trials; but (2) the district court has broad discretion to limit the discovery of an alleged victim's sexual history to protect the alleged victim's interests.

Petition granted in part.

Law Offices of Douglas R. Johnson and *Jennifer E. Sims* and *Douglas R. Johnson*, Las Vegas; *The Bach Law Firm, LLC*, and *Jason J. Bach*, Las Vegas, for Petitioner.

Michael I. Gowdey, Las Vegas, for Real Parties in Interest.

1. COURTS.
   Supreme court has original jurisdiction to issue writs of prohibition and mandamus. Const. art. 6, § 4.
2. PROHIBITION.
   A writ of prohibition serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction.
3. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.
4. MANDAMUS; PROHIBITION.
   An extraordinary writ may only be issued in cases where there is not a plain, speedy and adequate remedy at law. NRS 34.330.
5. COURTS.
   The consideration of an extraordinary writ is often justified where an important issue of law needs clarification and public policy is served by the supreme court's invocation of its original jurisdiction.
6. MANDAMUS; PROHIBITION.
   Supreme court would consider petition for extraordinary writ, filed following trial court's partial denial of motion for protective order under rape shield law in civil action, where petition raised an important issue of public policy regarding whether rape shield law applied in civil cases.
7. APPEAL AND ERROR.
   Supreme court reviews issues of statutory construction de novo.
8. STATUTES.
   When a statute is facially clear, the court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent.
9. STATUTES.
   Where the Legislature has explicitly applied a rule to one type of proceeding, supreme court will presume it deliberately excluded the rule's application to other types of proceedings.
10. STATUTES.
    If a statute is ambiguous, the supreme court will construe a statute by considering reason and public policy to determine the Legislature's intent.
11. RAPE; WITNESSES.
    Rape shield statute applies to criminal prosecutions but not to civil trials. NRS 50.090.
12. STATUTES.
    Words in a statute should be given their plain meaning unless this violates the spirit of the act.
13. PRETRIAL PROCEDURE.
    In civil sexual assault cases, discovery into alleged victim's sexual history should not be unlimited; rather, the district court should use its sound discretion to determine whether the discovery sought is consistent with rule providing that inquiries must be relevant and reasonably calculated to lead to the discovery of admissible evidence. NRCP 26(b)(1).

14. PRETRIAL PROCEDURE.

Discovery rules provide for the issuance of protective orders in civil cases to allow the district court to limit discovery as it sees fit, in order to protect an alleged sexual assault victim from annoyance, embarrassment, or oppression. NRCP 26(c)(5).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this petition for extraordinary relief, we exercise our discretion to consider an issue of first impression; namely, whether Nevada's rape shield law, which restricts the admissibility of evidence concerning a sexual assault victim's history of sexual conduct, applies in civil cases.

We conclude that Nevada's rape shield law, codified under NRS 50.090, is plain and unambiguous, and applies only to criminal proceedings and not civil cases. We further conclude, however, that the district court may limit the discovery of an alleged victim's sexual history under NRCP 26, if necessary to protect the victim's interests.

FACTS AND PROCEDURAL HISTORY

In November 2006, Sonia F., petitioner and guardian ad litem of J.M., filed a civil complaint against real party in interest Amir Ahmad, alleging various causes of action,[1] all of which stem from Ahmad's alleged rape of J.M. Specifically, Sonia F. claims that on the morning of July 5, 2006, Ahmad, who was 20 years old, forcibly raped her 14-year-old daughter, J.M., in Ahmad's parent's home. As a result of Ahmad's conduct, Sonia F. alleges that J.M. suffered and continues to suffer physical, emotional, and mental harm. Ahmad admits having sexual intercourse with J.M. but contends that it was consensual.

During discovery, Ahmad filed a motion to compel J.M. to submit to an independent medical examination to address J.M.'s claims for emotional damages. The district court granted the request for an independent examination, finding that the examination was appropriate because J.M. had placed her emotional and mental condition at issue.

Subsequently, Sonia F. moved the district court for a protective order seeking, in part, to prevent Ahmad and independent psychologists from questioning J.M. about her sexual history based on

[1]Specifically, Sonia F. asserted claims for sexual assault, statutory sexual seduction, battery, intentional and negligent infliction of emotional distress, gross negligence, negligence, and negligence per se.

Nevada's rape shield law. Ahmad opposed the motion, arguing that Nevada's rape shield law does not apply in civil cases because the element of damages differentiates the civil case from a criminal charge.

The district court denied, in part, Sonia F.'s motion for a protective order. Pertinent to this petition, the district court permitted Ahmad's attorneys and independent psychologists to question J.M. regarding her sexual history. In response, Sonia F. requested that the district court stay discovery so that she could file an emergency petition with this court seeking clarification of the application of Nevada's rape shield law to civil cases. The district court granted a temporary stay. Thereafter, this court granted a stay of all discovery related to J.M.'s sexual history pending the resolution of this writ petition.

DISCUSSION

[Headnotes 1-5]

This court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const. art. 6, § 4. A writ of prohibition serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction. *Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 356, 167 P.3d 421, 426 (2007). A writ of mandamus is available '' 'to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.' '' *Savage v. Dist. Ct.*, 125 Nev. 9, 14, 200 P.3d 77, 81 (2009) (quoting *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006)). An extraordinary writ may only be issued in cases ''where there is not a plain, speedy and adequate remedy'' at law. NRS 34.330. In addition, the consideration of an extraordinary writ is often justified '' 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.' '' *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

[Headnote 6]

Because this petition raises an important issue of public policy regarding whether Nevada's rape shield law applies in civil cases, we exercise our discretion to entertain Sonia F.'s petition.

Whether Nevada's rape shield law applies in civil cases

The parties dispute whether the rape shield law contained in NRS 50.090 applies to civil cases. Sonia F. argues that public policy supports her argument that NRS 50.090's evidentiary limitations and protections extend to sexual assault victims who file civil actions.

Sonia F. thus argues that a sexual assault victim in a civil case, particularly a minor victim, should not be questioned regarding her sexual history. Ahmad, on the other hand, argues that NRS 50.090 is plain and unambiguous and does not apply in civil cases. Ahmad further argues that the damages element necessary to a civil prosecution for sexual assault warrants the introduction of the alleged victim's sexual history. Therefore, to resolve this petition, we are called upon to interpret NRS 50.090.

[Headnotes 7-10]

This court reviews issues of statutory construction de novo. *Stalk v. Mushkin*, 125 Nev. 21, 25, 199 P.3d 838, 840 (2009). When a statute is facially clear, this court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent. *Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). Similarly, after reviewing the plain language of a statute, this court has concluded that ''[t]he mention of one thing implies the exclusion of another.'' *State v. Wyatt*, 84 Nev. 731, 734, 448 P.2d 827, 829 (1968) (BATJER, J., dissenting). Therefore, where the Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings. *See id.*; *see also Matter of Estate of Prestie*, 122 Nev. 807, 814, 138 P.3d 520, 524 (2006). If, on the other hand, a statute is ambiguous, this court will construe a statute by considering reason and public policy to determine the Legislature's intent. *Cable v. EICON*, 122 Nev. 120, 124-25, 127 P.3d 528, 531 (2006).

[Headnote 11]

Nevada's rape shield statute, codified under NRS 50.090, provides:

> In any *prosecution* for sexual assault or statutory sexual seduction . . . the *accused* may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the *prosecutor* has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the *accused's* cross-examination of the victim or rebuttal must be limited to the evidence presented by the *prosecutor* or victim.

(Emphases added.)

[Headnote 12]

We conclude that NRS 50.090 is plain and unambiguous and applies to criminal prosecutions but not to civil trials. Markedly, the term ''accused'' generally refers to a criminal defendant, and the term ''prosecution'' generally signifies a criminal action. *See*

Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) (''The plain language of NRS 48.045(2) uses the term 'person,' rather than 'defendant,' or 'accused.' In Nevada, 'words in a statute should be given their plain meaning unless this violates the spirit of the act.' '' (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). Indeed, this court has previously stated that ''NRS 50.090 . . . expressly limit[s] the admission of [evidence of a victim's prior sexual conduct] to prosecutions'' and that ''prosecution of a case does not exist until [criminal] charges are filed.'' *Lane v. District Court*, 104 Nev. 427, 443, 760 P.2d 1245, 1255 (1988).

In this instance, the plain language of NRS 50.090 prohibits the ''accused'' from presenting evidence of a sexual assault victim's sexual history in ''any prosecution.'' Unlike Federal Rule of Evidence 412(a)(1), which provides that ''evidence is not admissible in any civil or criminal proceeding [that is] . . . offered to prove that any alleged victim engaged in other sexual behavior,'' NRS 50.090 does not refer to the admissibility of evidence in civil proceedings. Therefore, under the rules of statutory construction, the Legislature specifically phrased NRS 50.090 to apply to criminal prosecutions to the exclusion of civil proceedings. *See Matter of Estate of Prestie*, 122 Nev. at 814, 138 P.3d at 524; *see also Doe by Roe v. Orangeburg Cty. Sch. Dist.*, 495 S.E.2d 230, 233 (S.C. Ct. App. 1997) (noting that because South Carolina's rape shield statute refers only to ''prosecutions,'' it is not applicable in civil cases). Accordingly, we hold that NRS 50.090, Nevada's rape shield law, does not apply to civil cases.[2]

[Headnote 13]

Nevertheless, in civil sexual assault cases, we conclude that discovery should not be unlimited. Rather, the district court should use its sound discretion to determine whether the discovery sought is consistent with NRCP 26(b)(1), which provides that inquiries must be relevant and ''reasonably calculated to lead to the discovery of admissible evidence.''

To that end, we identify *D.S. v. DePaul Institute*, 32 Pa. D. & C.4th 328 (Ct. Com. Pl. 1996), as instructive on this issue. Although the *DePaul* court concluded that Pennsylvania's criminal rape shield law did not apply in civil cases, it determined that dis-

[2]There are those jurisdictions that have held that the policy underlying the criminal rape shield law has similar import in civil cases. *See Macon Telegraph Pub. Co. v. Tatum*, 430 S.E.2d 18, 22 (Ga. Ct. App. 1993) (holding that the public policy underlying the rape shield law applies equally to civil actions), *judgment reversed on other grounds by Macon Telegraph Pub. Co. v. Tatum*, 436 S.E.2d 655 (Ga. 1993); *In re K.W.*, 666 S.E.2d 490, 493 (N.C. Ct. App. 2008) (holding that the logic behind the rape shield law makes the law applicable to civil actions). However, we defer to the Legislature to determine whether the public policy underlying the criminal rape shield law should be extended to include civil cases.

covery of a plaintiff's entire sexual history in a civil action was inappropriate. *Id.* at 333, 338. The court differentiated between the plaintiff's history of consensual sexual relationships from history of traumatic experiences, *id.* at 336-37, and thereafter emphasized that while consensual relationships may impact a person's emotions, ''[t]he law should not force plaintiffs . . . to disclose their entire [consensual] sexual . . . histories whenever they claim that they have sustained psychiatric problems from a traumatic event.'' *Id.* at 338; *see also Giron v. Corrections Corp. of America*, 981 F. Supp. 1406, 1408 (D.N.M. 1997) (recognizing that the plaintiff's previous experiences may be relevant as to issue of damages ''but only to the extent that such sexual contact caused pain and suffering'').

[Headnote 14]

We agree with the reasoning employed by the *DePaul* court for two reasons. First, the plain language of the rape shield law limits its application to criminal cases, and second, civil actions implicate different considerations for discovery, burdens of proof, and remedies than criminal prosecutions. However, we do not adopt a steadfast rule related to discovery in all civil proceedings for sexual assault. Rather, we stress that a district court has the broad discretion under NRCP 26 to determine, on a case-by-case basis, whether an alleged sexual assault victim's sexual history is discoverable. *See Abbott v. State*, 122 Nev. 715, 732, 138 P.3d 462, 473 (2006). And the discovery rules provide for the issuance of protective orders to allow the district court to limit discovery as it sees fit, in order to ''protect [an alleged sexual assault victim] from annoyance, embarrassment, [or] oppression.'' NRCP 26(5)(c).

CONCLUSION

Sonia F.'s petition raises an important issue of public policy related to the applicability of Nevada's rape shield law to civil proceedings. We conclude that NRS 50.090 is plain and unambiguous and applies only to criminal proceedings and not to civil actions. Nonetheless, we conclude that if necessary the district court may limit the discovery of an alleged victim's sexual history under NRCP 26 to protect the victim's interests.

Accordingly, we grant this petition in part. In addition, we vacate the stay on discovery that this court entered on February 2, 2009. The clerk of this court shall issue a writ of mandamus instructing the district court to conduct discovery in a manner consistent with this opinion.

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

FLAMINGO PARADISE GAMING, LLC, A NEVADA LIMITED LIABILITY COMPANY DBA TERRIBLE'S HOTEL AND CASINO; HIGCO, INC., A NEVADA CORPORATION DBA THREE ANGRY WIVES PUB; MARKET GAMING, INC., A NEVADA CORPORATION; CARDIVAN COMPANY, A NEVADA CORPORATION; E-T-T, INC., A NEVADA CORPORATION; AND NEVADA TAVERN OWNERS ASSOCIATION, APPELLANTS, *v.* GEORGE HANOS, ATTORNEY GENERAL OF THE STATE OF NEVADA; DAVID ROGER, CLARK COUNTY DISTRICT ATTORNEY; BILL YOUNG, SHERIFF OF LAS VEGAS METROPOLITAN POLICE DEPARTMENT; BRADFORD JERBIC, CITY ATTORNEY FOR THE CITY OF LAS VEGAS; KAREN COYNE, CHIEF CITY MARSHAL FOR THE CITY OF LAS VEGAS; RICHARD D. PERKINS, POLICE CHIEF OF THE CITY OF HENDERSON; SHAUNA HUGHES, CITY ATTORNEY FOR THE CITY OF HENDERSON; JOSEPH K. FORTI, POLICE CHIEF OF THE CITY OF NORTH LAS VEGAS; CARIE A. TORRENCE, CITY ATTORNEY FOR THE CITY OF NORTH LAS VEGAS; DR. LAWRENCE SANDS, CHIEF HEALTH OFFICER FOR THE SOUTHERN NEVADA HEALTH DISTRICT; AND NEVADA RESORT ASSOCIATION, A NONPROFIT COOPERATIVE ASSOCIATION, RESPONDENTS.

GEORGE CHANOS, CROSS-APPELLANT, *v.* FLAMINGO PARADISE GAMING, LLC, A NEVADA LIMITED LIABILITY COMPANY DBA TERRIBLE'S HOTEL AND CASINO; HIGCO, INC., A NEVADA CORPORATION DBA THREE ANGRY WIVES PUB; MARKET GAMING, INC., A NEVADA CORPORATION; CARDIVAN COMPANY, A NEVADA CORPORATION; E-T-T, INC., A NEVADA CORPORATION; AND NEVADA TAVERN OWNERS ASSOCIATION, CROSS-RESPONDENTS.

No. 49223

September 24, 2009 217 P.3d 546

Appeal and cross-appeal from a district court judgment concerning the constitutionality of the Nevada Clean Indoor Air Act, a ballot measure passed in 2006. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Business entities brought action against Attorney General and other defendants, challenging the constitutionality of Nevada Clean Indoor Air Act (NCIAA). The district court entered an order that found the criminal penalty portion of the statute unconstitutionally vague, and the court ordered that portion of the statute severed. On cross-appeals, the supreme court, HARDESTY, C.J., held that: (1) criminal penalties in the NCIAA were unconstitutionally vague, (2) severance of unconstitutional portion of NCIAA was warranted, (3) remaining portion of NCIAA was not unconstitutionally vague,

(4) NCIAA did not violate equal protection, (5) NCIAA did not constitute a permanent invasion of property that amounted to a regulatory taking, and (6) NCIAA did not constitute a physical invasion of property that constituted a taking.

Affirmed.

CHERRY, J., dissented in part.

Jones Vargas and *Bradley Scott Schrager, Kirk B. Lenhard*, and *Kathleen L. Fellows*, Las Vegas, for Appellants/Cross-Respondents Flamingo Paradise Gaming, LLC, Higco, Inc., Market Gaming, Inc., Cardivan Company, and E-T-T, Inc.

Kummer Kaempfer Bonner Renshaw & Ferrario and *Mark E. Ferrario* and *Tami D. Cowden*, Las Vegas, for Appellant Nevada Tavern Owners Association.

Catherine Cortez Masto, Attorney General, *Christine M. Guerci-Nyhus*, Chief Deputy Attorney General, and *Nancy D. Savage*, Senior Deputy Attorney General, Carson City, for Respondent/Cross-Appellant Chanos.

David J. Roger, District Attorney, and *Mary-Anne Miller*, Deputy District Attorney, Clark County, for Respondents Roger and Young.

Bradford R. Jerbic, City Attorney, and *Philip R. Byrnes*, Deputy City Attorney, Las Vegas, for Respondents Jerbic and Coyne.

Shauna M. Hughes, City Attorney, and *David W. Mincavage*, Assistant City Attorney, Henderson, for Respondents Perkins and Hughes.

Carie A. Torrence, City Attorney, and *Jeffrey F. Barr*, Deputy City Attorney, North Las Vegas, for Respondents Forti and Torrence.

Stephen F. Smith, Las Vegas, for Respondent Sands.

Brownstein Hyatt Farber Schreck, LLP, and *Todd L. Bice* and *Nathan T.H. Lloyd*, Las Vegas, for Respondent Nevada Resort Association.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Amicus Curiae American Cancer Society.

1. CRIMINAL LAW; STATUTES.

A statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute, while a statute that only involves civil penalties is only facially vague if it is void in all its applications.

2. APPEAL AND ERROR.
   The determination of whether a statute is constitutional is a question of law, which the supreme court reviews de novo.
3. CONSTITUTIONAL LAW.
   Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.
4. STATUTES.
   The court must interpret a statute in a reasonable manner, that is, the words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.
5. STATUTES.
   In reviewing a statute, it should be given its plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.
6. CONSTITUTIONAL LAW.
   Under two-factor test for analyzing whether a statute is unconstitutionally vague in violation of due process, an act is unconstitutionally vague if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. U.S. CONST. amend. 14.
7. CONSTITUTIONAL LAW; STATUTES.
   Under a facial challenge to a civil statute, the plaintiff must show that the statute is impermissibly vague in all of its applications; in making this showing, a complainant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.
8. CRIMINAL LAW; STATUTES.
   When the statute in a facial vagueness challenge involves criminal penalties or constitutionally protected rights, the case involves a higher standard of whether vagueness permeates the text.
9. STATUTES.
   When a statute is reviewed under the lower standard of vague in all its applications, if the statute provides sufficient guidance as to at least some conduct that is prohibited and standards for enforcement of that conduct, it will survive a facial challenge because it is not void in all its applications.
10. CRIMINAL LAW; STATUTES.
    Under the higher standard for a facial vagueness challenge of a statute involving criminal penalties or constitutionally protected rights, the question becomes whether vagueness so permeates the text that the statute cannot meet these requirements in most applications, and thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances.
11. CONSTITUTIONAL LAW; ENVIRONMENTAL LAW.
    Vagueness permeated the Nevada Clean Indoor Air Act (NCIAA) text in that it failed to provide sufficient notice of what conduct was prohibited and allowed for arbitrary enforcement, and thus, the criminal penalties in the Act could not withstand constitutional due process scrutiny; with regards to both notice and arbitrary enforcement, the statute failed to adequately define to whom the Act was enforced against, the Act failed to explain whether business owners had a responsibility to stop someone who was smoking in violation of the Act, and if so, what that responsibility entailed, and the Act failed to define several terms that did not have a plain meaning,

including ''smoking paraphernalia'' and ''large room.'' U.S. CONST. amend. 14; NRS 202.2483.

12. STATUTES.

Under the severance doctrine, it is the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.

13. STATUTES.

A statute is only severable if the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed.

14. STATUTES.

Severance of unconstitutional portion of Nevada Clean Indoor Air Act (NCIAA) that permitted imposition of criminal penalties was warranted; the portion severed was not the central component of the statute, the statute after severance could be legally enforced, and the statute contained a severability clause, indicating the initiative's proponents contemplated that should a constitutional challenge arise, the offending portion of the statute could be severed and the remaining portion could proceed and the smoking ban enforced. NRS 202.2483.

15. STATUTES.

In a facial challenge, under the lower standard test of whether the statute is vague in all its applications, a statute is sufficiently clear if, in any application, it does not (1) fail to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and does not (2) lack specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.

16. CONSTITUTIONAL LAW; ENVIRONMENTAL LAW.

While there was some uncertainty as to what affirmative actions, if any, a business owner had to take under the Nevada Clean Indoor Air Act (NCIAA) if someone was smoking within his or her business in violation of the statute, there was no question that the business owner was required to make his or her establishment nonsmoking and post signs designating it as such; as the main restrictions of the Act were sufficiently clear to establish specific prohibited conduct that a reasonable person could understand and did not promote arbitrary enforcement, the statute survived a facial vagueness challenge after severance of provisions that permitted imposition of criminal penalties. U.S. CONST. amend. 14; NRS 202.2483.

17. CONSTITUTIONAL LAW.

Equal protection allows different classifications of treatment, but the classifications must be reasonable. U.S. CONST. amend. 14.

18. CONSTITUTIONAL LAW.

While there are different levels of scrutiny that may apply under an equal protection analysis to determine if classifications are reasonable and therefore constitutional, when classifications do not involve a fundamental right or a suspect class, the classifications are reasonable, and the statute is constitutional, if there is a rational basis related to a legitimate government interest for treating classes differently. U.S. CONST. amend. 14.

19. CONSTITUTIONAL LAW.

Supreme court is not limited, when analyzing a rational basis review, to the reasons enunciated for enacting a statute; if any rational basis exists, then a statute does not violate equal protection. U.S. CONST. amend. 14.

20. CONSTITUTIONAL LAW.

Under a rational basis test, classifications must apply uniformly to all who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be rea-

sonable, not arbitrary; the classifications must also bear a rational relationship to the legislative purpose sought to be effected. U.S. CONST. amend. 14.

21. CONSTITUTIONAL LAW; ENVIRONMENTAL LAW.
Nevada Clean Indoor Air Act (NCIAA) did not violate equal protection due to exempting gaming areas in those businesses that held a nonrestricted gaming license; it was rational to apply exception to nonrestricted gaming licensees' large gaming areas but not to restricted gaming licensees' gaming areas, which were generally much smaller and likely too close to the other services provided by the establishment, and the exemption was rationally related to promoting nonrestricted gaming licensees further success and continued substantial benefit to the state's economy. U.S. CONST. amend. 14; NRS 202.2483.

22. EMINENT DOMAIN; ENVIRONMENTAL LAW.
Nevada Clean Indoor Air Act (NCIAA), which prohibited smoking in schools and indoor places of employment, did not prevent business owners from using the airspace within their buildings, and thus, it did not constitute a permanent invasion of property that amounted to a regulatory taking and required compensation. Const. art. 1, § 8(6); NRS 202.2483.

23. EMINENT DOMAIN; ENVIRONMENTAL LAW.
Nevada Clean Indoor Air Act (NCIAA), which required businesses to place ''no smoking'' signs, did not constitute a physical invasion of property that constituted a taking; the NCIAA did not give control over the installation or any portion of a person's property to a third party. Const. art. 1, § 8(6); NRS 202.2483.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, C.J.:

This appeal involves a facial challenge to the constitutionality of Nevada's Clean Indoor Air Act (NCIAA), which was passed as a ballot measure in 2006 and codified in NRS 202.2483. The NCIAA prohibits smoking in schools and ''indoor places of employment'' but provides exceptions for gaming areas in casinos, stand-alone bars, and strip clubs. In an action for injunctive and declaratory relief, appellants challenged the constitutional validity of the statute. The district court ruled that the statute was unconstitutionally vague for criminal enforcement purposes but not for civil enforcement purposes, and as a result, it severed from the statute the portion permitting the imposition of criminal penalties. In reaching this conclusion, the district court found that several terms within the statute were vague and the statute lacked a criminal intent requirement necessary to provide sufficient guidance for criminal enforcement of the statute. But the district court also found that the statute was not too vague for civil enforcement based on its conclusion that the test

[1]THE HONORABLE RON PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

for constitutional vagueness is less strict for civil enforcement than criminal enforcement.

[Headnote 1]

We conclude that the district court correctly ruled that under a facial challenge the statute is constitutional for civil enforcement but unconstitutionally vague for criminal enforcement. A statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute, while a statute that only involves civil penalties is only facially vague if it is void in all its applications. As vagueness permeates the text of the NCIAA, it is unconstitutionally vague for criminal enforcement. We further conclude that the district court properly severed the criminal enforcement provision from the statute because the statute, after severance, can be legally enforced and it was the intent of the proponents of the statute that the act remain in effect if a portion was severed. A review of the NCIAA, after severance, indicates that the statute survives a facial vagueness challenge, as it is not vague in all its applications. While we recognize that the NCIAA contains numerous defects that may potentially be subject to as-applied challenges, here, the civil enforcement of the statute does not violate constitutional due process rights for vagueness under the minimal requirements for surviving a facial challenge. Finally, we conclude that the statute does not violate equal protection, nor does it effect an unconstitutional government taking of private property. Accordingly, we affirm the district court's order upholding the civil enforcement of the statute and severing the statute's criminal enforcement provision as unconstitutional.

FACTS AND PROCEDURAL HISTORY

The Nevada Clean Indoor Air Act was enacted by initiative in 2006 and codified in NRS 202.2483.[2] Its stated purpose was to protect families and children from the harmful effects of secondhand smoke. NRS 202.2483 (Reviser's note). The NCIAA prohibits smoking in most indoor public places,[3] with exceptions for casino

[2]The NCIAA was challenged, preelection, in this court, resulting in the opinion, *Herbst Gaming, Inc. v. Secretary of State*, 122 Nev. 877, 141 P.3d 1224 (2006). In *Herbst Gaming*, several constitutional challenges to the NCIAA were raised; however, this court concluded that the constitutional challenges were premature and declined to address them at that time. *Id.* at 888, 141 P.3d at 1231. The voters passed the ballot petition and the NCIAA was codified as NRS 202.2483.

[3]NRS 202.2483(1)(a)-(g) identifies the indoor public places in which smoking is prohibited:

> 1. Except as otherwise provided in subsection 3, smoking tobacco in any form is prohibited within indoor places of employment including, but not limited to, the following:
>
> (a) Child care facilities;
>
> (b) Movie theatres;

gaming areas, stand-alone bars and taverns, retail tobacco stores, strip clubs, and brothels.[4] The statute imposes both criminal and civil penalties for violations.[5]

After the NCIAA passed, appellants, various business entities, brought suit in district court for declaratory and injunctive relief, arguing that the statute was unconstitutional on several grounds. The district court granted a temporary restraining order preventing the enforcement of the statute and set a hearing date for a preliminary injunction. Based on case authority suggesting that a less-strict test should be applied to civil statutes, the district court determined that it should properly review the NCIAA separately as a criminal statute and then as a civil statute. The court concluded that appellants were likely to succeed in demonstrating that the criminal portion of the statute was unconstitutional, but not the civil portion of the statute. Therefore, the district court granted a partial preliminary injunction.

The parties then filed cross-motions for summary judgment, with all parties acknowledging that the issues presented concerned questions of law because only a facial challenge to the statute was asserted. The district court held a hearing on the summary judgment motions, which was in effect a continuation of the hearing for a preliminary injunction. At the conclusion of the hearing, the district court entered an order that found the criminal penalty portion of the statute unconstitutionally vague, and the court ordered that portion of the statute severed. The district court upheld, as constitutional, the remainder of the statute.

This appeal and cross-appeal followed. Appellants challenge the portion of the district court's order that severed the criminal penal-

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(c) Video arcades;
(d) Government buildings and public places;
(e) Malls and retail establishments;
(f) All areas of grocery stores; and
(g) All indoor areas within restaurants.

[4]NRS 202.2483(3)(a)-(e) lists exceptions to the smoking ban:

3. Smoking tobacco is not prohibited in:
(a) Areas within casinos where loitering by minors is already prohibited by state law pursuant to NRS 463.350;
(b) Stand-alone bars, taverns and saloons;
(c) Strip clubs or brothels;
(d) Retail tobacco stores; and
(e) Private residences, including private residences which may serve as an office workplace, except if used as a child care, an adult day care or a health care facility.

[5]NRS 202.2483(7) provides for both criminal and civil enforcement and penalties:

7. Health authorities, police officers of cities or towns, sheriffs and their deputies shall, within their respective jurisdictions, enforce the provisions of this section and shall issue citations for violations of this section pursuant to NRS 202.2492 [criminal] and NRS 202.24925 [civil].

ties and declared the statute constitutional as a civil statute, arguing that the entire statute is unconstitutional. Cross-appellant George Chanos challenges the district court's determination that the criminal portion of the statute was unconstitutionally vague. An amicus curiae brief in support of respondents' position was filed by the American Cancer Society.

DISCUSSION

Standard of review

[Headnotes 2-5]

The determination of whether a statute is constitutional is a question of law, which this court reviews de novo. *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). ''Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional.'' *Id.* The court must interpret a statute in a reasonable manner, that is, ''[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.'' *Desert Valley Water Co. v. State Engineer*, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988). In reviewing a statute, it ''should be given [its] plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.'' *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotation omitted).

Appellants challenge the constitutionality of the statute on three grounds: vagueness, equal protection, and governmental takings. First, we address appellants' argument that the NCIAA violates due process rights because it is unconstitutionally vague. To analyze appellants' vagueness challenge, we must initially determine the proper framework for reviewing a facial vagueness challenge, and then we apply the framework to the present case. In doing so, we address cross-appellant Chanos's contention regarding the constitutionality of the criminal enforcement of the NCIAA, whether the district court properly severed the criminal enforcement provisions, and whether the statute withstands a facial vagueness challenge after severance. Second, we examine appellants' contention that the statute violates equal protection and is therefore unconstitutional. Finally, we consider appellant Nevada Tavern Owners Association's (NTOA) claim that the NCIAA is unconstitutional because it constitutes a governmental taking of private property without providing just compensation.

The proper framework for analyzing a facial vagueness challenge

There is a divergence of authority regarding the appropriate test that courts should apply in evaluating a facial vagueness challenge. Thus, we first address the conflicting vagueness tests and establish

a framework for analyzing the facial vagueness challenge presented in this appeal.

Relevant legal precedent addressing facial challenges

[Headnote 6]

When analyzing whether a statute is unconstitutionally vague in violation of due process, courts generally apply a two-factor test. *Silvar*, 122 Nev. at 293, 129 P.3d at 685; *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Under this two-factor test, an act is unconstitutionally vague if it ''(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.'' *Silvar*, 122 Nev. at 293, 129 P.3d at 685. Although this test is clear for as-applied challenges, how these factors apply in a facial challenge is less certain. This uncertainty lies in the United States Supreme Court's inconsistent application of these factors in its precedent.

Beginning in 1982, the Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982), stated that a facial vagueness challenge would fail unless the complainant could ''demonstrate that the law is impermissibly vague in all of its applications.'' *Id.* at 497. But after stating this requirement, the *Hoffman Estates* opinion went on to note that ''[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment'' and that the Court has ''greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.'' *Id.* at 498-99.

One year later, in *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court, in a footnote, called into question the requirement that a facial challenger must establish that a statute is vague in all its applications, at least when a statute involves a constitutionally protected right or criminal penalties. *Id.* at 358 n.8. Relying in part on the additional language in *Hoffman Estates*, the Court observed that there was a varying tolerance of vagueness, depending on the nature of the statute. *Id.* The *Kolender* Court recognized that a higher standard applied to statutes involving constitutional rights or criminal penalties, however, the Court did not articulate what constituted the higher standard.

Thereafter, in *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court reaffirmed the requirement for facial challenges, in general, that the challenger must show that the statute is void in all its applications. *Id.* at 745. The *Salerno* opinion did not address the *Kolender* footnote questioning this standard.

Then, in a 1999 plurality opinion, *Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion), the Supreme Court again called into question the requirement that a statute be void in all its

applications for a successful facial challenge. In *Morales*, the Court enunciated a higher standard test, at least in cases in which the statute involved criminal penalties with no mens rea requirement and that dealt with constitutional rights, holding that such statutes would be unconstitutional if ''vagueness permeates the text of such a law.'' *Id*. at 55.

More recently, the Supreme Court reaffirmed the requirement that a statute be void in all its applications for a facial challenge to be successful. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). The Court, however, recognized the disagreement among its members as to the proper standard to apply in reviewing a facial challenge, stating that ''some Members of the Court have criticized [the void-in-all-its-applications] formulation.'' *Id*. The *Washington State Grange* case did not involve a criminal statute, and therefore, it does not resolve the issue as to what standard applies to criminal statutes not involving constitutionally protected rights.

Thus, the Supreme Court has announced differing rules for facial challenges. On the one hand, the Court in *Hoffman Estates*, *Salerno*, and *Washington State Grange*, stated the requirement that a statute must be void in all its applications. On the other hand, in *Kolender* and *Morales*, the Court questioned this standard, at least in cases with statutes involving constitutional rights or criminal penalties.

As the Supreme Court precedent fails to explain with specificity the higher standard applicable to criminal statutes, several courts have expressed concerns as to when this higher standard applies and how the standard is measured. Some courts have concluded that the higher standard only applies when a First Amendment right is at issue. *U.S. v. Rybicki*, 354 F.3d 124, 130-31 (2d Cir. 2003) (distinguishing *Morales* based on the fact that *Morales* involved constitutionally protected conduct and the holding in *Morales* was a plurality opinion and not a majority opinion); *People v. Molnar*, 857 N.E.2d 209, 225 (Ill. 2006) (stating requirement that a facial challenge requires a void-in-all-its-applications showing, without addressing cases that question this requirement). Other courts have held that the higher standard applies when any constitutional right is at issue but not simply because criminal penalties not involving a constitutional right are present, again distinguishing *Morales* and *Kolender* because those cases involved constitutional rights. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 551 n.19 (5th Cir. 2008) (distinguishing *Morales* on the basis that it involved constitutionally protected activity); *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1348 (9th Cir. 1984) (limiting *Kolender* to its unique set of circumstances and that it involved substantial constitutional rights); *State ex rel. Children, Youth & Families*, 999 P.2d 1045, 1051 (N.M Ct. App. 2000) (same). Still, other courts have held that a higher standard applies to statutes involving constitutional rights *or* criminal penalties.

U.S. v. Doremus, 888 F.2d 630, 635 (9th Cir. 1989) (recognizing the holding in *Hoffman* that a higher standard applies when criminal penalties exist); *Steffes v. City of Lawrence*, 160 P.3d 843, 850 (Kan. 2007) (stating that a higher standard exists for a facial vagueness challenge of a criminal statute).

Similarly, our prior opinions have applied the requirement that a statute be void in all its applications for facial challenges, *Matter of T.R.*, 119 Nev. 646, 652, 80 P.3d 1276, 1280 (2003), but we have also recognized the higher standard of ''vagueness permeates the text'' for statutes involving criminal penalties. *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). And our prior opinions have likewise evidenced confusion over how the higher standard applies by failing to explain or sometimes apply a higher standard. *Matter of T.R.*, 119 Nev. at 652, 80 P.3d at 1280; *Sheriff v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486-87 (2002). That the Supreme Court has not articulated a separate test for this higher standard, or provided a clear explanation of how this higher standard should apply, compounds the ongoing confusion.

Standards for reviewing facial vagueness challenge

[Headnotes 7, 8]

By examining the facial vagueness doctrine through the varied legal precedent, we conclude that there are two approaches to a facial vagueness challenge depending on the type of statute at issue. The first approach arises under a facial challenge to a civil statute and the plaintiff must show that the statute is impermissibly vague in all of its applications. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008); *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982). In making this showing, ''[a] complainant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'' *Matter of T.R.*, 119 Nev. at 652, 80 P.3d at 1280 (internal quotation omitted); *Hoffman Estates*, 455 U.S. at 495. But, when the statute involves criminal penalties or constitutionally protected rights, the second approach involves a higher standard of whether ''vagueness permeates the text.''[6] *City of Las Vegas v. Dist. Ct.*, 118 Nev. at 862, 59 P.3d at 480; *Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion). Both of these standards are applied through the consideration of the two-factor test for vagueness challenges as stated above, whether the statute: ''(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing

[6]We do not decide when the higher standard applies for statutes involving constitutional rights but not criminal penalties, as the parties agree that this case does not implicate any constitutionally protected rights.

to prevent arbitrary and discriminatory enforcement.'' *Silvar*, 122 Nev. at 293, 129 P.3d at 685; *Kolender*, 461 U.S. at 357; *Hoffman Estates*, 455 U.S. at 498.

[Headnotes 9, 10]

Thus, when a statute is reviewed under the lower standard of vague in all its applications, if the statute provides sufficient guidance as to at least some conduct that is prohibited and standards for enforcement of that conduct, it will survive a facial challenge because it is not void in all its applications. *Hoffman Estates*, 455 U.S. at 497. Under the higher standard, the question becomes whether vagueness so permeates the text that the statute cannot meet these requirements in most applications; and thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances. *See Kolender*, 461 U.S. at 358 n.8.

The NCIAA is unconstitutionally vague as to criminal enforcement, but is constitutional as to civil enforcement

Having established the proper framework for analyzing a facial vagueness challenge, we now apply it to the present case. In doing so, we first consider whether the NCIAA is unconstitutionally vague for criminal enforcement. Concluding that it is, we next determine whether the district court properly severed the criminal provision from the statute. After concluding that severance was proper, we address whether the NCIAA passes a facial challenge for civil enforcement.

The NCIAA is unconstitutionally vague for criminal enforcement

Because the district court severed the criminal portion of the statute, to determine the proper standard to apply to this facial challenge, we first address cross-appellant Chanos's contention that the district court erred in ruling that the criminal enforcement of the statute is unconstitutionally vague. If Chanos's cross-appeal is successful, then the statute would include criminal penalties. As a result, we apply the higher standard of whether vagueness permeates the statute's text to analyze the cross-appeal.[7]

[Headnote 11]

We conclude that vagueness permeates the NCIAA text in that it fails to provide sufficient notice of what conduct is prohibited and allows for arbitrary enforcement. With regards to both notice and ar-

[7]NRS 202.2483(7) states, ''Health authorities, police officers of cities or towns, sheriffs and their deputies shall, within their respective jurisdictions, enforce the provisions of this section and shall issue citations for violations of this section pursuant to NRS 202.2492 [criminal penalties] and NRS 202.24925 [civil penalties].''

bitrary enforcement, the statute fails to adequately define to whom the Act is enforced against. While it is clear that a person cannot smoke in a restricted area, it is unclear if there is an obligation to affirmatively prevent smoking by a business owner, manager, or employee. The statute fails to explain whether business owners, such as appellants, have a responsibility to stop someone who is smoking in violation of the Act, and if so, what that responsibility entails. Consequently, we question whether it is sufficient, under the statute, to ask the person to stop smoking, or does the business owner have to demand that the person leave the premises, and if the person refuses to leave the premises, is the owner required to call the police? The statute fails to provide guidelines as to what action is required and how the statute is enforced, and therefore, it creates the possibility of arbitrary and discriminatory enforcement.

Vagueness also permeates the NCIAA's text by failing to define several terms included in the statute that do not have a plain meaning. These terms include ''smoking paraphernalia'' and ''large room.'' For example, as one court has recognized, the term ''smoking paraphernalia'' is too vague because ''the reasonable parameters of exactly what constitutes such equipment are unstated and potentially boundless.'' *Lexington Fayette Cty Food v. Urban Cty Gov*, 131 S.W.3d 745, 754 (Ky. 2004). The court reasoned that the term could include anything from cigarettes, cigars, and tools to make them, to air freshener and breath mints. *Id.* at 754-55. While it recognized that a fair assumption could be made that the statute covered cigarettes and cigars and did not cover air freshener and breath mints, the court stated that ''lying between those extremes . . . is a vast middle ground which is subject to characterization as lawful or unlawful in the discretion of the enforcing authorities.'' *Id.* at 756 (internal quotation and citation omitted).

Thus, we conclude that vagueness as to the criminal penalties so permeates the NCIAA that it cannot withstand constitutional due process scrutiny. Accordingly, the statute is unconstitutionally vague for criminal enforcement under the higher standard that applies for a facial challenge of a criminal statute, and we affirm the district court's conclusion that the statute's criminal provisions could not be constitutionally enforced. Having so concluded, we next address whether the district court properly severed the criminal enforcement provisions from the statute.

The district court properly severed the criminal enforcement provisions

The district court determined that the statute was unconstitutionally vague when considered as a criminal statute, but not when viewed as only a civil statute. As a result, the district court severed

the portion of the statute that provided for criminal penalties.[8] Appellants argue that this was improper because the NCIAA was a ballot measure and there is no definitive way of knowing if the voters would still want the statute with the criminal portion removed. Additionally, appellants argue that the severance of the criminal provision was improper because that language is not vague, rather the statute as a whole is vague, and thus, the district court could not sever the criminal portion because that portion was not the unconstitutional part of the statute. Respondents counter that the district court properly severed the criminal penalties from the statute because the remainder of the statute stands without the offensive portion and it is clear that the voters would prefer the statute without criminal penalties as opposed to no statute at all, especially in light of the severance provision included in the NCIAA, codified as NRS 202.2483(11).[9] Respondents consequently argue that because the district court concluded that the criminal portion was unconstitutional, nothing prevented it from severing that portion.

[Headnotes 12, 13]

Under the severance doctrine, it is ''the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.'' *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) (quotation omitted). This court has adopted a two-part test for severability: a statute is only severable if the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed.[10] *County of Clark v. City of Las Vegas*, 92 Nev. 323, 336-37, 550 P.2d 779, 788 (1976).

Appellants argue that severance is improper because the statute was passed as a ballot measure and with no legislative history there

[8]Specifically, the district court severed the words ''NRS 202.2492 and'' (the criminal penalties) from the statute.

[9]NRS 202.2483(11) expressly provides for severance of any unconstitutional section:

> The provisions of this section are severable. If any provision of this section or the application thereof is declared by a court of competent jurisdiction to be invalid or unconstitutional, such declaration shall not affect the validity of the section as a whole or any provision thereof other than the part declared to be invalid or unconstitutional.

[10]To support their respective positions, the parties relied on a three-part test from California case authority, which requires that the improper portion can only be severed if ''it is grammatically, functionally and volitionally separable.'' *Jevne v. Superior Court*, 111 P.3d 954, 971 (Cal. 2005) (internal quotations omitted). The *Jevne* court outlines this test as follows:

> It is grammatically separable if it is distinct and separate and, hence, can be removed as a whole without affecting the wording of any of the mea-

is no way to determine whether voters would still want the statute if the criminal portions are severed. Appellants focus on this court's opinion in *Rogers* and primarily the dissenting opinion in *Nevadans for Property Rights v. Secretary of State*, 122 Nev. 894, 922-29, 141 P.3d 1235, 1253-58 (2006) (HARDESTY, J., concurring in part and dissenting in part), for support. Respondents counter that *Rogers* and *Nevadans for Property Rights* dealt with pre-ballot challenges to initiative petitions, unlike this case where the NCIAA has already passed the voting process and is now a statute. Thus, respondents argue, the severance provision that applies to statutes under NRS 0.020 governs.[11] Respondents also rely on *Nevadans for Property Rights*' majority opinion, which allowed severance, even pre-ballot. Appellants respond by arguing that the reasoning of *Rogers* is stronger in this case because of the fact that this is now law and cannot be amended by the Legislature until December 2009, based on the requirement in Article 19, Section 2(3) of the Nevada Constitution that an initiative cannot be amended for three years after passage.

In *Rogers*, this court declined to sever an initiative petition. 117 Nev. at 178, 18 P.3d at 1039-40. There, the petition sought to require that 50 percent of the projected revenue for the state be used for public education and imposed a new tax with a requirement that the new tax money be devoted solely to education. *Id.* at 174-75, 18 P.3d at 1037-38. The petition was ruled unconstitutional because the appropriation required was not covered by the new tax. *Id.* at 177, 18 P.3d at 1039. The proponents of the initiative asked the court to sever the 50-percent appropriation requirement and allow the remainder of the initiative to proceed. *Id.* The court rejected the argument that the initiative could be severed, even though it contained a severability clause. *Id.* at 177-78, 18 P.3d at 1039-40. The *Rogers*

> sure's other provisions. It is functionally separable if it is not necessary to the measure's operation and purpose. And it is volitionally separable if it was not of critical importance to the measure's enactment.

Id. (internal quotations omitted). Although worded differently, the Nevada and California tests are essentially the same, in that after severance the statute must stand on its own and the removed portion must not be critical, *i.e.*, it was intended that the rest of the statute remain even without the severed portion.

[11]NRS 0.020 states as follows:

> 1. If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, and to this end the provisions of NRS are declared to be severable.
>
> 2. The inclusion of an express declaration of severability in the enactment of any provision of NRS or the inclusion of any such provision in NRS, does not enhance the severability of the provision so treated or detract from the severability of any other provision of NRS.

court held that ''[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed.'' *Id.* at 177, 18 P.3d at 1039. The court continued, stating that ''initiative legislation is not subject to judicial tampering—the substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed.'' *Id.* at 178, 18 P.3d at 1039-40.

In *Nevadans for Property Rights*, the court concluded that severance of the initiative petition was proper. 122 Nev. at 912-13, 141 P.3d at 1247-48. *Nevadans for Property Rights* involved a petition dealing primarily with eminent domain, but which also contained provisions regarding property rights. The *Nevadans for Property Rights* court concluded that the petition violated the single-subject requirement and was therefore unconstitutional. *Id.* at 909, 141 P.3d at 1245. The court determined, however, that the provisions concerning property rights could be severed and the remainder of the provision would satisfy the single-subject requirement. *Id.* at 913, 141 P.3d at 1248. In reaching this conclusion, the court held that severance would still preserve the primary purpose of the petition (eminent domain), that the severability provision included in the initiative demonstrated that the voters would still want the petition without the severed portion, and that severance would preserve the people's right to enact law through the initiative process. *Id.* at 909-13, 141 P.3d at 1245-48. The *Nevadans for Property Rights* court distinguished the *Rogers* case, stating that the petition in *Rogers* was not severable because it ''would have gutted the initiative's central component'' and that ''[n]o other portion of the initiative could have stood in the absence of this central component.'' *Nevadans for Prop. Rights*, 122 Nev. at 913, 141 P.3d at 1247. Thus, while severance was improper in *Rogers*, the petition in *Nevadans for Property Rights* could be properly severed because the severed portion did not destroy the central purpose of the initiative and the remainder of the initiative could stand alone.

[Headnote 14]

Based on the *Rogers* and *Nevadans for Property Rights* holdings, especially the distinction set forth in *Nevadans for Property Rights* between its petition and the *Rogers* petition, we conclude that the district court properly severed the criminal penalty portion of the NCIAA. The portion severed was not the central component of the statute and the remainder of the statute, as explained below, can stand alone. Moreover, the NCIAA included a severability clause, which indicates that the initiative's proponents contemplated that should a constitutional challenge arise, the offending portion of the statute could be severed and the remaining portion could proceed and the smoking ban enforced.

Appellants also argue that severance is only permissible if the severed portion is unconstitutional on its own, citing among other cases, *Rogers*, in which the court stated that severance was used ''to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.'' 117 Nev. at 177, 18 P.3d at 1039 (quotation omitted). Appellants insist that because imposing criminal penalties for violation of a smoking statute is not in and of itself unconstitutional, the criminal penalties cannot properly be severed, as severance would only be permitted if it was in fact unconstitutional to impose criminal penalties. Appellants' argument is refuted by *Nevadans for Property Rights*, however, in that there we severed portions of an initiative that were not unconstitutional on their own but that made the initiative unconstitutional and which, when severed, cured the initiative's unconstitutional defects. 122 Nev. 894, 141 P.3d 1235. The NCIAA falls under the *Nevadans for Property Rights* reasoning, in that, as explained below, the portion severed by the district court cured the statute's unconstitutional defect. Thus, the severed portion was in fact the unconstitutional portion of the statute and severance was permissible.

The NCIAA passes a facial vagueness challenge for civil enforcement

Having concluded that the district court properly severed the criminal enforcement provisions from the NCIAA, we now address whether the statute passes a facial vagueness test for civil enforcement. Because the statute does not contain criminal provisions in its severed state and, as all parties agree, does not involve constitutionally protected activity, we review the statute under the lower standard of whether it is vague in all its applications.[12] We conclude that the statute's civil enforcement is not vague, and therefore, it survives appellants' facial constitutional vagueness challenge.

[Headnote 15]

Under the lower standard test of whether the statute is vague in all its applications, the NCIAA is sufficiently clear if, in any application, it does not ''(1) fail[ ] to provide notice sufficient to enable

[12]Appellants argue that the statute without the criminal provisions is still a quasi-criminal statute because it imposes fines, and therefore, the higher standard test should still apply. We reject this contention. The statute is not quasi-criminal as to the appellant business owners because it does not include any possibility of license revocation nor does it have a stigmatizing effect. *See Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 508 (5th Cir. 2001). While the fact that the statute imposes fines may be sufficient to constitute a quasi-criminal statute when applied to individuals, it is not sufficient when applied to appellants as business owners, *id.*, and appellants cannot rely on the application to others in a facial challenge when it is constitutional as applied to them. *Matter of T.R.*, 119 Nev. 646, 652, 80 P.3d 1276, 1280 (2003); *Hoffman Estates*, 455 U.S. at 495.

persons of ordinary intelligence to understand what conduct is prohibited'' and does not ''(2) lack[ ] specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.'' *Silvar*, 122 Nev. at 293, 129 P.3d at 685; *Hoffman Estates*, 455 U.S. at 498.

[Headnote 16]

We conclude that the statute is not vague in all its applications and, therefore, survives a facial challenge for civil enforcement because there are very clear applications of the statute in which no one could reasonably question whether a particular act would violate the statute. For example, smoking is clearly prohibited in certain areas, including bars and restaurants where food is served. This prohibition is unquestionably enforceable against someone who is smoking inside these restricted areas and, thus, illustrates how the statute is not impermissibly vague in all its applications. Another example as to why the statute survives a facial challenge is that the statute is clear that certain businesses cannot allow smoking and must post no-smoking signs.[13] It cannot be reasonably disputed that this portion of the statute clearly outlines the requirements that a business owner prohibit smoking and post no-smoking signs. Once again, this requirement demonstrates that the statute is not unconstitutional in all its applications. Thus, under the lower level test of requiring appellants to show vagueness in all its applications, the statute is sufficiently clear to provide notice of what conduct is prohibited and adequate guidance to enforcement officials to avoid arbitrary or discriminatory enforcement.

While there may be uncertainty as to what affirmative actions, if any, a business owner must take if someone smokes within his or her business in violation of the statute, there is no question that the business owner is required to make his or her establishment nonsmoking and post signs designating it as such. As the main restrictions of the Act are sufficiently clear to establish specific prohibited conduct that a reasonable person could understand and does not promote arbitrary enforcement, the statute survives a facial vagueness challenge.[14]

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[13]The requirement to post no-smoking signs is outlined in NRS 202.2483(6):

> 6. ''No Smoking'' signs or the international ''No Smoking'' symbol shall be clearly and conspicuously posted in every public place and place of employment where smoking is prohibited by this section. Each public place and place of employment where smoking is prohibited shall post, at every entrance, a conspicuous sign clearly stating that smoking is prohibited. All ashtrays and other smoking paraphernalia shall be removed from any area where smoking is prohibited.

[14]In reaching this conclusion, we emphasize that this appeal involves a facial challenge to the statute. We note that the statute contains numerous defects that may be subject to as-applied challenges once the statute is enforced against a particular party, but it is improper in the context of a facial challenge review to

Therefore, under a facial challenge the statute is not unconstitutionally vague for civil enforcement because the general restrictions under the statute have clear, constitutional applications. Accordingly, we affirm the district court's ruling upholding civil enforcement of the statute.

The NCIAA does not violate equal protection

[Headnotes 17-20]

Appellants argue that the NCIAA is unconstitutional because it violates the Equal Protection Clauses under the Fourteenth Amendment to the United States Constitution and Article 4, Section 21 of the Nevada Constitution. Equal protection allows different classifications of treatment, but the classifications must be reasonable. *State Farm v. All Electric, Inc.*, 99 Nev. 222, 225, 660 P.2d 995, 997 (1983), *overruled on other grounds by Wise v. Bechtel Corp.*, 104 Nev. 750, 766 P.2d 1317 (1988). While there are different levels of scrutiny that may apply under an equal protection analysis to determine if classifications are reasonable and therefore constitutional, here, both parties agree that smoking does not involve a fundamental right or a suspect class. Thus, the classifications are reasonable, and the statute is constitutional if there is a rational basis related to a legitimate government interest for treating businesses differently. *Arata v. Faubion*, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007). This court is not limited, when analyzing a rational basis review, to the reasons enunciated for enacting a statute; if any rational basis exists, then a statute does not violate equal protection. *Id.* at 160, 161 P.3d at 249. Further, under a rational basis test, classifications must ''apply uniformly to all who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be reasonable, not arbi-

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consider these hypothetical situations. For example, as noted above, under the language of the statute, uncertainty arises regarding whether the statute imposes upon business owners an obligation to stop a person who is smoking in violation of the statute. As another example, ambiguity concerning what is included as smoking paraphernalia under the statute may potentially provide a basis for an as-applied challenge.

While such arguments may be valid in an as-applied challenge, they are improper in a facial challenge to the statute under the lower level test of whether a statute is vague in all its applications. *Hoffman Estates*, 455 U.S. at 497. As the United States Supreme Court has stated, concerning facial challenges, ''[e]xercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'' *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation omitted). Additionally, the Supreme Court has recognized that ''facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.'' *Id.* at 451.

trary.'' *State Farm*, 99 Nev. at 225, 660 P.2d at 997. The classifications must also ''bear[ ] a rational relationship to the legislative purpose sought to be effected.'' *Id*.

Appellants argue that the NCIAA violates equal protection because the NCIAA applies to businesses that hold a restricted gaming license but does not apply to gaming areas in those businesses that hold a nonrestricted gaming license. Appellants assert that this distinction violates equal protection because no rational reason exists to allow smoking in one place but not another based solely on what type of gaming license the business holds. Respondents counter by arguing that the gaming-license holders are not similarly situated and, therefore, can be treated differently, and the differing treatment in the statute is reasonable. While the district court did not resolve this issue, it was properly raised below and on appeal, and it is therefore necessary for us to address the issue.

A ''nonrestricted gaming license'' allows for, among other things, the operation of 16 or more slot machines or the combination of any amount of slot machines in connection with the operation of other games or sports pool. NRS 463.0177. A ''restricted gaming license'' only allows for the operation of 15 or fewer slot machines and no other types of gaming, and requires that the slot machines operation is ''incidental to the primary business of the establishment.'' NRS 463.0189.

[Headnote 21]

There are a number of reasons why the different treatment of license holders passes equal protection requirements. First, in the case of nonrestricted gaming licensees, their primary business is gaming and their other operations and services are incidental to gaming; the other services offered by the nonrestricted license holder are still subject to the Act. The different treatment, thus, only applies to the main gaming areas, where minors are restricted from loitering pursuant to NRS 463.350. Restricted gaming licensees, however, offer gaming only incidentally to their other primary business, which makes it much more difficult, if not impossible, to provide an exclusion from the smoking ban for their gaming areas. Thus, it is rational to provide this exception to nonrestricted gaming licensees' large gaming areas but not to restricted gaming licensees' gaming areas, which are generally much smaller and likely too close to the other services provided by the establishment, where minors are not excluded.

Allowing different treatment on this basis is further supported by the fact that the NCIAA also provides an exception for stand-alone bars and taverns. Minors are prohibited in these businesses, NRS 202.030, just as they are prohibited from gaming areas. Thus, the purpose of the statute, to protect families and children from secondhand smoke, is not defeated by allowing an exception for large

gaming areas in nonrestricted licensees' businesses or in a standalone bar or tavern, as both places restrict access to minors. The same does not hold true to restricted gaming licensees' businesses because they generally offer other services, such as food service, for which families are more likely to patronize. *See* NRS 202.030(1) (allowing the presence of minors in establishments where alcohol is served in connection with offering meals at tables separate from the bar).

A second reason for different treatment stems from the businesses' primary functions. Nonrestricted gaming licensees are in the business of gaming, NRS 463.0177, whereas restricted gaming licensees are primarily in the retail and restaurant businesses, and thus, gaming is minimal to the primary purpose of the business. NRS 463.0189. Thus, while both types of business licensees contribute to the gaming economy, a business operating under a nonrestricted license contributes substantially more to the state's economy. Therefore, economics provides a rational basis for distinction in the statute. *See, e.g.*, *Batte-Holmgren v. Com'r of Public Health*, 914 A.2d 996, 1015 (Conn. 2007) (recognizing, in a case challenging a smoking ban statute, that economic reasons can provide a rational basis for differing treatment). Thus, the differing treatment of these types of businesses under the statute is allowed to promote nonrestricted gaming licensees further success and continued substantial benefit to the state's economy. Whether these are the reasons why the classification was made is irrelevant, *Arata*, 123 Nev. at 160, 161 P.3d at 248, as they are rational reasons for allowing the classification.

As a result, the NCIAA does not violate equal protection. Because restricted gaming licensees are not similarly situated with nonrestricted gaming licensees, it is permissible to treat them differently if a rational basis exists. There are rational reasons for the differing treatment of nonrestricted and restricted license holders. Therefore, the statute does not violate equal protection.

The NCIAA does not constitute a taking of private property for which compensation is required

The last issue that we address in this appeal is whether the NCIAA constituted a governmental taking of private property for which appellant Nevada Tavern Owners Association (NTOA) argues requires compensation and, therefore, asserts that the statute is unconstitutional because it failed to provide for funding of the necessary appropriations to make the compensation payments to property owners, as required under Article 1, Section 8(6) of the Nevada Constitution. In particular, NTOA contends that prohibiting smoking is a per se regulatory taking of property owners' airspace and that

requiring the posting of ''no smoking'' signs is a physical invasion of property.

Per se regulatory taking

This court has recognized two types of per se regulatory takings that occur: ''when a government regulation either (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property.'' *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662, 137 P.3d 1110, 1122 (2006). NTOA argues that the NCIAA constitutes a permanent physical invasion of property.

NTOA relies on this court's opinion in *Sisolak* to support its argument. In *Sisolak*, this court held that ordinances that prevented Sisolak from using his airspace, because the airspace needed to be free from obstruction for plane flights, constituted a permanent invasion of the airspace for which Sisolak had to be compensated. *Id.* at 666-70, 137 P.3d at 1124-27. The *Sisolak* court explained that when determining if a regulation constitutes a permanent physical invasion, ''a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space.'' *Id.* at 662, 137 P.3d at 1122. NTOA argues that, similar to the situation in *Sisolak*, the NCIAA prevents business owners from using their airspace within their buildings and therefore constitutes a permanent invasion.

[Headnote 22]

To the contrary, the *Sisolak* opinion refutes NTOA's argument, as the NCIAA only forbids certain uses of the space and does not give the government physical possession of the airspace. In *Sisolak*, the regulation completely prevented occupation of the airspace, whereas here, there is no such restriction in the occupation of the airspace, merely a limit on what can be done with it. Therefore, the NCIAA does not constitute a taking of the airspace under *Sisolak*.

Physical invasion of property

NTOA also argues that the requirement to post a ''no smoking'' sign is a physical invasion of property that constitutes a taking of that property based on the United States Supreme Court case *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

In *Loretto*, the Supreme Court held that a regulation that required a landlord to permit a cable company to install cable television facilities on the property constituted a physical invasion requiring compensation. 458 U.S. at 438. The taking was the result of the installation of small cable boxes and wiring installed on the roof of the landlord's building. *Id.* The statute in question essentially

gave the cable company full control over the installation and maintenance of the cable box. NTOA argues that the requirement of posting a sign is similar to the requirement in *Loretto* of allowing the installation of cable boxes and, therefore, constitutes a taking. We do not agree.

[Headnote 23]

The NCIAA does not give full control over the installation and maintenance of ''no smoking'' signs to a third party, which is what occurred in *Loretto*. The *Loretto* court recognized this distinction, stating that its holding

> in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.

Id. at 440. The determination of whether the landlord maintained control over the property, or if that control was given to a third party, was an important aspect of determining if there was a per se taking. *Id*. at 440 n.19. The Court stated that if the statute at issue had only required a landlord to allow installation, without more, then a different question would be presented because the landlord would retain control over placement and other effects of the installation. *Id*. As the NCIAA does not give control over the installation or any portion of a person's property to a third party, it is distinguishable from *Loretto*, as that opinion itself recognized. Thus, NTOA's per se taking argument must fail.[15]

We therefore conclude that the NCIAA does not constitute a governmental taking of private property. Business owners still maintain possession and control over their property. The fact that they are subject to certain regulations does not result in the government tak-

[15]The conclusion that no taking is effected by requiring the posting of a sign is further supported by this court's *Sisolak* opinion, in which this court stated that most property rights ''may be the subject of valid zoning and related regulations which do not give rise to a takings claim.'' *Sisolak*, 122 Nev. at 660 n.25, 137 P.3d at 1120 n.25. Further, the United States Supreme Court has held that ''where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking'' and that all land-use regulations will have some impact on property values, but ''[t]reating them all as *per se* takings would transform government regulation into a luxury few governments could afford.'' *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324, 327 (2002) (internal quotations omitted). Therefore, the NCIAA does not effect a taking of private property without compensation.

ing complete control over their airspace or building property. Thus, NTOA's taking argument is without merit and cannot serve as a basis for invalidating the NCIAA.

CONCLUSION

The NCIAA provides sufficient definiteness to avoid a facial challenge under the lower level test of whether the statute is vague in all its applications but does not survive the higher test of whether vagueness permeates its text. Thus, we conclude that the statute is not unconstitutionally vague for civil enforcement, but it is unconstitutionally vague for criminal enforcement, and the district court properly severed the criminal enforcement provisions from the Act. In addition, we conclude that the NCIAA does not violate equal protection, as there are rational bases for the classifications made within the statute. Finally, the NCIAA does not constitute a governmental taking of private property. Accordingly, we affirm the district court's judgment.

DOUGLAS, SAITTA, and PICKERING, JJ., concur.

GIBBONS, J., concurring:

I concur with the majority. However, I wish to emphasize that in my view, this opinion does not preclude aggrieved parties, such as the appellants, from challenging the NCIAA on an ''as applied'' basis. As an example, in the event an aggrieved party receives a civil sanction, I make no conclusion as to whether the NCIAA provides sufficient guidance as to what an aggrieved party's obligation is in the event a patron chooses to smoke in the aggrieved party's establishment.

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

While I concur with the majority's conclusion that the criminal provisions of Nevada's Clean Indoor Air Act (NCIAA) are unconstitutional, the majority's equal protection analysis of the civil provisions, concluding that there are rational reasons for allowing different treatment of businesses, misses the mark. In my opinion, even if the criminal provisions are severed, the statute is unconstitutional as it violates equal protection. Therefore, I dissent from the portion of the majority opinion that upholds the statute's civil provisions.

The NCIAA's purpose is to protect families and children from secondhand smoke. The NCIAA creates a distinction in treatment based primarily on whether a business holds a restricted or nonrestricted gaming license, but that distinction is arbitrary. Allowing smoking in the gaming areas of nonrestricted gaming licensees but not in restricted gaming licensees' gaming areas has no rational basis and is contrary to the statute's purpose.

The majority concludes that the exception for smoking in a nonrestricted gaming license business is rational because it is limited to its gaming areas, a place where minors are prohibited and adults can avoid. But the majority ignores the reality that the dangers of secondhand smoke are the same whether the smoking is in a nonrestricted or restricted gaming licensee's business. To me, the exclusion for nonrestricted licensees that allows smoking only in the gaming areas is spurious at best, as the secondhand smoke is not confined within those boundaries merely because the actual smoking occurs only there. The secondhand smoke carries beyond the gaming areas and still impacts families and children that are located beyond those areas. It makes no difference that minors are not permitted in the gaming areas where the smoking is permitted. The mere fact that minors are precluded from inside the gaming areas does not mean that they are not inside nongaming areas, and minors and families are often more likely to be inside a nonrestricted gaming licensee casino than inside a restricted gaming licensee bar or tavern that happens to sell food. Thus, the statute creates an arbitrary distinction that is not rationally related to the purpose of the statute.

Further, the majority attempts to justify its conclusion by determining that gaming is incidental to the business of a restricted gaming licensee's business, and therefore, a restricted license holder generates less gaming revenue for state economic purposes. Economics does not provide a rational basis for different treatment. First, both types of licensees have gaming and, thus, contribute to the revenues generated by the state from the gaming profits. Second, simply because a nonrestricted gaming licensee may generate more tax revenue from gaming than a restricted gaming licensee does not provide a rational basis for different treatment in the context of protecting families and children, because the secondhand smoke will have the same detrimental effect regardless of the amount of tax revenue generated from the business.

The distinctions that the majority makes for upholding the civil portion of the statute do not bear a rational relation to the statute's purpose, and the NCIAA is unconstitutional because it violates equal protection. Accordingly, I dissent from the majority's decision to uphold the civil enforcement of the NCIAA.

ARGENTENA CONSOLIDATED MINING COMPANY, APPELLANT, *v*. JOLLEY URGA WIRTH WOODBURY & STANDISH, RESPONDENT.

No. 50282

September 24, 2009 216 P.3d 779

Appeal from a district court order adjudicating an attorney-client fee dispute and the entry of judgment awarding attorney fees in a personal injury action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Following settlement of underlying personal injury suit, law firm that had represented former client against the plaintiff in the suit filed motion requesting trial court to adjudicate its retaining lien and enter judgment in its favor for the attorney fees former client owed firm, but refused to pay it. Former client opposed motion, asserting that court lacked jurisdiction to adjudicate lien, and that firm had committed legal malpractice and was not entitled to attorney fees. The district court granted firm's motion in a summary proceeding and entered judgment in favor of firm, awarding it attorney fees of $213,990.62. Former client appealed. The supreme court, HARDESTY, C.J., held that: (1) law firm did not have an enforceable charging lien, and (2) district court lacked jurisdiction to adjudicate retaining lien held by firm.

Reversed.

Sullivan Law Offices and *J.D. Sullivan* and *Gene M. Kaufmann*, Minden, for Appellant.

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

1. APPEAL AND ERROR.
   Questions of law are subject to de novo review.
2. APPEAL AND ERROR.
   Attorney fee awards are reviewed under an abuse of discretion standard.
3. ATTORNEY AND CLIENT.
   The state recognizes two kinds of attorney liens; the first lien, a creature of statute, is a special or charging lien on the judgment or settlement that the attorney has obtained for the client; the second lien, established at common law, is a general or retaining lien, which allows a discharged attorney to withhold the client's file and other property until the court, at the request or consent of the client, adjudicates the client's rights and obligations with respect to the lien. NRS 18.015.
4. APPEARANCE; ATTORNEY AND CLIENT.
   The district court's in personam jurisdiction to adjudicate an attorney fee dispute based on a charging lien is derived from the fact that the client has already submitted himself or herself to the court's jurisdiction and the

court has personal jurisdiction over the attorney due to the attorney's appearance as the client's counsel of record. NRS 18.015.

5. ATTORNEY AND CLIENT.
The court has in rem jurisdiction to resolve an attorney fee dispute between an attorney and client that arises from a charging lien because the attorney's fee is recovered on account of the suit or other action. NRS 18.015.

6. ATTORNEY AND CLIENT.
Because an attorney's retaining lien is a passive lien, the client determines whether it wants to extinguish the lien by requesting that the court compel the former attorney to deliver the client's files.

7. ATTORNEY AND CLIENT.
When a client seeks to extinguish an attorney's retaining lien, the client must provide adequate or substitute security in exchange for having the files returned.

8. ATTORNEY AND CLIENT.
When a client requests that the court compel the return of his or her files from the former attorney, and the client does not provide payment for the attorney's retaining lien or does not consent to posting substitute security, the court is without jurisdiction to extinguish the retaining lien.

9. ATTORNEY AND CLIENT.
The district court's jurisdiction to adjudicate an attorney's retaining lien is invoked as a result of the client's request to obtain his or her files and consent to provide adequate or substitute security in exchange.

10. ATTORNEY AND CLIENT.
If the court lacks jurisdiction to resolve an attorney's retaining lien, the attorney may keep possession of the former client's files and the attorney's recourse is to file a separate action to recover for the services expended on behalf of the former client.

11. ATTORNEY AND CLIENT.
Law firm that had obtained settlement for former client in underlying personal injury suit brought against client did not have an enforceable charging lien, as former client did not file an affirmative claim against the plaintiff in the underlying action, and, although firm obtained a dismissal of all claims against former client in underlying action, the settlement did not result in any affirmative recovery for former client. NRS 18.015.

12. ATTORNEY AND CLIENT.
An attorney's charging lien is a lien on the judgment or settlement that the attorney has obtained for the client. NRS 18.015.

13. ATTORNEY AND CLIENT.
District court lacked jurisdiction, in underlying personal injury action filed against law firm's former client, to adjudicate retaining lien held by firm, resulting from firm's withholding of former client's file after former client refused to pay firm attorney fees in connection with firm's representation of former client in underlying action, as former client neither requested nor consented to district court's adjudication of firm's retaining lien.

14. ATTORNEY AND CLIENT.
A retaining lien allows a displaced attorney to withhold a client's file and other property until the client requests or consents to the court's adjudication of the dispute.

15. COURTS.
Dicta is not controlling.

16. COURTS.
A statement in a case is dictum when it is unnecessary to a determination of the questions involved.

17. ATTORNEY AND CLIENT.
A district court's summary adjudication of an attorney fee dispute in the underlying action is inappropriate when the client asserts negligence or misconduct on the part of his former attorney.

18. ATTORNEY AND CLIENT.
When an attorney does not have an enforceable charging lien, a client does not move the court to resolve the attorney's retaining lien, or the client refuses to consent to the court's adjudication of a retaining lien, the proper method by which the attorney should seek adjudication of the attorney fee dispute is an action against his or her former client in a separate proceeding.

19. COSTS.
District courts, in making an attorney fee award, must make findings as to the reasonableness of the attorney fees.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

This appeal arises out of a district court's order adjudicating an attorney-client fee dispute between appellant Argentena Consolidated Mining Company and its former law firm respondent Jolley Urga Wirth Woodbury & Standish. Jolley Urga defended Argentena in the underlying personal injury action between Argentena and an injured plaintiff. In this opinion, we must determine whether, in the absence of an enforceable charging lien or the client's request or consent to the district court's adjudication of a retaining lien, and in light of the client's legal malpractice allegation, a district court has jurisdiction to adjudicate an attorney-client fee dispute in the underlying action in which the attorney's services were rendered.

We conclude that absent an enforceable charging lien or the client's request or consent to the district court's adjudication of a retaining lien, the district court is without jurisdiction to adjudicate an attorney-client fee dispute in the underlying action. We further conclude that when the client asserts legal malpractice as a defense against the attorney's claim for fees, it is particularly inappropriate to summarily adjudicate the fee dispute in the underlying action. We instruct that when the district court lacks jurisdiction to adjudicate the fee dispute or the client objects to the court's adjudication of the dispute based on its legal malpractice claim against the attorney, the attorney seeking to recover fees should file a separate action to do so.

FACTS AND PROCEDURAL BACKGROUND

Argentena is a Nevada corporation that does business in Clark County, Nevada, and is the alleged owner of an abandoned mine located in southern Nevada. In the case underlying this appeal, Argentena was one of several defendants sued by the plaintiff for severe injuries, including quadriplegia, partial blindness, and brain damage, which the plaintiff sustained while inside the abandoned mine shaft during a ''high-tech'' scavenger hunt. Argentena retained Jolley Urga to represent it in the personal injury suit.

After approximately three years of litigation, and near the end of a three-week trial, Jolley Urga entered into a settlement agreement with the plaintiff on behalf of Argentena. The terms of the settlement provided for a dismissal of all of the plaintiff's claims against Argentena and Argentena's waiver of ''any and all costs or rights to be able to go against the plaintiff in this action,'' which included Argentena's right to recover attorney fees from the plaintiff.

After entering into the settlement agreement, Jolley Urga, on behalf of Argentena, orally moved for a good-faith settlement of the personal injury action during a hearing before the district court, which the district court granted. Shortly after the hearing regarding the good-faith settlement, Argentena terminated its attorney-client relationship with Jolley Urga and retained another law firm. Argentena claimed that it did not authorize Jolley Urga to waive its right to recover attorney fees as part of the settlement and, as a result, Argentena refused to pay Jolley Urga's fees, totaling $213,990.62. Jolley Urga maintained that it communicated the settlement agreement to Argentena and it withheld Argentena's file as a retaining lien until it obtained adequate assurances that its attorney fees would be paid.

Jolley Urga then filed a motion in the underlying action requesting that the district court adjudicate ''its Attorney's lien'' and enter judgment totaling $213,990.62 in attorney fees. Argentena opposed the motion, arguing that the district court could not adjudicate the disputed fees because Jolley Urga did not have an enforceable charging lien and Argentena did not consent to the district court's adjudication of Jolley Urga's retaining lien. Moreover, Argentena alleged that by waiving Argentena's right to recover attorney fees from the plaintiff without authorization, Jolley Urga committed legal malpractice and was not entitled to attorney fees, which, according to Argentena, further rendered such summary proceedings inappropriate.

Jolley Urga replied, contending that *Sarman v. Goldwater, Taber and Hill*, 80 Nev. 536, 396 P.2d 847 (1964), authorizes district courts to adjudicate fee disputes in the underlying actions irrespective of an attorney's lien because of the district court's incidental powers. Regarding Argentena's legal malpractice claim, al-

though Jolley Urga acknowledged that summary adjudication of an attorney-client fee dispute is generally improper when the client alleges that the attorney committed legal malpractice, Jolley Urga contended that the district court could properly adjudicate the dispute because, in its view, Argentena's malpractice claim was baseless.

The district court granted Jolley Urga's motion in a summary proceeding and entered judgment in favor of Jolley Urga, awarding attorney fees in the amount of $213,990.62. Argentena appeals.

DISCUSSION

On appeal, Argentena contends that the district court lacked jurisdiction to resolve the fee dispute in the underlying action because Jolley Urga did not have an enforceable charging lien, Argentena did not request or consent to the district court's adjudication of Jolly Urga's retaining lien, and Jolley Urga committed legal malpractice. Jolley Urga argues that *Sarman v. Goldwater, Taber and Hill*, 80 Nev. 536, 396 P.2d 847 (1964), is dispositive of this issue and demonstrates that the district court had jurisdiction to resolve the fee dispute between Argentena and Jolley Urga in the underlying action and further alleges that Argentena's legal malpractice claim is meritless. Therefore, we are asked to determine whether, in light of Argentena's contentions, the district court had jurisdiction to summarily adjudicate the fee dispute between Argentena and Jolley Urga and enter a judgment that awarded Jolley Urga attorney fees in the underlying action in which Jolley Urga's services were rendered.

Standard of review

[Headnotes 1, 2]

The primary issue before this court—whether the district court exceeded its jurisdiction when it resolved an attorney-client fee dispute in the pending action—is a question of law. *See generally Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 1215, 197 P.3d 1051, 1057 (2008) (considering whether the district court lacked authority to adjudicate an attorney-client fee dispute). Questions of law are subject to de novo review. *Commission on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009). Assuming that the district court had jurisdiction to resolve the fee dispute, its attorney fees award is reviewed under an abuse of discretion standard. *Settelmeyer & Sons*, 124 Nev. at 1215, 191 P.3d at 1057.

Attorney's liens in Nevada

[Headnote 3]

Nevada recognizes two kinds of attorney's liens. *Figliuzzi v. District Court*, 111 Nev. 338, 342, 890 P.2d 798, 801 (1995). The first

lien, a creature of statute,[1] is ''a special or charging lien on the judgment or settlement [that] the attorney has obtained for the client.'' *Figliuzzi*, 111 Nev. at 342, 890 P.2d at 801. The second lien, established at common law, is a general or retaining lien, which allows a discharged attorney to withhold the client's file and other property until the court, at the request or consent of the client, adjudicates the client's rights and obligations with respect to the lien. *Id*. The district court's jurisdiction over these two liens arises, however, in distinctive manners.

Jurisdiction over charging and retaining liens

[Headnotes 4, 5]

This court has established that ''[a] district court is empowered to render a judgment either for or against a person or entity only if it has jurisdiction over the parties and the subject matter.'' *C.H.A. Venture v. G. C. Wallace Consulting*, 106 Nev. 381, 383, 794 P.2d 707, 708 (1990). The district court's in personam jurisdiction to adjudicate a fee dispute based on a charging lien is derived from the fact that the client has already submitted himself or herself to the court's jurisdiction and the court has personal jurisdiction over the attorney due to the attorney's appearance as the client's counsel of record. *Earl v. Las Vegas Auto Parts*, 73 Nev. 58, 63, 307 P.2d 781, 783 (1957). Concerning the court's subject matter jurisdiction, the court has in rem jurisdiction to resolve a fee dispute between an attorney and client, which arises from a charging lien, because the attorney's fee ''is recovered on account of the suit or other action.'' NRS 18.015(3); *see, e.g.*, *Johnston v. Stephens*, 266 S.W. 881, 882 (Ky. 1924) (stating that ''the judgment [with respect to a charging lien] in the absence of pleadings, summons, or entrance of appearance would be in rem only''); *Rhoads v. Sommer*, 931 A.2d 508, 523 (Md. 2007) (concluding that proceedings to enforce charging liens are proceedings in rem); *In re Davis' Estate*, 169 N.Y.S.2d 983, 989 (Sur. Ct. 1957) (same). Thus, the court acquires incidental jurisdiction

[1]NRS 18.015, the statute governing charging liens, provides, in pertinent part:

> 1. An attorney at law shall have a lien upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in his hands by a client for suit or collection, or upon which a suit or other action has been instituted. The lien is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client on account of the suit, claim, demand or action.
>
> . . . .
>
> 3. The lien attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section.

over the parties and the subject matter. *See Earl*, 73 Nev. at 63, 307 P.2d at 783.

[Headnotes 6-10]

Regarding the district court's jurisdiction to adjudicate a fee dispute based on a retaining lien, this court has previously held that a retaining lien is a passive lien that cannot be actively enforced by the attorney in judicial proceedings. *Figliuzzi v. District Court*, 111 Nev. 338, 342, 890 P.2d 798, 801 (1995); *Morse et al. v. District Court*, 65 Nev. 275, 282-84, 195 P.2d 199, 202-04 (1948). Because a retaining lien is a passive lien, the client determines whether it wants to extinguish the lien by requesting that the court compel the former attorney to deliver the client's files. *Figliuzzi*, 111 Nev. at 343-44, 890 P.2d at 801-02. When the client seeks to extinguish the retaining lien, the client must provide adequate or substitute security in exchange for having the files returned. *Id.* Even when a client requests that the court compel the return of his or her files from the former attorney, and the client does not provide payment for the lien or does not consent to posting substitute security, the court is without jurisdiction to extinguish the retaining lien. *Id.* Consequently, the district court's jurisdiction to adjudicate a retaining lien is invoked as a result of the client's request to obtain his or her files and consent to provide adequate or substitute security in exchange. *See Figliuzzi*, 111 Nev. at 339, 890 P.2d at 799 (providing that the district court has jurisdiction to enforce an attorney's retaining lien upon the client's consent); *Morse*, 65 Nev. at 291, 195 P.2d at 206-07 (''[W]here the attorney is brought into court upon application of his client, to compel the attorney to turn over the money or papers upon which he claims a lien . . . the court may ascertain the extent of the lien and enforce it.'' (emphasis omitted) (quoting 7A C.J.S. *Enforcement of Retaining Lien* § 290 (1980)). If the court lacks jurisdiction to resolve the retaining lien, the attorney may keep possession of the former client's files and the attorney's recourse is to file a separate action to recover for the services expended on behalf of the former client. *See* Don C. Smith, Jr., *Cause of Action by Attorney for Recovery of Fee Under Contingent Fee Contract*, *in* 5 Causes of Action 259, 299 (1st ed. 1983) (stating that ''[w]hen there is no lien involved, the attorney must proceed in a separate action at law'' to resolve the fee dispute); *see also* 7A C.J.S. *Attorney & Client* §§ 419, 422 (2004) (discussing when the attorney and client agreed to the value of the attorney's services prior to representation, ''[t]he proper form of action by which to enforce payment, generally, is by an action at law on the contract'').

Having clarified when a district court has jurisdiction to adjudicate an attorney-client fee dispute in the underlying action in which the attorney's services were rendered, we examine whether the dis-

trict court in this case had jurisdiction to adjudicate the dispute between Jolley Urga and Argentena.

The district court did not have jurisdiction based on an enforceable charging lien

[Headnote 11]

Argentena argues that the district court did not have jurisdiction over an enforceable charging lien in this case because an attorney's charging lien only exists when the ''client has filed suit and asserted an affirmative claim for damages.'' Because Argentena did not seek or obtain any affirmative recovery in the underlying action, it argues that there could be no basis for a charging lien. We agree.

[Headnote 12]

A charging lien is a lien on the judgment or settlement that the attorney has obtained for the client. NRS 18.015; *Figliuzzi v. District Court*, 111 Nev. 338, 342, 890 P.2d 798, 801 (1995). Here, it is undisputed that Argentena did not file an affirmative claim against the plaintiff in the underlying action. And although Jolley Urga obtained a dismissal of all claims against Argentena, the settlement did not result in any recovery for Argentena. In the absence of affirmative relief that Jolley Urga obtained for Argentena, we conclude that Jolley Urga did not have an enforceable charging lien over which the district court had incidental jurisdiction to adjudicate in the underlying case. Thus, we turn to whether the district court had jurisdiction to adjudicate Jolley Urga's retaining lien.

The district court did not have jurisdiction to extinguish Jolley Urga's retaining lien

[Headnote 13]

Argentena argues that the district court did not have jurisdiction to adjudicate Jolley Urga's retaining lien because a district court obtains jurisdiction over the retaining lien only when the client requests or consents to the district court's adjudication of the lien. Because Argentena did not request or consent to such adjudication, it asserts that the district court lacked jurisdiction to resolve the fee dispute in the underlying action. We agree.

[Headnote 14]

A retaining lien allows a displaced attorney to withhold a client's file and other property until the client requests or consents to the court's adjudication of the dispute. *Figliuzzi*, 111 Nev. at 342, 890 P.2d at 801; *Morse*, 65 Nev. at 285, 195 P.2d at 204. The policy underlying this notion is based on the fact that a retaining lien is passive and cannot be actively enforced without the client's request or consent. *Morse*, 65 Nev. at 285, 195 P.2d at 204.

In this case, the parties do not dispute that Jolley Urga had a retaining lien against Argentena's file. However, Argentena neither requested nor consented to the district court's adjudication of Jolley Urga's retaining lien. Because Argentena failed to request or consent to the court's adjudication of the fee dispute in the underlying action, the district court lacked jurisdiction to ascertain the extent of the lien and to extinguish it. *See Figliuzzi*, 111 Nev. at 339, 890 P.2d at 799. Therefore, we conclude that the district court exceeded its jurisdiction to enforce Jolley Urga's retaining lien.

Because an enforceable charging lien did not exist in this case and Argentena did not consent to the district court's adjudication of Jolley Urga's retaining lien, we must now determine whether the district court nevertheless had jurisdiction to adjudicate the fee dispute in the underlying action.

The district court lacked jurisdiction to adjudicate the fee dispute in the underlying action in which Jolley Urga's services were rendered

Jolley Urga argues that regardless of whether an enforceable charging lien existed or Argentena refused to consent to the court's adjudication of the fee dispute, this court's statements in *Sarman v. Goldwater, Taber and Hill*, 80 Nev. 536, 540-41, 396 P.2d 847, 849 (1964), demonstrate that this court has previously approved of a district court's adjudication of a fee dispute and subsequent entry of judgment against the client in the underlying action based on the district court's incidental powers to resolve fee disputes. We reject Jolley Urga's claim and clarify the breadth of the statements upon which Jolley Urga relies.

In *Sarman*, the court considered whether the district court had jurisdiction to fix the fee of the discharged counsel and enter a binding judgment in a summary proceeding in the underlying guardianship action. 80 Nev. at 539, 396 P.2d at 849. The client in *Sarman* fired her attorney who represented her in the guardianship action and requested that the attorney deliver her files to her new counsel and submit a statement for services rendered. *Id.* at 538, 396 P.2d at 848. The former attorney notified the client that it would retain her files until the client paid for the attorney's past services. *Id.* The client disputed the amount of fees and sought to compel her former counsel to relinquish her file. *Id.* at 538-39, 396 P.2d at 848. As a result, the district court held a hearing at which evidence was submitted regarding the value of the former attorney's services. *Id.* at 539, 396 P.2d at 848. The client did not object to the district court's jurisdiction to resolve the dispute but consented to the procedures taken by the district court. *Id.* As a result of the attorney's retaining lien and the client's consent to the procedures in the underlying action, the district court enforced the lien against the client by fixing

the attorney's fees and ordering the attorney to deliver the files to the client upon receipt of payment or substitute security for the amount of fees due. *Id*. at 538, 396 P.2d at 848.

On appeal, the client challenged the district court's jurisdiction to enter the order adjudicating the fee dispute. *Id*. The *Sarman* court first noted that the district court had jurisdiction to resolve the retaining lien because the client had consented to the court's procedure for resolving the fee dispute. *Id*. at 539, 396 P.2d at 848. The *Sarman* court further affirmed the district court's adjudication of the dispute, relying on the district court's original jurisdiction of guardianship matters, in light of this court's previous statement—that district courts have ''incidental jurisdiction'' to adjudicate an attorney-client fee dispute in the underlying action regardless of whether a valid lien exists. *Id*. at 540-41, 396 P.2d at 849. The *Sarman* court also stated that the district court's authority is ''unrelated to the nature of the lien sought to be enforced.'' *Id*. at 540, 396 P.2d at 849.

As a result of these statements made in *Sarman*, Jolley Urga contends that the district court had jurisdiction to resolve the fee dispute in the underlying action. We conclude that Jolley Urga's reliance on the statements made in *Sarman* regarding the district court's powers is misplaced because those statements constitute dicta and are overbroad. Moreover, we note that *Sarman* and the cases that it relied on are factually inapposite from the matter presented to this court in this appeal.

Sarman's statements regarding incidental jurisdiction constitute dicta and are, nevertheless, overbroad

[Headnotes 15, 16]

Dicta is not controlling. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001). A statement in a case is dictum when it is ''unnecessary to a determination of the questions involved.'' *See St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009) (quoting *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941)). Because the attorney in *Sarman* had a retaining lien, and the client consented to the district court's adjudication of the fee dispute in that case, it was unnecessary for the Sarman court to consider whether the district court had jurisdiction to resolve an attorney-client fee dispute in a pending action regardless of whether the client sought to extinguish the attorney's retaining lien. As such, we conclude that the statements concerning a court's incidental jurisdiction to resolve an attorney-client fee dispute in a pending matter when the client is moving the court to resolve a retaining lien are not binding, as they constitute dicta. As previously noted, a district court has jurisdiction to resolve a fee dispute based on a retaining lien when the client consents, as were the facts in *Sarman*.

To the extent that the *Sarman* court held that a court has ''incidental jurisdiction'' to resolve an attorney-client fee dispute regardless of whether a valid lien existed, we conclude that the *Sarman* opinion is overbroad. Specifically, in stating that a district court has power to resolve fee disputes in the underlying action irrespective of whether the attorney sought to enforce a lien, the *Sarman* court relied, in part, on *Gordon v. Stewart*, 74 Nev. 115, 116, 324 P.2d 234, 235 (1958). In *Gordon*, the attorney had neither a charging or retaining lien against the client. Rather, the ''withdrawing attorneys simply asked the court to fix the compensation due them for services performed prior to their withdrawal,'' which, according to the *Sarman* court, indicated that a court's power to resolve an attorney-client fee dispute is ''unrelated to the nature of the lien sought to be enforced,'' so that the court could adjudicate the fee dispute regardless of whether the attorney sought adjudication of a lien or not. *Sarman*, 80 Nev. at 540, 396 P.2d at 849. In reviewing the *Gordon* opinion, however, like the *Sarman* court, the *Gordon* court conflated statements made in *Earl v. Las Vegas Auto Parts*, 73 Nev. 58, 307 P.2d 781 (1957), and improperly extended the *Earl* court's holding. *See Gordon*, 74 Nev. at 116, 324 P.2d at 235.

In *Gordon*, the attorneys, on behalf of the client, filed counterclaims against the plaintiffs. *Id*. The attorneys and the client agreed that the attorneys would receive a contingency fee from the damages recovered by the counterclaim. *Id*. Thereafter, the attorneys withdrew as counsel for the client. *Id*. As a result, the attorneys had neither a charging nor a retaining lien. Nonetheless, the attorneys moved the district court to fix their compensation based on quantum meruit principles. *Id*. The client consented to the district court's jurisdiction to ascertain the reasonable value of the fees sought by the attorneys. Consequently, the district court fixed the attorney's compensation. *Id*.

On appeal, the *Gordon* court affirmed the fee award, in part, on the basis that the district court had incidental jurisdiction to adjudicate the attorney-client fee dispute ''in the action in which the attorney's services were rendered . . . relative to the establishment of an attorney's lien.'' 74 Nev. at 118, 324 P.2d at 236. In reaching this conclusion, the *Gordon* court relied on statements made by the *Earl* court. The *Earl* court was asked to consider the district court's jurisdiction to resolve a fee dispute that arose from an attorney's charging lien and affirmed the district court's adjudication of a fee dispute that arose from a charging lien. *Earl*, 73 Nev. at 60, 307 P.2d at 781-82. The *Earl* court specifically held that a court's power to ''enforce or determine the validity of the attorney's claimed lien'' in the pending action was due to the court's personal jurisdiction over the parties and subject matter jurisdiction of the charging lien. *Id*. at 62-64, 307 P.2d at 783.

As stated previously, a district court may enter judgment against a person or entity if the court has personal and subject matter jurisdiction over the parties and matter in dispute. *C.H.A. Venture v. G.C. Wallace Consulting*, 106 Nev. 381, 383, 794 P.2d 707, 708 (1990). In *Earl*, the district court had personal jurisdiction over the parties to the fee dispute, and because a district court obtains in rem jurisdiction to adjudicate a charging lien, the district court had jurisdiction to extinguish the charging lien. Thus, in *Earl*, the district court had incidental jurisdiction to resolve the attorney's charging lien in the action in which the attorney's services were rendered.

Gordon, however, did not involve a charging lien. And the attorney in that case voluntarily withdrew, compared to the *Earl* attorney who was discharged by the client; furthermore, the *Gordon* client consented to the district court's adjudication of the fee dispute. Because of these factual distinctions, we conclude that the *Gordon* court improperly extended the *Earl* court's holding. Hence, we reject *Sarman* and *Gordon* to the extent that those opinions indicate that the district court has the power to resolve a fee dispute in the underlying action irrespective of whether the attorney sought adjudication of a lien. We also note that *Gordon* and *Earl* are inapposite to *Sarman* because *Gordon* did not involve an attorney seeking to enforce any type of lien and *Earl* involved a charging lien, whereas *Sarman* involved a retaining lien.

Because the *Sarman* court's statements indicating that district courts have incidental jurisdiction to adjudicate fee disputes in the underlying action and that the court has power to do so irrespective of the type of attorney's lien at issue and whether the attorney sought to enforce a lien at all constitute dicta and are overbroad, we limit or reject those statements to the extent that they are contrary to our holding in this opinion. We reiterate that the district court has jurisdiction to adjudicate a fee dispute in the underlying action upon the existence of an enforceable charging lien or the client's request or consent to the court's adjudication of a retaining lien.

Sarman is factually inapposite to the appeal at hand

Aside from the fact that the statements in *Sarman* constitute dicta and are overbroad, we further conclude that *Sarman* is inapposite to the disposition of this case based on two important facts. First, as explained above, the client in *Sarman* consented to the district court's adjudication of the displaced attorney's retaining lien, as the *Sarman* court explicitly explained that the client in that case ''did not object to the power of the lower court to hear evidence and determine the fee due her displaced attorneys, but consented to the procedure outlined by the court.'' 80 Nev. at 539, 396 P.2d at 848. Unlike the client in *Sarman*, Argentena did not request or consent to the district court's adjudication of Jolley Urga's retaining lien.

Second, the client in *Sarman* (and the clients in *Gordon* and *Earl*, the cases upon which the *Sarman* and *Gordon* courts relied) did not assert a legal malpractice claim against the fee-seeking attorney as a defense. This court has stated that when the client asserts that the attorney committed legal malpractice, it is proper for the district court to refuse to decide those issues in a summary proceeding in the pending case. *Morse et al. v. District Court*, 65 Nev. 275, 287-88, 195 P.2d 199, 204-05 (1948).

In this case, Argentena argued that Jolley Urga was not authorized to waive Argentena's right to recover attorney fees from the plaintiff. While Jolley Urga concedes that a summary proceeding is inappropriate when the client asserts a legal malpractice claim against its former attorney, Jolley Urga argues that the district court's summary proceedings were proper in this case because Argentena's legal malpractice claim lacked merit.

[Headnote 17]

We reject Jolley Urga's proposition that the district court's summary adjudication of the dispute was proper because Argentena's legal malpractice defense allegedly lacked merit. Instead, we reiterate statements made in *Morse* and conclude that a district court's summary adjudication of a fee dispute in the underlying action is inappropriate when the client asserts negligence or misconduct on the part of their former attorney. *See* 65 Nev. at 287-88, 195 P.2d at 204-05. For these reasons, we determine that *Sarman* is distinguishable from the facts of this case and conclude that *Sarman* is inapposite.

In sum, because a district court lacks jurisdiction to summarily adjudicate an attorney-client fee dispute in the underlying action when the attorney does not have an enforceable charging lien or the client does not request that a retaining lien be extinguished or consent to the district court's adjudication of a retaining lien, we conclude that the district court was without power to adjudicate the fee dispute between Argentena and Jolley Urga. Because the district court exceeded its jurisdiction, we conclude that the district court's order is void. We further note that even if the district court had jurisdiction to resolve the fee dispute in this case, such summary proceedings would have been improper in light of Argentena's objection to the court's adjudication based on its legal malpractice claim. Accordingly, we reverse.

[Headnote 18]

In reversing the district court's order and judgment, we further instruct that when an attorney does not have an enforceable charging lien, a client does not move the court to resolve the retaining lien, or the client refuses to consent to the court's adjudication of a retaining lien, the proper method by which the attorney should seek

adjudication of the fee dispute is an action against his or her former client in a separate proceeding. *See* Don C. Smith, Jr., *Cause of Action by Attorney for Recovery of Fee Under Contingent Fee Contract*, *in* 5 Causes of Action 259, 299 (1st ed. 1983) (stating that ''[w]hen there is no lien involved, the attorney must proceed in a separate action at law'' to resolve the fee dispute); *see also* 7A C.J.S. *Attorney & Client* §§ 419, 422 (2004) (when the attorney and client agreed to the value of the attorney's services prior to representation, ''[t]he proper form of action by which to enforce payment, generally, is by an action at law on the contract''). Therefore, because the district court lacked jurisdiction to summarily adjudicate the dispute in this case, if Jolley Urga seeks resolution of the dispute, it must file a separate action against Argentena.

CONCLUSION

[Headnote 19]

We conclude that in the absence of an enforceable charging lien, a client's request to extinguish a retaining lien, or the client's consent to the district court's adjudication of a retaining lien, the district court lacks jurisdiction to adjudicate the attorney-client fee dispute in the underlying action in which the attorney's services are rendered. Because Jolley Urga did not have an enforceable charging lien and Argentena did not request or consent to the district court's summary adjudication of Jolley Urga's retaining lien, we conclude that the district court exceeded its jurisdiction by employing the summary proceedings in the underlying action.[2] We further conclude that

[2]In addition, while we conclude that the district court's order is void for lack of jurisdiction, we further conclude that even if the district court had jurisdiction to resolve the dispute in the underlying action, we would nevertheless reverse the judgment because the court failed to include any basis for its decision in awarding the fees. The district court summarily granted Jolley Urga's request for adjudication and simultaneously entered judgment stating:

> The law firm of Jolley Urga Wirth Woodbury and Standish (the ''JUWWS'') represented Argentena Consolidated Mining Company (''Argentena'') in the above-captioned matter. Following trial of the matter, Argentena refused to pay its attorneys' fees. Following a Motion brought by JUWWS, it was determined by the Court that JUWWS was rightly owed attorneys' fees in the amount of $213,990.62. Accordingly, it is hereby
>
> ORDERED, ADJUDGED and DECREED that JUWWS shall have and recover $213,990.6[2] from Argentena, with interest accruing at the statutory rate from August 1, 2007 moving forward.

As illustrated by the district court's conclusory judgment, the court failed to render any findings of the reasonableness of Jolley Urga's attorney fees. Even when district courts have jurisdiction to resolve fee disputes, courts must still make findings of reasonableness on awards of attorney fees under *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33-34 (1969). We conclude that the district court's failure to make any findings on this issue would constitute an abuse of discretion if the district court had jurisdiction to resolve the fee dispute.

even if the district court had jurisdiction to adjudicate the fee dispute, such summary proceedings were improper in light of Argentena's objections to the proceedings based on its legal malpractice allegations. Therefore, we reverse the district court's order adjudicating the fee dispute and the entry of judgment against Argentena in the amount of $213,990.62 in attorney fees.

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

MARK R. ZANA, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 50786

September 24, 2009 216 P.3d 244

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count of open or gross lewdness, three counts of lewdness with a child under the age of 14, and six counts of possession of visual representation depicting sexual conduct of a person under the age of 16. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The supreme court, DOUGLAS, J., held that: (1) testimony of alleged victims of prior incidents involving defendant was admissible even though the records of the court proceedings that followed the prior incidents were sealed or expunged, (2) juror's independent search of the Internet for a particular pornographic website that was mentioned during trial amounted to the use of extrinsic evidence in violation of the Confrontation Clause, (3) such juror misconduct did not prejudice defendant, and (4) defendant was not entitled to severance of charges of lewdness with a child under the age of 14 from charges of possession of visual representation depicting sexual conduct of a person under the age of 16.

Affirmed.

Christopher R. Oram, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Thomas M. Carroll*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
Testimony of alleged victims of prior incidents involving defendant was admissible at a lewdness trial even though the records of the court pro-

ceedings that followed the prior incidents were sealed or expunged; trial court was not required to ignore the recollections of defendant's accusers, and testimony regarding the court proceedings that were subject to the sealing or expungement orders was excluded. NRS 179.285.

2. CRIMINAL LAW.

A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the trial court.

3. CRIMINAL LAW.

Absent clear error, a trial court's findings of fact in connection with a motion for a new trial based upon juror misconduct will not be disturbed.

4. CRIMINAL LAW.

Where juror misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate. U.S. CONST. amend. 6.

5. CRIMINAL LAW.

To justify a new trial on the ground of juror misconduct, a defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict.

6. CRIMINAL LAW.

When analyzing extrinsic material to determine whether a jury's exposure to material resulted in prejudice to a defendant, so as to justify a new trial on the ground of juror misconduct, the trial court is required to objectively evaluate the effect it had on the jury and determine whether it would have influenced the average, hypothetical juror.

7. CRIMINAL LAW.

Several factors guide an inquiry into whether a jury's exposure to extrinsic material resulted in prejudice to the defendant and thus warrants a new trial on the ground of juror misconduct, including how long the jury discussed the extrinsic material, when that discussion occurred relative to the verdict, the specificity or ambiguity of the information, and whether the issue involved was material.

8. CRIMINAL LAW.

Juror's independent search of the Internet for a particular pornographic website that was mentioned during trial amounted to the use of extrinsic evidence in violation of the Confrontation Clause at a trial for lewdness with a child under the age of 14 and possession of visual representation depicting sexual conduct of a person under the age of 16. U.S. CONST. amend. 6.

9. CRIMINAL LAW.

Juror's independent search of the Internet for a particular pornographic website that was mentioned during trial, which amounted to the use of extrinsic evidence in violation of the Confrontation Clause, did not prejudice defendant at a trial for open or gross lewdness, lewdness with a child under the age of 14, and possession of visual representation depicting sexual conduct of a person under the age of 16; the search was fruitless, the jury only briefly discussed the search and then continued with its deliberation for at least a few more hours, and the search was highly ambiguous. U.S. CONST. amend. 6.

10. CRIMINAL LAW.

Defendant was not entitled to severance of charges of lewdness with a child under the age of 14 from charges of possession of visual representation depicting sexual conduct of a person under the age of 16; evidence of pornography found on defendant's computer was admissible to prove the in-

tent element of the lewdness charges, and evidence of defendant's lewd behavior was admissible to prove the knowing and willful element of the pornography charges. NRS 200.730, 201.230.

11. CRIMINAL LAW.
Joinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. NRS 173.115.

12. CRIMINAL LAW.
Charges with mutually cross-admissible evidence are properly joined because in such a situation the accused would fare no better from a severance and trial of the severed counts independently. NRS 173.115.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

This appeal presents three main issues. First, we consider whether testimony regarding prior bad acts is admissible when the resulting court proceedings were sealed or expunged. Second, we address whether the jury committed misconduct in this case, and if so, whether such misconduct warranted a new trial. Third, we discuss whether the district court erred in denying the motion to sever the lewdness counts from the child pornography counts.[1]

We conclude that the district court may permit testimony that is confined to a witness's personal experiences so long as the witness does not rely on the previously sealed or expunged court proceedings and does not indicate that such proceedings took place. Next, we conclude that any jury misconduct that occurred in this case did not prejudice the verdict, and thus, a new trial was not warranted. Finally, we conclude that the district court did not abuse its discretion by denying the motion to sever the lewdness counts from the pornography counts because the evidence presented in each case was admissible in the other case. We therefore affirm appellant Mark R. Zana's conviction.

[1]Appellant also argues that: (1) he is entitled to a new trial based upon the introduction of inadmissible evidence of other crimes, wrongs, or acts; (2) the testimony about his prior bad acts was inadmissible pursuant to NRS 48.045(2); (3) the district court erred when it permitted several instances of hearsay testimony to be admitted; (4) the district court erred when it failed to suppress images obtained from his computer because the search warrant did not contain sufficient information to support probable cause; (5) insufficient evidence supported his conviction of possession of visual representation depicting sexual conduct of a person under the age of 16; (6) the district court erred when it failed to dismiss the child pornography counts based on improper pleading and notice; and (7) his convictions must be reversed based upon the cumulative errors committed during trial. We have carefully considered these issues and conclude that these additional challenges are without merit.

FACTS AND PROCEDURAL HISTORY

The case before us arose out of multiple allegations by several female students that Zana, a fifth-grade teacher, had touched them inappropriately while they were under his supervision. In total, six girls came forward alleging Zana would touch their breasts and/or invite them to place their hand in his pocket to get candy. During the investigation of these allegations, two previous allegations against Zana came to light.

In 1992, while Zana was living in Pennsylvania, he was accused of pinning a 13-year-old girl against his bed and fondling her breast. The case against Zana was concluded when he agreed to a plea bargain that prohibited him from teaching minors. The records of the case were subsequently expunged pursuant to the plea agreement and in accordance with Pennsylvania law.

Then, in 1998 while working as a teacher in Henderson, Nevada, Zana was accused of enticing a second-grader to touch his penis by telling her she could retrieve candy from his pocket. Criminal proceedings were also initiated as a result of the allegation in Henderson, but that case was dismissed because the victim's parents did not want her to have to testify. The records of the dismissed Henderson case were subsequently sealed. Prior to trial, the State filed a motion to unseal the records of the 1998 Henderson case, arguing it was going to prosecute Zana for that incident as well. The justice court unsealed the records for that limited purpose.[2]

The State charged Zana with 9 counts of lewdness with a child under the age of 14. He was also charged with 12 counts of possession of visual representations depicting sexual conduct of a person under the age of 16 stemming from pictures investigators found on his computer.

At trial, the State introduced the prior allegations against Zana through the testimony of his alleged victims pursuant to NRS 48.045. Through this testimony, the State sought to prove Zana's motive in touching his female students and to rebut Zana's claims that the touching was accidental, misinterpreted, or an isolated mistake. Because records of the previous incidents were sealed or ex-

[2]Zana appealed the unsealing of these records to the district court and the record does not disclose the issue's ultimate resolution. Moreover, no party contests, and we decline to consider, the propriety of unsealing these records. We do note, however, that to inspect sealed records of a defendant's prior offense, the State must demonstrate that based on newly discovered evidence it has sufficient evidence to reasonably conclude that the defendant will be tried for that prior offense. NRS 179.295; *see Walker v. Dist. Ct.*, 120 Nev. 815, 820, 101 P.3d 787, 791 (2004) (implying that the State's failure to arrest for prior offense used to justify record's unsealing suggests unsealing was error). Here, the State never charged Zana in the 1998 Henderson case.

punged, the district court limited the victims' testimony to Zana's actual conduct and the witnesses' experiences, and excluded testimony regarding subsequent charges and judicial proceedings.[3]

DISCUSSION

First, we will discuss the admissibility of testimony regarding prior bad acts by the defendant, where the records of the criminal proceedings resulting from those acts have been sealed or expunged. Next, we will address whether jury misconduct occurred in this case and, if so, whether it was prejudicial and, thus, warranted a new trial. Finally, we will consider whether the district court should have granted Zana's motion to sever the lewdness charges from the pornography charges.

Sealed or expunged cases

[Headnote 1]

Zana contends that the testimony about the allegations in Pennsylvania and Henderson were improperly admitted because these cases had previously been sealed or expunged. Zana believes that the testimony about these previous allegations violated the courts' prior orders to seal or expunge the records. We disagree.

When a court orders a record sealed, ''[a]ll proceedings recounted in the record are deemed never to have occurred.'' NRS 179.285. This fiction permits the subject of the sealed proceedings to properly deny his or her arrest, conviction, dismissal, or acquittal in connection with the proceedings. *See Yllas v. State*, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996). In this way, sealing orders are intended to permit individuals previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions. *See Baliotis v. Clark County*, 102 Nev. 568, 570-71, 729 P.2d 1338, 1340 (1986). ''It is clear, however, that such authorized disavowals cannot erase history. Nor can they force persons who are aware of an individual's criminal record to disregard independent facts known to them.'' *Id.* at 571, 729 P.2d at 1340.

Thus, as we have previously observed, while a sealing order erases many of the consequences that potentially flow from past criminal transgressions, it is beyond the power of any court to

[3]One witness tangentially referenced a prior court proceeding, but the reference was inadvertent, brief, and the district court acted quickly to rectify the situation. Outside the presence of the jury, the district court admonished the witness and subsequent witnesses not to refer to any court proceeding. Because the reference was fleeting and did not explicitly refer to a court case, we conclude its erroneous admission was harmless and do not address it further.

unring a bell. *See id*. For example, in *Baliotis*, the Las Vegas Metropolitan Police Department recommended denial of a convicted felon's application for a private detective's license based on his prior felonies even though records of the applicant's felony convictions were sealed. *Id*. at 569, 729 P.2d at 1339. This court upheld the recommendation because the officers investigating the applicant's character had personal knowledge of the applicant's criminal history. *Id*. at 570-71, 729 P.2d at 1339-40. In so doing, we respected the sealing statute's limited effect: it erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others. *See id*. at 571, 729 P.2d at 1340.

Here, the district court properly excluded testimony regarding the court proceedings that were subject to the sealing orders in order to preserve the effect of the orders, while it correctly admitted testimony to which the sealing orders did not apply. Neither the Pennsylvania order nor the Henderson order erased the witnesses' memories of Zana's inappropriate conduct. Just as the sealing statute did not require the licensing commission in *Baliotis* to disregard the investigating officers' independent knowledge, it does not require the district court to ignore the recollections of Zana's accusers. Although statutes empower courts to seal a proceeding's records, individual memories of events outside the courtroom are beyond such judicial control.

Moreover, the district court's exclusion of testimony regarding the proceedings that were subject to the sealing orders secured the integrity of the sealing orders. Coincident with the purpose of the sealing statutes, the State did not use records of prior proceedings against Zana. Instead, the State admitted testimony of the prior events against Zana and illuminated Zana's pattern of behavior without implicating the sealed records.

We therefore conclude that the district court did not err in admitting the testimony. Instead, it properly restricted the scope of the testimony to preserve the statutory effect of the previous cases' sealing or expungement orders while allowing relevant testimony.

Jury misconduct

Zana contends the district court erred when it denied his motion for a mistrial in the face of juror misconduct. Although the juror's behavior was inappropriate, we conclude that the misconduct did not prejudice the jury's decision and, thus, affirm the district court's decision to deny the motion for mistrial.

While investigating the allegations of inappropriate touching, investigators discovered what appeared to be pornographic pictures of young females on Zana's home computer. The central question left

to the jury's determination was the actual age of the females pictured in the photographs relating to the counts of possession of visual representation depicting sexual conduct of a person under the age of 16. At trial, there was competing expert testimony regarding the age of the females.

The jury deliberations in this case began on a Friday and finished on a Monday. While at home over the weekend, one juror engaged in an Internet search for a particular pornographic website that was mentioned during the trial.[4] Despite the juror's efforts, he was unable to locate the website. Upon returning on Monday to deliberate, he advised his fellow jurors of his fruitless search but came to no conclusion about the meaning of that failure. After discussing the search for a short time, the jury returned to its deliberations and rendered a verdict a few hours later.

When Zana later learned of the juror's online research, he moved for a mistrial. At the hearing on the matter, every juror available testified about the Internet search and the resulting discussion. The district court then concluded that while the juror had committed misconduct by conducting his own investigation, the information obtained through the juror's independent research was vague, ambiguous, and only discussed for a brief time, and therefore, the misconduct was not prejudicial. Based on this conclusion, the district court denied the motion for a mistrial.

[Headnotes 2-4]

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

[Headnotes 5-7]

To justify a new trial, ''[t]he defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict.'' *Id.* at 565, 80 P.3d at 456. When analyzing extrinsic material to determine

[4]Zana also characterized additional juror behavior as misconduct, including attempting to guess the ages of churchgoers and testing the accessibility of a seated man's pants pocket. Because we conclude such behavior is not misconduct but simply ''observation based on matters generally experienced by people in their everyday lives,'' we confine our discussion of the jury misconduct to the Internet search. *Meyer v. State*, 119 Nev. 554, 568, 80 P.3d 447, 458 (2003).

whether the jury's exposure to the material resulted in prejudice to the defendant, the district court is required to objectively evaluate the effect it had on the jury and determine whether it would have influenced ''the average, hypothetical juror.'' *Id.* at 566, 80 P.3d at 456. Several factors guide the juror prejudice inquiry, including how long the jury discussed the extrinsic material, when that discussion occurred relative to the verdict, the specificity or ambiguity of the information, and whether the issue involved was material. *Id.*

[Headnote 8]

We conclude that the juror's independent search of the Internet did amount to the use of extrinsic evidence in violation of the Confrontation Clause. However, we conclude that one juror's inability to locate a website mentioned during trial is not so prejudicial as to necessitate a new trial.

[Headnote 9]

Upon review of the jurors' testimony at the hearing, it is clear that the jury only briefly discussed the fruitless search and then continued with its deliberation for at least a few more hours. Moreover, the fruitless search was highly ambiguous; there are many possible interpretations of the extrinsic information the juror presented and this resulted in little, if any, probative information being relayed to the other jurors. Furthermore, although the issue that motivated the search—the ages of the females depicted in the photographs on Zana's computer—was material, the fruitless search could in no way affect the jury's inquiry. Because the search's implications are ambiguous, it could not speak to a material issue in the case. Information so ostensibly irrelevant could not prejudice the average, hypothetical juror.

For the foregoing reasons, we conclude that the district court's denial of Zana's motion for a mistrial, based on juror misconduct, was not an abuse of discretion.

Joinder of charges

[Headnote 10]

We now turn to Zana's argument that the district court erred in denying his motion to sever the lewdness charges from the pornography charges. Zana contends that because the pornography charges are unconnected with the lewdness charges, the district court should have severed the two. However, given the cross-admissibility of the evidence in the two cases, we disagree.

[Headnote 11]

'' '[J]oinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.' ''

Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996) (quoting *Robins v. State*, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990)). Criminal charges are properly joined whenever: (1) the acts leading to the charges are part of the same transaction, scheme, or plan or (2) the evidence of each charge would be admissible in the separate trial of the other charge. NRS 173.115; *Mitchell v. State*, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989); *see generally Robinson v. United States*, 459 F.2d 847, 855-56 (D.C. Cir. 1972).

[Headnote 12]

Charges with mutually cross-admissible evidence are properly joined because in such a situation ''the accused would fare no better from a severance and trial of the severed counts independently.'' *Robinson*, 459 F.2d at 855-56. Moreover, severance in such a case would naturally result in separate trials presenting identical evidence and consequentially result in needless judicial inefficiency. *See Robinson*, 459 F.2d at 856. Here, we conclude that joinder was proper because, had the district court granted the motion to sever the lewdness counts from the pornography counts, the evidence of each charge would have been admissible in the separate trial of the other charge.

First, the lewdness charge required the State to prove that Zana touched his young victims for the purpose of gratifying his lusts, passions, or sexual desires. NRS 201.230. The pornography found on Zana's computer suggests that Zana found pornographic images of young females sexually gratifying. The pornography evidence indicates Zana intentionally touched his female students for the purpose of satiating his sexual appetite, and that the touching was not by mistake or accident. Therefore, evidence of the pornography was admissible to prove the mental state required for the lewdness charge.

Likewise, evidence of Zana's lewd behavior with young girls under his supervision suggests that the pornography found on Zana's computer was not the result of an accident or mistake. To prove the underage pornography charge against Zana, the State had to prove that he knowingly and willfully possessed the materials. NRS 200.730. Evidence that he inappropriately touched young girls suggests contact with young girls sexually gratified Zana. It is reasonable to then infer that he did not possess pornographic photographs of young females accidently, but rather knowingly and willfully downloaded the photographs to satisfy the sexual desires his inappropriate touching evidences. Therefore, evidence of Zana's lewd behavior was admissible to prove the knowing and willful element of the pornography charge.

Thus, because evidence of the two charges was cross-admissible, the district court did not abuse its discretion in denying Zana's motion to sever the charges.

CONCLUSION

We conclude that the district court properly exercised its discretion in admitting the testimony of Zana's prior victims, denying his motion for a mistrial based on juror misconduct, and denying his motion to sever lewdness and pornography charges. Accordingly, we affirm the judgment of conviction.

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

IN THE MATTER OF THE ESTATE AND LIVING TRUST OF ROSE MILLER.

BARBARA LEPOME, AN INDIVIDUAL, APPELLANT/CROSS–RESPONDENT, *v.* MARILYN BERKSON, AN INDIVIDUAL AND GERTRUDE MALACKY, AN INDIVIDUAL, RESPONDENTS/CROSS-APPELLANTS.

No. 51891

September 24, 2009 216 P.3d 239

Appeal and cross-appeal from a district court order denying a motion for attorney fees but awarding costs. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Individuals who had formerly been named primary beneficiaries of decedent's estate plan filed suit against primary beneficiary who had been named in estate plan by decedent shortly before her death, seeking to invalidate estate plan revision. Beneficiary made separate offers of judgment to each of the individuals, which were rejected. Following a trial, a jury returned a verdict in favor of individuals, but on appeal, the supreme court reversed. Thereafter, beneficiary filed motion for attorney fees and costs. The district court denied motion. Appeal and cross-appeal were taken. The supreme court, PICKERING, J., held that beneficiary was entitled to reasonable attorney fees and costs incurred at trial and appellate levels under statute and rule governing offers of judgment.

Reversed and remanded.

[Rehearing denied December 16, 2009]

Marquis & Aurbach and *Terry A. Coffing, Micah S. Echols*, and *Tye S. Hanseen*, Las Vegas, for Appellant/Cross-Respondent.

Cary Colt Payne, Las Vegas; *Bruce L. Gale*, Las Vegas, for Respondents/Cross-Appellants.

1. COSTS.
   An award of attorney fees is generally entrusted to the sound discretion of the district court.
2. APPEAL AND ERROR.
   When a party's eligibility for an attorney fee award is a matter of statutory interpretation, a question of law is presented, which the supreme court reviews de novo.
3. COSTS.
   Primary beneficiary of decedent's estate plan, against whom suit had been brought by individuals who had formerly been named primary beneficiaries of estate plan until decedent revised plan shortly before her death, was entitled to reasonable attorney fees and costs from individuals under statute and rule permitting fee-shifting penalties to be assessed against an offeree who rejects an offer and fails to obtain a more favorable judgment, incurred at trial court and appellate levels, as beneficiary had made separate offers of judgment to each individual, which were rejected, and, while jury returned verdict in favor of individuals at trial court level, supreme court reversed decision on appeal, such that individuals ultimately failed to receive more favorable judgments than beneficiary had offered. NRS 17.115; NRCP 68(f).
4. COSTS.
   For purposes of statute and rule governing offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who ''rejects an offer and fails to obtain a more favorable judgment,'' the word ''judgment'' connotes a final judgment. NRS 17.115; NRCP 68(f).
5. COSTS.
   Statute and rule governing offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who rejects an offer and fails to obtain a more favorable judgment, apply to the judgment that determines the final outcome in the case which, in the event of an appellate reversal, may be different from the judgment originally entered by the district court. NRS 17.115; NRCP 68.
6. COSTS.
   Statute and rule governing offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who rejects an offer and fails to obtain a more favorable judgment, extend to fees incurred on and after appeal. NRS 17.115; NRCP 68.
7. COSTS.
   Proper person litigants may not recover attorney fees for their efforts in representing themselves.
8. COSTS.
   Pursuant to statute and rule governing offers of judgment, permitting fee-shifting penalties to be assessed against an offeree who rejects an offer and fails to obtain a more favorable judgment, an unrepresented party who serves an offer of judgment may recover post-offer fees incurred and paid to a lawyer who thereafter appears in the case on the offering party's behalf. NRS 17.115; NRCP 68.

Before the Court EN BANC.[1]

[1]THE HONORABLE MICHAEL L. DOUGLAS and THE HONORABLE MARK GIBBONS, Justices, voluntarily recused themselves from participation in the decision of this matter.

OPINION

By the Court, PICKERING, J.:

This appeal presents three narrow but previously undecided issues concerning offer of judgment practice under NRCP 68 and NRS 17.115. Reversing, we hold that (1) a judgment obtained on or after appeal can qualify as a ''more favorable judgment'' for purposes of the fee-shifting provisions of NRCP 68 and NRS 17.115, (2) appellate fees are recoverable, and (3) an unrepresented party who serves an offer of judgment may recover fees later paid to a lawyer hired to prosecute or defend the case.

FACTS AND PROCEDURAL BACKGROUND

The underlying dispute involves a contest over the distribution of Rose Miller's estate. Shortly before her death, Miller amended her estate plan to name appellant/cross-respondent Barbara LePome as her main beneficiary. Before this amendment, respondents/cross-appellants Marilyn Berkson and Gertrude Malacky had been Miller's primary beneficiaries.

Alleging that LePome had exercised undue influence, Berkson and Malacky sued to invalidate Miller's estate plan revision. Proceeding without a lawyer, LePome made separate $12,500 offers of judgment to each of them. When her offers of judgment were rejected, LePome turned the defense of the suit over to counsel.

The jury favored Berkson and Malacky with a unanimous verdict. On appeal, however, this court reversed and ruled that because substantial evidence did not support the verdict, LePome deserved judgment as a matter of law. As a result, Berkson and Malacky ultimately failed to receive more favorable judgments than LePome had offered.

After the remittitur issued on our judgment of reversal, LePome moved the district court for attorney fees and costs pursuant to NRCP 68 and NRS 17.115. The district court initially determined that LePome's offers of judgment entitled her to $28,730.25 in costs and $100,000 in attorney fees. Upon reconsideration, the district court reversed its decision and held as a matter of law that the offer of judgment rules do not apply to judgments won by appellate reversal. In the district court's view, the Nevada Supreme Court settlement conference program is the appropriate mechanism for facilitating settlements on appeal, *see* NRAP 16, not the fee-shifting offer of judgment rules.

DISCUSSION

[Headnotes 1, 2]

Although the award of attorney fees is generally entrusted to the sound discretion of the district court, *Bergmann v. Boyce*, 109 Nev.

670, 674, 856 P.2d 560, 563 (1993), when a party's eligibility for a fee award is a matter of statutory interpretation, as is the case here, a question of law is presented, which we review de novo. *See, e.g.*, *Barney v. Mt. Rose Heating & Air*, 124 Nev. 821, 825, 192 P.3d 730, 733 (2008).

[Headnote 3]

Berkson and Malacky first argue that a judgment rendered as the result of appellate reversal cannot serve as the predicate for an award of attorney fees and costs under Nevada's offer of judgment rules. In their view, the district court and appellate results are separate. Since the judgment they originally obtained in the district court was more favorable than the $12,500 judgments LePome had offered, they argue that the fee-shifting provisions should not apply. Thus, despite our reversal and despite the judgment in favor of LePome that resulted from the prior appeal, they urge us to focus solely on the initial district court result.

Berkson and Malacky attempt to support their argument with the language of NRCP 68 and NRS 17.115. Neither the rule nor the statute uses the word ''final'' in referring to ''judgment.'' Rather, under NRCP 68(f), fee-shifting penalties are assessed against an offeree who ''rejects an offer and fails to obtain a more favorable judgment.'' The language of NRS 17.115 is substantially similar. *See* NRS 17.115(4).

[Headnote 4]

We conclude that the word ''judgment'' in this context connotes a final judgment. The trial and appellate stages are naturally related, and if an appeal is taken, the final outcome may change depending on the outcome on appeal. When this court reverses a judgment on a jury verdict for insufficient evidence and declares the appellant entitled to judgment as a matter of law, the reversal and remittitur comprise the judgment by which the parties and the district court are thereafter bound. *See* NRS 17.160 (making reference to the ''judgment of appellate court'' in defining the district court's docket); NRAP 36(a) (noting that this court's opinion is its judgment). Absent some language in NRCP 68 or NRS 17.115 that signifies a different interpretation of ''judgment,'' we conclude that the policy of promoting settlement does not end in district court but continues until the case is resolved.

Although the procedural inverse of this case, *Tipton v. Heeren*, 109 Nev. 920, 924-25, 859 P.2d 465, 467 (1993), supports our conclusion. In *Tipton*, we held that, ''[i]n view of our decision reversing the district court's judgment, attorney's fees are not available pursuant to NRCP 68 and NRS 17.115 because on remand Tipton will obtain a judgment more favorable than Heerens' pre-trial settlement offer.'' *Id.* at 925, 859 P.2d at 467. The appellate reversal in *Tipton* resulted in the offeree obtaining a more favorable judgment

than had been offered, and this defeated an award of attorney fees and costs. *Id*. In contrast, the appellate reversal on the prior appeal in this case produced a less favorable judgment for the offerees, resulting in a judgment that qualified the offeror for an award of attorney fees and costs. Despite being procedurally opposite, the basic principle of *Tipton* applies: The judgment looked to in determining whether the judgment obtained is more or less favorable than that which was offered is the final judgment in the case, which may or may not be the initial judgment entered by the district court. *See Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 322, 890 P.2d 785, 788 (1995) (''When there is a pretrial offer of judgment that the offeree refuses and the *final judgment* results in an outcome less favorable to the offeree, NRCP 68 and NRS 17.115 authorize the trial judge to make awards of costs, attorney fees and interest on the judgment to the offeror.'' (emphasis added)), *superseded by statute on other grounds as stated in RTTC Communications v. Saratoga Flier*, 121 Nev. 34, 41-42 & n.20, 110 P.3d 24, 29 & n.20 (2005); *Ramadanis v. Stupak*, 104 Nev. 57, 59, 752 P.2d 767, 768 (1988) (''we note additionally that Stupak's offer of judgment was made specifically pursuant to NRCP 68, which does not provide for the denial of prejudgment interest when the *final judgment* is less favorable than the offer of judgment'' (emphasis added)), *superseded by statute on other grounds as stated in RTTC Communications v. Saratoga Flier*, 121 Nev. at 41-42 & n.20, 110 P.3d at 29 & n.20.

Although the wording in NRCP 68 and NRS 17.115 is somewhat unique, other jurisdictions with comparable statutes and rules similarly interpret their cost-shifting provisions to apply to judgments rendered on and after an appeal. *See Pouillon v. Little*, 326 F.3d 713, 718-19 (6th Cir. 2003) (recognizing that defendant's failure to renew offer of judgment did not preclude plaintiff from being required to pay defendant's costs when plaintiff obtained an amount less than the offer on remand); *Payne v. Milwaukee County*, 288 F.3d 1021, 1024-25 (7th Cir. 2002) (holding that defendant's failure to renew offer of judgment after trial did not prevent the offer from barring plaintiff from recovering costs after plaintiff lost at retrial); *Mackie v. Chizmar*, 965 P.2d 1202, 1204-05 (Alaska 1998) (concluding that offers of judgment remain effective after appeal and remand because the judgment by which an offeror is entitled to costs may be a judgment entered after appeal).

[Headnote 5]

Accordingly, we hold that the fee-shifting provisions in NRCP 68 and NRS 17.115 apply to the judgment that determines the final outcome in the case which, in the event of an appellate reversal, may be different from the judgment originally entered by the district court.

Next, we determine whether an offer of judgment permits a party to recover post-offer fees and costs incurred on appeal, as well as in the trial court.

[Headnote 6]

States with fee-shifting rules or statutes similar to Nevada's have held they apply to appellate fees. *See Rosenaur v. Scherer*, 105 Cal. Rptr. 2d 674, 693 (Ct. App. 2001) (holding that a statute authorizing an attorney fees award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise); *Williams v. Brochu*, 578 So. 2d 491, 495 (Fla. Dist. Ct. App. 1991) (''[a]lthough we find no case in point, because an appeal is but part of the same action being appealed, we perceive no reason why a defendant's right to recover reasonable costs and attorney's fees under section 768.79(1) does not apply to those incurred on appeal in the same action''), *abrogated on other grounds by White v. Steak and Ale of Florida, Inc.*, 816 So. 2d 546 (Fla. 2002). In other contexts, we have held that an attorney fees award includes fees incurred on appeal. *See Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477-78 (1988) (holding that ''a contract provision for attorney's fees includes an award of fees for successfully bringing or defending an appeal''). Additionally, nothing in the language of NRCP 68 and NRS 17.115 suggests that their fee-shifting provisions cease operation when the case leaves trial court. We therefore hold that the fee-shifting provisions in NRCP 68 and NRS 17.115 extend to fees incurred on and after appeal.

[Headnote 7]

Berkson and Malacky's third contention is that LePome should be deemed as a matter of law to have made her offer of judgment in bad faith, making it inappropriate to award fees and costs. In particular, they claim that LePome, who was initially proceeding as a proper person litigant, failed to disclose that she had already retained a lawyer's services when she made the offers of judgment. Proper person litigants may not recover attorney fees for their efforts in representing themselves. *See Sellers v. Dist. Ct.*, 119 Nev. 256, 259, 71 P.3d 495, 498 (2003) (holding that ''all proper person litigants, whether attorney or non-attorney, [must] be obligated to pay attorney fees as a prerequisite for an award of prevailing party attorney fees''). Berkson and Malacky argue that this makes it unfair to award post-offer fees, because they rejected LePome's offer of judgment believing she did not have a lawyer and would not be entitled to attorney fees if they failed to obtain a more favorable judgment.

[Headnote 8]

This view, however, perverts the statutory policy promoting settlement by removing a litigant's incentive to accept an offer of judgment from a proper person litigant. In evaluating an offer of judgment, a party should not rely on whether the offeror then has counsel. Rather, the party should be aware that a proper person litigant may change his mind about representation decisions, especially if the case cannot be settled. An unrepresented party who serves an offer of judgment may recover post-offer fees incurred and paid to

a lawyer who thereafter appears in the case on the offering party's behalf.

Finally, we note LePome appears to have recovered costs for photocopies, scanning, faxes, and Westlaw charges without providing sufficient itemization or explanation of those costs, making reevaluation of the cost award appropriate on remand. *See Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998).

Therefore, we reverse the judgment of the district court and remand for the award of reasonable attorney fees and costs under NRCP 68 and NRS 17.115.[2] On remand, the district court should award reasonable post-rejection fees incurred at the district court and appellate levels both on this appeal and the prior appeal. Furthermore, the district court should reconsider the award of costs to LePome and confirm the award only if LePome provides sufficient explanation to justify them.

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

LELAND OZAWA, APPELLANT, *v.* VISION AIRLINES, INC., FKA AVIATION VENTURES, INC., A NEVADA CORPORATION; VISION AVIATION HOLDINGS, INC., DBA VISION AIR, A NEVADA CORPORATION, RESPONDENTS.

No. 49435

LELAND OZAWA, APPELLANT/CROSS-RESPONDENT, *v.* VISION AIRLINES, INC., FKA AVIATION VENTURES, INC., A NEVADA CORPORATION; AND VISION AVIATION HOLDINGS, INC., DBA VISION AIR, A NEVADA CORPORATION, RESPONDENTS/CROSS-APPELLANTS.

No. 49660

October 1, 2009 216 P.3d 788

Consolidated appeals from a district court summary judgment in an employment action and from a post-judgment order denying in part and granting in part a motion for attorney fees and costs. Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge (Docket No. 49435); James Bixler, Judge (Docket No. 49660).

Pilot brought retaliatory discharge and breach of contract action against airline. The district court granted summary judgment to air-

[2]This disposition makes it unnecessary to decide LePome's alternative argument for fees based on NRS 18.010(2)(b).

line, but denied fees and costs in part. Both parties appealed. The supreme court held that: (1) pilot had an alternative remedy for retaliatory discharge claim, and thus no claim for tortious discharge existed; (2) district court did not abuse its discretion in denying airline attorney fees; but (3) district court's grant of a setoff to award of costs was an abuse of discretion.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied November 12, 2009]

[En banc reconsideration denied March 17, 2010]

Kemp & Kemp and *James P. Kemp*, Las Vegas, for Appellant/Cross-Respondent.

Lemons, Grundy & Eisenberg and *Alice Campos Mercado*, Reno, for Respondents/Cross-Appellants.

1. LABOR AND EMPLOYMENT.
   Pilot who alleged retaliatory discharge against airline had an alternative remedy under the federal Railway Labor Act that provided employees shall have the right to organize and bargain collectively, and that it was unlawful for airline to interfere with pilot's efforts to organize or participate in a labor union, and the federal courts which had read an implied private right of action from this provision, and thus, since pilot failed to avail himself of this remedy, no claim for tortious discharge existed. 45 U.S.C. § 152.
2. APPEAL AND ERROR.
   The supreme court reviews an order granting summary judgment de novo.
3. JUDGMENT.
   Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
4. LABOR AND EMPLOYMENT.
   Since employees are presumed to be at-will, an employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend this state's public policy.
5. LABOR AND EMPLOYMENT.
   Exceptions to the at-will employment doctrine are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy.
6. LABOR AND EMPLOYMENT.
   The supreme court will not recognize an action for tortious discharge when a plaintiff has an adequate, comprehensive, statutory remedy.
7. COSTS.
   District court did not abuse its discretion in denying airline attorney fees pursuant to the offer of judgment rule, and as the prevailing party in pilot's retaliatory discharge and breach of contract action, where trial court found pilot's claims were brought in good faith, and his rejection of airline's offer of $2,500 in settlement of his claims was not grossly unreasonable. NRCP 68.
8. APPEAL AND ERROR; COSTS.
   A district court's award of attorney fees and costs pursuant to offer of judgment rule is reviewed for an abuse of discretion; a clear disregard of the guiding legal principles may constitute an abuse of discretion. NRCP 68.

9. COSTS.

In making an award of attorney fees pursuant to the offer of judgment rule, the district court must carefully review the following factors: (1) whether the plaintiff brought the claim in good faith, (2) whether the defendants' offer of judgment was reasonable and brought in good faith in both its amount and timing, (3) whether it was grossly unreasonable or an act in bad faith for the plaintiff to reject the offer and proceed to trial, and (4) whether the fees sought are reasonable and justifiable in amount. NRCP 68.

10. COSTS.

District court's grant of a setoff to pilot from costs awarded to airline as prevailing party pursuant to offers of judgment rule, for alleged earned and unpaid vacation and paid time off, was an abuse of discretion, in pilot's retaliatory discharge and breach of contract action, where the court had already dismissed or granted airline summary judgment on all causes of action. NRCP 68.

Before PARRAGUIRRE, DOUGLAS and PICKERING, JJ.

OPINION

Per Curiam:

In these consolidated appeals, we consider two issues. First, we are asked to recognize a new exception to the at-will employment doctrine and to allow a claim for tortious discharge related to an employee's termination for attempting to organize his fellow employees. Because we conclude that the appellant had an available statutory remedy, we decline to recognize this claim for tortious discharge and we affirm the district court's order granting summary judgment on this claim. Second, we review whether the district court abused its discretion in its resolution of respondents' request for attorney fees and costs. Although we affirm the district court's denial of respondents' motion for attorney fees based on our conclusion that the district court properly weighed the relevant factors, we reverse in part the district court's costs award that attempts to provide compensation for a previously dismissed cause of action.

FACTS AND PROCEDURAL HISTORY

Appellant/cross-respondent Leland Ozawa was employed as a pilot for respondents/cross-appellants Vision Airlines, f.k.a. Aviation Ventures, Inc., and Vision Aviation Holdings, Inc., d.b.a. Vision Air (collectively, Vision Airlines). Although Ozawa was at one point offered the opportunity to sign an employment agreement with Vision Airlines, he declined to do so and instead chose part-time, at-will employment. During the period of Ozawa's employment with Vision Airlines, some of the pilots at the company apparently became disgruntled over a requirement to attend training. Ozawa took a leadership role in the preparation of a responsive petition re-

questing additional compensation for attending any training. Shortly thereafter, Ozawa was contacted by Vision Airlines' director of human resources and told to bring his pilot manuals and company identification to the company office. Although the parties dispute the details surrounding Ozawa's subsequent resignation, Ozawa stopped working for Vision Airlines.

The district court proceedings in this matter were initiated by Ozawa's complaint, which alleged retaliatory discharge, intentional infliction of emotional distress, and breach of contract. The district court dismissed the intentional infliction of emotional distress claim, which Ozawa had abandoned, and granted summary judgment to Vision Airlines on the remaining claims after concluding that Ozawa's claim for retaliatory discharge was not recognized by Nevada law and that the breach of contract claim failed because Ozawa was an at-will employee. The district court subsequently denied a motion for reconsideration and denied in part and granted in part a motion by Vision Airlines for attorney fees and costs. Ozawa has appealed the order granting summary judgment to Vision Airlines.[1] Vision Airlines has cross-appealed from the attorney fees and costs order. This court has consolidated these appeals.

DISCUSSION

In resolving the issues presented in these appeals, we first address, in Docket No. 49435, Ozawa's argument that this court should recognize a new exception to the at-will employment doctrine and permit a claim for retaliatory discharge when an employee is allegedly terminated for collectively organizing his coworkers. Then, on cross-appeal, in Docket No. 49660, we address Vision Airlines' challenges to the district court's post-judgment order regarding its request for attorney fees and costs.

Summary judgment was proper as Ozawa failed to avail himself of an available remedy in federal court

[Headnote 1]

Ozawa argues that the district court erred in dismissing his claim for retaliatory discharge because terminating an employee for organizing his coworkers to collectively seek increased compensation violates the public policy of this state and, thus, should constitute an

[1]Although Ozawa filed a notice of appeal in Docket No. 49660 that indicated an intent to challenge the district court order granting in part and denying in part Vision Airlines' request for attorney fees and costs, neither his opening brief nor his reply brief challenge this order, and thus, we treat Ozawa's appeal of this order as abandoned. *See Edwards v. Ghandour*, 123 Nev. 105, 118-19 & n.31, 159 P.3d 1086, 1095 & n.31 (2007) (noting that this court need not consider alleged errors when not supported by any pertinent legal authority), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008).

additional exception to the at-will employment doctrine. Ozawa cites to NRS 614.090, NRS 613.220, and the National Labor Relations Act as support for the exception he seeks to the at-will employment doctrine. He argues that failing to protect this public policy will have a chilling effect on Nevada employees who might seek collectively to better their compensation or working conditions. Vision Airlines, however, argues that the district court correctly dismissed the retaliatory discharge claim because termination for seeking increased compensation does not constitute an exception to the at-will employment doctrine.

[Headnotes 2-6]

This court reviews an order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 731, 121 P.3d at 1031. Since employees in Nevada are presumed to be at-will, an employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend this state's public policy. *State of Nevada v. Dist. Ct. (Anzalone)*, 118 Nev. 140, 151, 42 P.3d 233, 240 (2002). While this court has recognized certain exceptions to the at-will employment doctrine, *see D'Angelo v. Gardner*, 107 Nev. 704, 719, 819 P.2d 206, 216 (1991) (adopting an exception based on ''the public policy of this state favor[ing] safe employment practices and the protection of the health and safety of workers on the job''), these exceptions are ''severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy.'' *Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989) (declining to create an additional exception to the at-will employment doctrine for age discrimination). Further, this court will not recognize an action for tortious discharge when a plaintiff has an adequate, comprehensive, statutory remedy. *D'Angelo*, 107 Nev. at 720-22, 819 P.2d at 217-18.

Here, we decline to recognize the claim for tortious discharge. While Ozawa has identified NRS 614.090[2] and NRS 613.220[3] as

[2]NRS 614.090(1) declares as public policy of this state that

> it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[3]NRS 613.220 provides that no part of NRS Chapter 613 ''shall be construed to restrict or prohibit the orderly and peaceable assembling or cooperation of persons employed in any profession, trade or handicraft for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such rate.''

support for his contention that it is the public policy of this state to protect the ability of employees to enhance or protect the conditions of their employment, we have previously explained that the mere identification of a public policy is not the entire analysis. *See D'Angelo*, 107 Nev. at 719-20, 819 P.2d at 216-17 (noting that a determination that public policy has been violated does not end the matter of whether an additional exception to the at-will employment doctrine should be recognized). In *D'Angelo*, this court explained that it will not recognize a claim for tortious discharge when an adequate statutory remedy already exists, as it would be unfair to a defendant to allow additional tort remedies under such circumstances. 107 Nev. at 720, 819 P.2d at 217.

Having reviewed the parties' briefs and researched the availability of alternative remedies, we conclude that Ozawa had an alternative remedy under the federal Railway Labor Act, 45 U.S.C. §§ 151-188 (2006). Specifically, 45 U.S.C. § 152 Fourth sets forth in relevant part that ''[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing'' and that it is unlawful for an airline to interfere with an employee's efforts to organize or participate in a labor union. The United States Supreme Court has recognized this provision as ''addressing primarily the precertification rights and freedoms of unorganized employees.'' *TWA, Inc. v. Flight Attendants*, 489 U.S. 426, 440 (1989). Further, federal courts have read in an implied private right of action from this provision in recognition that ''since the National Mediation Board lacks authority to redress [an allegedly wrongful discharge for labor union activity], and since there is apparently . . . no board of adjustment to which these grievances might be brought, [the federal courts are] not without power to decide this case.'' *Intern. Ass'n of Machinists, Etc. v. Altair Airlines*, 481 F. Supp. 1359, 1360 (E.D. Pa. 1979).

Determinative in our resolution of this matter is the fact that this private right of action is recognized by the Ninth Circuit Court of Appeals. *See Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1365 (9th Cir. 1996); *but see Carmak v. National R.R. Passenger Corp.*, 486 F. Supp. 2d 58, 94 (D. Mass. 2007) (noting that the existence of a private right of action has not been finally decided in the First or Fifth Circuits). Thus, we conclude that Ozawa had the opportunity to avail himself of this remedy but did not. Accordingly, because Ozawa had an adequate remedy, we affirm the district court order in Docket No. 49435 granting summary judgment on his claim for tortious discharge.[4] *D'Angelo*, 107 Nev. at 720-22, 819 P.2d at 217-18.

[4]Because Ozawa makes no arguments regarding the district court's disposition of his claims for intentional infliction of emotional distress or breach of contract, we do not address these claims. *See Edwards v. Ghandour*, 123 Nev. 105, 118-19 & n.31, 159 P.3d 1086, 1095 & n.31 (2007) (noting that this court need not

The district court's attorney fees and costs award

On cross-appeal, Vision Airlines argues that the district court abused its discretion in declining to award attorney fees and in setting the award of costs. We address each of these issues in turn.

Attorney fees

[Headnote 7]

Regarding the attorney fees, Vision Airlines contends that although the district court's post-judgment order analyzes the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), the district court failed to give the factors truly meaningful consideration because it felt that Ozawa had, in its words, ''already taken it in the shorts.'' Ozawa disagrees.

[Headnotes 8, 9]

A district court's award of attorney fees and costs pursuant to NRCP 68 is reviewed for an abuse of discretion. *Wynn v. Smith*, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). A clear disregard of the guiding legal principles may constitute an abuse of discretion. *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 722-23 (1993). In making such an award of attorney fees, the district court must carefully review the following factors: (1) whether the plaintiff brought the claim in good faith, (2) whether the defendants' offer of judgment was reasonable and brought in good faith in both its amount and timing, (3) whether it was grossly unreasonable or an act in bad faith for the plaintiff to reject the offer and proceed to trial, and (4) whether the fees sought are reasonable and justifiable in amount. *Beattie*, 99 Nev. at 588-89, 668 P.2d at 274.

Here, the district court found that Ozawa's claims were brought in good faith and that his rejection of Vision Airlines' $2,500 offer of judgment was in good faith and not grossly unreasonable. Having reviewed the record in this matter, including the transcript of the May 9, 2007, district court proceedings, we conclude that the district court based its decision upon a proper consideration of the factors set forth in *Beattie* and did not abuse its discretion in declining to award Vision Airlines attorney fees.

Costs

[Headnote 10]

In regard to the award of costs, Vision Airlines argues that the district court erred by (1) awarding costs to Vision Airlines based on its

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consider alleged errors when not supported by any pertinent legal authority), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008).

original, as opposed to amended, memorandum of costs, which added $320.75 to the costs bill; and (2) improperly granting Ozawa a set-off against its costs award based on a claim in Ozawa's complaint that Vision Airlines owed him accrued vacation and paid time off. Vision Airlines argues that the judgment in its favor precludes Ozawa from receiving this set-off in the costs award.

Ozawa does not dispute Vision Airlines' arguments regarding the district court's use of the memorandum of costs rather than the amended memorandum of costs, conceding the point. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the failure to respond to an argument as a confession of error). Thus, Vision Airlines' award of costs should be supplemented to include the additional $320.75.

As for Ozawa's accrued vacation and paid time off, in the ''facts common to all counts'' section of his district court complaint, Ozawa alleged that Vision Airlines owed him $723.23 in earned and unpaid vacation and paid time off. Because the district court had already dismissed or granted Vision Airlines summary judgment on all of the causes of action in Ozawa's complaint, we conclude that it was an abuse of discretion for the district court to nevertheless reduce its award of costs to Vision Airlines by $723.45 based on an allegation in the dismissed complaint. *Allianz Ins. Co.*, 109 Nev. at 993, 860 P.2d at 722-23 (explaining that a clear disregard of guiding legal principles may constitute an abuse of discretion). Thus, Vision Airlines' award of costs should be further amended to reinstate this $723.45.[5]

CONCLUSION

As we determine that Ozawa failed to avail himself of an available statutory remedy, we decline to recognize a tortious discharge claim for the alleged termination of Ozawa's employment with Vision Airlines based on his efforts to organize his coworkers. Accordingly, we affirm the district court's grant of summary judgment in Docket No. 49435. Further, while we conclude that the district court did not abuse its discretion in declining to award attorney fees under NRCP 68 and affirm that portion of the district court's post-judgment order in Docket No. 49660, we reverse the order in part and remand this matter to the district court with instructions to amend respondents' award of costs by reinstating the $723.45 previously deducted as an off-set and adding $320.75 to reflect the difference in the amended memorandum of costs and disbursements.

[5]We note that there is a minor discrepancy between the amount requested in Ozawa's complaint and the amount described in the district court's order. Because the parties do not challenge this discrepancy, we do not address it.

DIONICIA DELGADO AND DIEGO DELGADO, APPELLANTS, *v.* AMERICAN FAMILY INSURANCE GROUP, A WISCONSIN CORPORATION DBA AMERICAN FAMILY MUTUAL INSURANCE CO., RESPONDENT.

No. 49008

October 1, 2009 217 P.3d 563

Appeal from a district court order, certified as final pursuant to NRCP 54(b), granting summary judgment in a contract action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Automobile passenger brought breach of contract action against underinsured (UIM) carrier for failure to pay for injuries and damages caused by underinsured motorist. The district court granted summary judgment in favor of insurer, and passenger appealed. The supreme court, HARDESTY, C.J., held that: (1) passenger's claim was not barred by judicial estoppel; (2) antistacking prohibition set forth in *Peterson v. Colonial Insurance Co.*, 100 Nev. 474, 686 P.2d 239 (1984), and *Baker v. Criterion Insurance*, 107 Nev. 25, 805 P.2d 599 (1991), was not implicated in passenger's breach of contract action; (3) allowing passenger to recover both liability and UIM benefits under single policy of insurance was consistent with purpose of underinsured coverage; and (4) injured passenger could recover under permissive driver's UIM policy for third-party tortfeasor's negligence if both drivers were adjudged jointly negligent.

Reversed and remanded.

Benson, Bertoldo, Baker & Carter, Chtd., and *Steven M. Baker*, Las Vegas, for Appellants.

Prince & Keating, LLP, and *Dennis M. Prince* and *Douglas J. Duesman*, Las Vegas, for Respondent.

1. INSURANCE.

   The antistacking rule set forth in *Peterson v. Colonial Insurance Co.*, 100 Nev. 474, 686 P.2d 239 (1984), and *Baker v. Criterion Insurance*, 107 Nev. 25, 805 P.2d 599 (1991), is not implicated when a passenger, whose injuries are attributable to two jointly negligent drivers, exhausts the liability limits of the permissive driver's automobile insurance policy without satisfying his or her damages, and seeks recovery under the permissive driver's underinsured motorist policy based on the other driver's underinsured status.

2. INSURANCE.

   An insurance company may limit coverage only if the limitation does not contravene public policy.

3. INSURANCE.

   A passenger who is injured by two concurrently negligent drivers may recover from both the permissive driver's single automobile insurance policy liability benefits based on the permissive driver's negligence in addition

to recovering under the permissive driver's underinsured motorist policy if the other tortfeasor driver is underinsured.

4. ESTOPPEL.

Automobile passenger's underinsured motorist claim was not barred by judicial estoppel, even though passenger named the wrong motorist in her complaint, where passenger argued the correct underinsured motorist in her opposition to automobile insurer's motion for summary judgment, without objection by insurer, and passenger did not assert inconsistent arguments to obtain an unfair result.

5. ESTOPPEL.

The doctrine of judicial estoppel is an extraordinary remedy that is invoked to protect the integrity of the justice system when a party argues two conflicting positions to abuse the legal system.

6. ESTOPPEL.

Judicial estoppel will bar a party from raising an argument only when the following conjunctive test is satisfied: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position, *i.e.*, the tribunal adopted the position or accepted it as true; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

7. APPEAL AND ERROR.

The supreme court reviews a district court's decision granting summary judgment de novo.

8. JUDGMENT.

Summary judgment is appropriate if, after viewing the record before the district court in the light most favorable to the nonmoving party, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.

9. JUDGMENT.

When determining whether to grant summary judgment, whether an issue of fact is material or irrelevant is controlled by the substantive law at issue in the case.

10. JUDGMENT.

When determining whether to grant summary judgment, a factual dispute is genuine if the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.

11. INSURANCE.

Antistacking prohibition set forth in *Peterson v. Colonial Insurance Co.*, 100 Nev. 474, 686 P.2d 239 (1984), and *Baker v. Criterion Insurance*, 107 Nev. 25, 805 P.2d 599 (1991), was not implicated in passenger's breach of contract action against permissive driver's automobile insurer, where passenger was not asserting that vehicle she was riding in was underinsured, rather her claim was based on the concurrent negligence of a third-party tortfeasor, and the underinsured status of the third-party tortfeasor's vehicle.

12. INSURANCE.

Allowing injured passenger to recover both liability and underinsured motorist benefits under permissive driver's single policy of insurance was consistent with the purpose of uninsured/underinsured motorist coverage, as the passenger was being compensated for damages caused by the joint negligence of third-party underinsured driver.

13. INSURANCE.

Injured passenger could recover under permissive driver's underinsured policy for third-party tortfeasor's negligence, and based on the third-

party tortfeasor's vehicle's underinsured status, if both drivers were adjudged jointly negligent, even though the permissive driver's vehicle would not qualify as an underinsured vehicle under the terms of her policy, where under permissive driver's policy, passenger was a lawful occupant of permissive driver's vehicle, and the third-party tortfeasor's vehicle did qualify as an underinsured vehicle.

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

OPINION

By the Court, HARDESTY, C.J.:

Appellant Dionicia Delgado was injured when the automobile in which she was a passenger collided with another automobile, allegedly as a result of the drivers' concurrent negligence. In this appeal, we consider whether a passenger, such as Dionicia, may recover under the permissive driver's insurance policy both liability benefits based on the policyholder's negligence and underinsured motorist benefits based on the other driver's underinsured status.[1]

Here, a passenger made a claim against both at-fault drivers' insurance policies and recovered the liability limits under those policies. However, alleging that her damages exceeded the limits of both liability policies, the passenger then made a claim against the permissive driver's underinsured motorist policy. The permissive driver's insurance company denied the claim, arguing that, under Nevada law, an insured who is covered under the liability policy cannot also recover under the underinsured motorist provision of that same policy, as such recovery amounts to impermissible ''stacking'' of the policies.

The district court granted summary judgment in favor of the insurance company, concluding that a passenger involved in a two-car automobile accident who alleged that both drivers were negligent[2] could not recover liability benefits and underinsured motorist benefits under the permissive driver's single insurance policy pursuant to *Peterson v. Colonial Insurance Co.*, 100 Nev. 474, 686 P.2d 239 (1984), and *Baker v. Criterion Insurance*, 107 Nev. 25, 805 P.2d 599 (1991).

[Headnote 1]

We conclude that a passenger who is injured by two concurrently negligent drivers may recover from both the permissive driver's sin-

[1]Respondent American Family Insurance Group claims that the Delgados are judicially estopped from raising this argument on appeal. However, the Delgados preserved the argument when they maintained in their opposition to American Family's motion for summary judgment that their first-party underinsured motorist claim was based on the factual assertion that the Dean vehicle was underinsured.

[2]Liability has not been adjudicated in this matter.

gle insurance policy liability benefits based on the permissive driver's negligence and underinsured motorist benefits based on the other driver's underinsured status. In so doing, we clarify that *Peterson* and *Baker* are not determinative on this issue. The antistacking rule set forth in *Peterson* and *Baker* is not implicated when a passenger, whose injuries are attributable to two jointly negligent drivers, exhausts the liability limits of the permissive driver's policy without satisfying his or her damages, and seeks recovery under the permissive driver's underinsured motorist policy based on the other driver's underinsured status. Accordingly, we reverse the district court's grant of summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2004, appellant Dionicia Delgado was injured in an automobile accident while riding as a passenger in a car owned and operated by Eunice Marcelino. Marcelino had attempted to turn left across the lanes of northbound traffic on Nellis Boulevard in Las Vegas. A northbound car, owned and operated by Toquanda Dean, struck Marcelino's car, severely injuring Dionicia. Marcelino was insured by American Family Insurance Group for liability up to $50,000 per person and had underinsured motorist coverage up to $25,000 per person. Dean carried an insurance policy with a $15,000 liability limitation.

Marcelino's underinsured motorist policy with American Family promises that American Family will ''pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle.'' Marcelino's underinsured motorist policy defines the ''[i]nsured person'' as the contracting party, relatives, ''[a]nyone else occupying [Marcelino's] . . . insured car,'' and anyone claiming damages due to bodily injury caused by a person in the car. The parties do not dispute that because Dionicia was occupying Marcelino's car as a guest passenger at the time of the accident, Dionicia was an ''[i]nsured person'' under Marcelino's underinsured motorist provision.

American Family's policy further defined an ''[u]nderinsured motor vehicle'' as ''a motor vehicle which is insured by a liability bond or policy at the time of the accident and the amount of the bond or policy . . . [i]s less than the limit of underinsured motorists coverage under this policy.'' Although the policy specifically excludes Marcelino's vehicle from uninsured/underinsured motorist coverage, another driver's vehicle may qualify as underinsured under the policy if the other driver carried less liability coverage than the limit of Marcelino's underinsured motorist coverage.

Dionicia offered to settle her claims with American Family for a total of $75,000—$50,000 for the liability coverage limit plus

$25,000 for the underinsured motorist coverage limit. (Dionicia also offered to settle with Dean's insurance carrier for the extent of Dean's $15,000 liability policy.) American Family denied Dionicia's underinsured motorist claim, reasoning that Marcelino's vehicle could not qualify as an underinsured vehicle according to the policy terms.

Dionicia and her husband, appellant Diego Delgado, filed suit, complaining, in relevant part, that American Family breached its contract by denying Dionicia's demand for payment of Marcelino's underinsured motorist policy limits. The Delgados' complaint specifically alleged that Marcelino's underinsured motorist policy ''created a contractual duty and obligation on the part of [American Family] to . . . compensate [Dionicia] for injuries and damages caused by an *underinsured motorist*, in this instance *Defendant* [*Marcelino*].'' (Emphases added.) Thus, the Delgados grounded their breach of contract claim on the factual assertion that Marcelino's vehicle qualified as the underinsured vehicle.

American Family moved for summary judgment on the Delgados' breach of contract claim, arguing that the Delgados could not recover under the factual assertion that Marcelino's car was the underinsured vehicle because the coverage endorsement in Marcelino's policy with American Family excluded Marcelino's car from qualifying as underinsured.[3] In support of its argument, American Family cited to this court's decisions in *Peterson* and *Baker*, in which this court precluded recovery under both liability and underinsured motorist coverage provisions of a single insurance policy.

In their opposition, the Delgados argued that the coverage endorsement did not prohibit recovery in this case because the coverage endorsement only excluded vehicles covered under the insurance policy, and the Delgados alleged that their underinsured motorist claim was based on the Dean vehicle being underinsured. Further, the Delgados distinguished their case from *Peterson* and *Baker* by arguing that, unlike the claimants in *Peterson* and *Baker*, they are not seeking to recover under Marcelino's liability and underinsured motorist policies based on Marcelino's negligence alone. Instead, according to the Delgados, in addition to recovering under the liability policy for Marcelino's vehicle, they were seeking to recover underinsured motorist benefits based on Dean's joint negligence and the Dean vehicle being underinsured. The record does not reflect that American Family filed a reply to the Delgados' opposition.

The district court concluded in its order granting summary judgment that Marcelino's vehicle was not ''underinsured'' as defined by

[3]American Family also sought summary judgment on the Delgados' breach of contract claim regarding third-party liability benefits, which the district court granted. At oral argument, the parties conceded that this issue is now moot.

the policy and that *Peterson* and *Baker* completely barred recovery for both liability and underinsured motorist benefits under a single insurance policy. This appeal followed.

DISCUSSION

As an initial matter, American Family contends that the Delgados' underinsured motorist claim is barred by the doctrine of judicial estoppel because the Delgados named the wrong motorist in their complaint. We disagree since the Delgados argued the correct underinsured in their opposition to American Family's motion for summary judgment, without objection by American Family.

[Headnote 2]

On appeal, the Delgados argue that the district court erred by granting summary judgment because their case is factually distinguishable from *Peterson* and *Baker*, and the stacking prohibition set forth in those cases is inapplicable to this case. American Family argues, on the other hand, that the Delgados' argument is identical to the arguments presented in *Peterson* and *Baker*, which this court rejected, and that recovery under these circumstances would amount to stacking Marcelino's underinsured motorist policy on top of her liability policy to impermissibly increase her liability limits.[4]

[Headnote 3]

In resolving this appeal, we address an issue of first impression: whether, in light of *Peterson* and *Baker*, a passenger who is injured in a two-car collision where both drivers are concurrently negligent may recover liability benefits under the permissive driver's policy based on the permissive driver's negligence, and also recover underinsured motorist benefits under the same policy for the negligence of the other driver, whose vehicle was underinsured. We determine that, so long as the passenger is injured by joint tortfeasors and is deemed the insured upon the occurrence of an accident, that passenger may recover under the permissive driver's liability policy in addition to recovering under the permissive driver's underinsured motorist policy if the other tortfeasor driver is underinsured.

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[4]The Delgados also challenge the policy's vehicle exclusion provision, arguing that it is void for violating public policy because it is more restrictive than NRS 687B.145(2). ''An insurance company may limit coverage only if the limitation does not contravene public policy.'' *State Farm Mut. Auto. Ins. v. Hinkel*, 87 Nev. 478, 481, 488 P.2d 1151, 1153 (1971). However, upon review of the record, we determine that the Delgados waived this argument by failing to raise it below. *See Kahn v. Morse & Mowbray*, 121 Nev. 464, 480 n.24, 117 P.3d 227, 238 n.24 (2005). Moreover, even if the issue was properly raised on appeal, the Delgados' argument is without merit because the exclusion is consistent with our holdings in *Peterson* and *Baker*; therefore, no public policy exists to void the exclusion.

Judicial estoppel

[Headnote 4]

Prior to reaching the merits of this appeal, we must first address whether the doctrine of judicial estoppel precludes the Delgados from basing their underinsured motorist claim on the Dean vehicle being underinsured, not Marcelino's, as stated in the Delgados' complaint. We conclude that the doctrine of judicial estoppel does not bar the Delgados from raising this claim on appeal. We further conclude that the Delgados did not waive the issue, as they argued this point in their opposition to American Family's motion for summary judgment without contest.

American Family argues that the doctrine of judicial estoppel precludes the Delgados from raising the argument that their breach of contract claim was based on the Dean vehicle being underinsured, and not Marcelino's, as specified in the Delgados' complaint. We disagree.

[Headnotes 5, 6]

The doctrine of judicial estoppel is an '' 'extraordinary remedy' '' that is invoked to protect the integrity of the justice system when a party argues two conflicting positions to abuse the legal system. *Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004) (quoting *Kitty-Anne Music Co. v. Swan*, 4 Cal. Rptr. 3d 796, 800 (Ct. App. 2003)). This court has emphasized that the doctrine ''should be cautiously applied only when 'a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage.' '' *Id.* (alterations in original) (quoting *Swan*, 4 Cal. Rptr. 3d at 800). Thus, judicial estoppel will bar a party from raising an argument only when the following conjunctive test is satisfied:

> ''(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.''

Marcuse v. Del Webb Communities, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007) (quoting *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004)). For the reasons set forth below, we determine that the test is not satisfied in this case.

Here, the Delgados do not assert inconsistent arguments to obtain an unfair result. At all times, the Delgados have argued that, based on the concurrent negligence of both drivers involved in the accident, both of whose liability limits were less than Dionicia's dam-

ages, Dionicia was entitled to recover both liability and underinsured motorist benefits under Marcelino's policy with American Family.

Moreover, while this court will not consider an argument raised for the first time on appeal, *Kahn v. Morse & Mowbray*, 121 Nev. 464, 480 n.24, 117 P.3d 227, 238 n.24 (2005), we determine that the Delgados effectively raised their argument—that their underinsured motorist claim is based on the Dean vehicle being underinsured—in their opposition to American Family's motion for summary judgment. American Family failed to reply to the Delgados' opposition or argue that the Delgados' complaint was insufficient to support their first-party insurance claim. The Delgados allege in their complaint that Marcelino's underinsured motorist policy ''created a contractual duty and obligation on the part of [American Family] to . . . compensate [Dionicia] for injuries and damages caused by an underinsured motorist, in this instance Defendant [Marcelino].'' However, later in their complaint the Delgados alleged that American Family denied their underinsured motorist claim because American Family's representative ''either misunderstood or misstated [Dionicia's] UIM claim for benefits, given the fact that Defendant [*Dean*] was underinsured.'' (Emphasis added.) We conclude that neither judicial estoppel nor waiver doctrines bar the Delgados from asserting on appeal that their underinsured motorist claim was grounded in the factual assertion that the Dean vehicle was underinsured.[5]

Standard of review

[Headnotes 7-10]

''This court reviews a district court's [decision granting] summary judgment de novo.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if, after viewing the record before the district court in the light most favorable to the nonmoving party, ''no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.'' *Id*. at 731, 121 P.3d at 1031. Whether an issue of fact is material or irrelevant is controlled by the substantive law at issue in the case. *Id*. A factual dispute is genuine if ''the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.'' *Id*.

[5]Based on this conclusion, we determine that American Family's argument that the coverage endorsement in Marcelino's insurance policy bars the Delgados from recovering underinsured motorist benefits because Marcelino's vehicle is not an underinsured vehicle is without merit. Since we conclude that the Delgados effectively argued that their underinsured motorist claim was based on the Dean vehicle being underinsured, the fact that the policy excludes Marcelino's vehicle from being considered underinsured is not pertinent to our analysis. Moreover, nothing in Marcelino's insurance policy precludes a passenger from receiving underinsured motorist benefits under the facts presented in this case, as further discussed in this opinion.

Peterson v. Colonial Insurance Co. and Baker v. Criterion Insurance are not controlling in this case

Next, we consider the Delgados' contention that, notwithstanding *Peterson v. Colonial Insurance Co.*, 100 Nev. 474, 686 P.2d 239 (1984), and *Baker v. Criterion Insurance*, 107 Nev. 25, 805 P.2d 599 (1991), a passenger who is injured by the concurrent negligence of two drivers may recover liability benefits under the permissive driver's liability policy based on the permissive driver's negligence in addition to recovering underinsured motorist benefits under the same insurance policy for the negligence of the other driver, whose vehicle was underinsured. As discussed below, we conclude that neither *Peterson* nor *Baker* preclude the Delgados from recovering under the facts presented in this case. Moreover, we conclude that such a result coheres with the purpose of uninsured/underinsured motorist coverage and is consonant with the reasoning applied in other jurisdictions addressing this issue.

Peterson

In *Peterson*, this court addressed whether a passenger ''is entitled to recover benefits under both the 'bodily injury' and the uninsured/underinsured motorist coverages afforded by a single insurance policy.'' 100 Nev. at 475, 686 P.2d at 239. That case stemmed from an accident where the motorcycle on which Peterson was riding as a passenger collided with another vehicle. *Id.* Solely claiming negligence on the part of the motorcycle's operator, Peterson recovered under the motorcycle owner's liability policy. *Id.* After Peterson exhausted the limits of the owner's policy, she made an uninsured/underinsured motorist claim under that same policy of insurance, again based on the permissive driver's negligence. *Id.* Because Peterson sought recovery based only on the permissive driver's negligence, but under both coverages in the single insurance policy, this court concluded that Peterson was essentially attempting to increase the liability coverage under the owner's policy. *Id.* at 476, 686 P.2d at 240. The *Peterson* court therefore held that the stacking of a liability policy on top of an uninsured/underinsured motorist policy was impermissible. *Id.*

Baker

Later, in *Baker*, this court again considered whether a passenger could recover benefits under both the liability and uninsured/underinsured motorist provisions of a single policy of insurance. 107 Nev. at 26, 805 P.2d at 599-600. In that case, the passenger sought to recover liability and uninsured/underinsured motorist benefits under her own policy of insurance, and not the permissive driver's. *Id.* at 26, 805 P.2d at 600. Based on this difference, Baker argued that her case was distinguishable from *Peter-*

son. *Id*. Determining that this difference was inconsequential, we reaffirmed *Peterson*, concluding that once a passenger has recovered under the vehicle owner's liability policy—whether that policy is the permissive driver's policy or the passenger's own policy—the passenger may not also recover under the owner's uninsured/underinsured motorist policy, although the guest passenger may ''stack their own UM/UIM coverage with the benefits they receive from the owner's policy.'' *Id*.

The district court erred when it relied upon Peterson and Baker in granting American Family's motion for summary judgment

Because the district court in this case relied on *Peterson* and *Baker* in granting summary judgment, the Delgados assert error, arguing that their case is factually distinguishable from *Peterson* and *Baker*. Specifically, the Delgados maintain that unlike the *Peterson* and *Baker* cases, which involved single automobiles and the vehicles' respective insurance policies, their case involves the concurrent negligence of two drivers, with separate insurance policies, both of which were insufficient according to Dionicia. In response, American Family asserts that the Delgados' argument is meritless because it is identical to the insured's argument rejected by this court in *Peterson* and reaffirmed in *Baker*. As a result, American Family argues, because the Delgados are seeking to stack the underinsured motorist benefits on top of the liability benefits to increase the total available liability coverage for the loss caused by Marcelino, their recovery should be barred. We disagree.

In both *Peterson* and *Baker*, we based our decisions, in part, on the following pertinent language in NRS 687B.145(2): ''Uninsured and underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of his own coverage any amount of damages for bodily injury from his insurer which he is legally entitled to recover from the owner or operator of the other vehicle.'' *Peterson*, 100 Nev. at 475, 686 P.2d at 240; *Baker*, 107 Nev. at 27, 805 P.2d at 600. This court interpreted that language to require ''the tortious involvement of a party and vehicle other than the insured and the insured's vehicle.'' *Peterson*, 100 Nev. at 476, 686 P.2d at 240; *see also Baker*, 107 Nev. at 27, 805 P.2d at 600. We reasoned that allowing a passenger to recover under the permissive driver's liability and uninsured/underinsured motorist policies based solely on the permissive driver's negligence would impermissibly increase the liability limit for the owner/insured. *Peterson*, 100 Nev. at 476, 686 P.2d at 240; *Baker*, 107 Nev. at 27, 805 P.2d at 600.

While we determined in *Peterson* and *Baker* that a passenger may not recover under both coverages of a permissive driver's single insurance policy based on the permissive driver's negligence, we did not consider whether a guest passenger, whose injuries are at-

tributed to jointly negligent drivers, may recover liability benefits under the permissive driver's policy based on the permissive driver's negligence, in addition to recovering underinsured motorist benefits under the same policy for damages caused by the other driver, who is underinsured. Although American Family argues that *Peterson* and *Baker* are authoritative on this matter, we disagree.[6]

[Headnote 11]

Neither *Peterson* nor *Baker* precludes recovery of underinsured benefits under the facts presented in this case. The passenger-claimants in *Peterson* and *Baker* did not properly allege that the vehicle involved in the accident was uninsured or underinsured. Rather, both passengers alleged that although both vehicles were insured vehicles under their respective policies, the vehicle in which they were riding was the uninsured or underinsured vehicle, not the other vehicle involved in the accident. Moreover, both claims were based on the negligence of the permissive driver, not a third-party tortfeasor. *Peterson*, 100 Nev. at 475, 686 P.2d at 239; *Baker*, 107 Nev. at 27, 805 P.2d at 600. Recovery under those circumstances would have amounted to impermissible stacking of the uninsured/underinsured motorist coverage on top of the liability coverage. Contrary to the facts presented in *Peterson* and *Baker*, in this case, Dionicia made her underinsured motorist claim based on Dean's concurrent negligence and the Dean vehicle being underinsured. The Delgados are not asserting that Marcelino's vehicle qualifies as an underinsured vehicle. This difference is substantial because the stacking prohibition set forth in *Peterson* and *Baker* is not implicated in this situation.

Allowing recovery of underinsured benefits under the facts presented in this case coheres with the purpose of uninsured/underinsured motorist coverage

[Headnote 12]

This court has stated that the purpose of uninsured/underinsured motorist coverage is to compensate the insured for damages ''based

[6]American Family argues that its reading of *Peterson* and *Baker* is consistent with the Illinois case *Mercury Indemnity Co. of Illinois v. Kim*, 830 N.E.2d 603, 619 (Ill. App. Ct. 2005). We disagree. In *Mercury*, like *Peterson* and *Baker*, the passengers recovered under the permissive driver's liability provision and then sought additional recovery under the permissive driver's underinsured motorist provision under the same policy, basing both claims on the sole negligence of the permissive driver. *Mercury*, 830 N.E.2d at 604-05. And similar to our reasoning in *Peterson* and *Baker*, the *Mercury* court rejected such recovery because the passengers were attempting to stack the liability and underinsured motorist provisions under a single policy of insurance based on one driver's negligence—not the concurrent negligence and underinsured status of a third-party tortfeasor and his or her vehicle. *Id.* at 611-12, 615.

upon the tort liability of the uninsured, underinsured, or hit-and-run driver.'' *St. Paul Fire v. Employers Ins. Co. of Nev.*, 122 Nev. 991, 993, 146 P.3d 258, 260 (2006). Allowing a passenger to recover both liability and underinsured motorist benefits under a single policy of insurance in this situation is consistent with the purpose of uninsured/underinsured motorist coverage, as the passenger is being compensated for damages caused by the joint negligence of an uninsured/underinsured driver.

Various insurance treatises, while they are persuasive authority only, provide comprehensive explanations on uninsured/underinsured motorist benefits. For example, ''[a]s a general rule, a passenger who has made a liability recovery under [the permissive driver's] policy may also make an underinsured motorist recovery under the same policy where a second negligent vehicle involved in the accident was underinsured.'' 3 Irvin E. Schermer & William J. Schermer, *Automobile Liability Insurance* § 39:12 (4th ed. 2004). Despite the language in the permissive driver's liability policy excluding the vehicle the permissive user is driving from being deemed underinsured, ''it is the jointly liable tortfeasor's lack of adequate liability coverage which is the pivotal factor'' in allowing recovery for underinsured motorist benefits. *Id.*

Likewise, passenger-claimants are ''entitled to recover both under a bodily injury liability coverage and an uninsured motorist coverage included in the same insurance policy . . . when . . . [the] passenger [is] in an insured automobile and is injured in an accident with an uninsured motorist that is caused by the negligence of both drivers.'' 1 Alan I. Widiss & Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance* § 14.6 (3d ed. 2005). Because the insurance company is liable to the passenger under the liability provision of the policy for the insured driver's negligence, the passenger may recover liability benefits. *Id.* And because the other motorist was jointly negligent and underinsured, and the passenger is generally defined as an ''insured'' under the uninsured/underinsured motorist policy, the policy extends coverage to occupants of the insured vehicle. *See id.* Therefore, the insured passenger may recover uninsured/underinsured motorist benefits. *Id.*

Moreover, other courts addressing this issue have determined that a guest passenger may recover for another driver's negligence under his or the permissive driver's uninsured or underinsured motorist policy and recover for the permissive driver's negligence as a third-party claimant. *See, e.g.*, *Dairyland Ins. Co. v. Bradley*, 451 S.E.2d 765 (W. Va. 1994).

In *Dairyland Insurance Co. v. Bradley*, the mother of a passenger who perished when the motorcycle on which she was riding collided with another vehicle sought recovery for her daughter's death under both the liability and underinsured motorist provisions of the mo-

torcycle driver's policy. *Id.* at 765. The accident resulted from the concurrent negligence of both the motorcycle driver and the other driver. *Id.* After exhausting the liability limits of the motorcycle driver's and the other driver's policies, the estate of the deceased passenger sought to recover underinsured motorist benefits under the motorcycle driver's policy. *Id.* at 766. Thus, similar to the facts presented in this case, the passenger was attempting to recover underinsured motorist benefits based on the other driver's negligence and underinsured status. *See id.*

In rejecting the insurance company's argument that a guest passenger could not recover both liability and underinsured motorist benefits under a single policy of insurance, the *Dairyland* court held that

> when the [permissive] driver's policy language specifically provides coverage of a guest passenger as insured, a guest passenger who is injured by the concurrent negligence of the [permissive] driver and a *third party* may recover under the [permissive] driver's underinsured motorist insurance if the limits of liability of the *third-party* tortfeasor are such as to make him an ''underinsured motorist'' within the contemplation of the [permissive] driver's underinsured motorist policy.

Id. at 768. The court reasoned that while such passengers are precluded from recovering underinsured benefits based on the permissive driver's negligence—*i.e.*, when the permissive driver's policy excludes the permissive driver's vehicle from being deemed underinsured—a passenger could recover underinsured motorist benefits for injuries caused by a jointly negligent and underinsured motorist involved in the accident when the permissive driver's policy language extended coverage to that passenger. *Id.* at 767-68. Pursuant to the express language of the motorcycle driver's insurance policy, the guest passenger was deemed an ''insured.'' *Id.* As a result, the *Dairyland* court permitted the ''insured'' passenger's estate to recover both liability and underinsured motorist benefits, stating that ''the limits of liability of the *third-party* tortfeasor are such as to make him an 'underinsured motorist' within the contemplation of the motorcycle driver's underinsured motorist policy,'' after determining that the guest passenger was injured by the concurrent negligence of the motorcycle driver and the other driver. *Id.* at 768.

Other courts have similarly reasoned that the prohibition against stacking policies is not implicated when a passenger seeks to recover liability and uninsured/underinsured motorist benefits when his or her injuries are attributable to joint tortfeasors and the other driver is uninsured or underinsured. *See, e.g.*, *Woodard v. Pa. Nat. Mut. Ins. Co.*, 534 So. 2d 716, 721 (Fla. Dist. Ct. App. 1988) (explain-

ing that because the passenger was attempting to collect uninsured motorist benefits based on the other driver's concurrent negligence and uninsured status, the passenger was not attempting to impermissibly ''stack'' the uninsured motorist and liability coverages); *Lahr v. American Family Mut. Ins. Co.*, 528 N.W.2d 257, 260 (Minn. Ct. App. 1995) (stating that when ''a vehicle other than the one in which the passenger is riding is potentially at fault, the prohibition against converting the passenger's driver's [underinsured motorist] coverage into liability coverage is not applicable'' since it is the ''other vehicle's lack of sufficient liability coverage [that] triggers the passenger's claim for [underinsured motorist] benefits from her driver's insurer''); *cf. Casson v. Dairyland Ins. Co.*, 400 So. 2d 713, 716 (La. Ct. App. 1981) (noting that ''a guest passenger can recover against [the permissive] driver under the liability coverage on the [permissive driver's] vehicle and also against the driver of another vehicle under the uninsured motorist coverage on the [permissive driver's] vehicle'').

[Headnote 13]

Applying this rationale to the facts of this case, we conclude that if Marcelino and Dean are adjudged jointly negligent, the Delgados can recover under Marcelino's underinsured motorist policy for Dean's negligence and the Dean vehicle's underinsured status. Under Marcelino's policy, Dionicia was a lawful occupant of Marcelino's vehicle; therefore, the policy extended underinsured motorist coverage to Dionicia at the time of the accident. Although Marcelino's vehicle could not qualify as an underinsured vehicle under the terms of the policy, the Dean vehicle could. If the Delgados can prove that Dionicia is legally entitled to recover damages from Dean, they may recover the amount of excess damages under Marcelino's underinsured motorist policy with American Family. Therefore, we conclude that American Family was not entitled to judgment as a matter of law and reverse the district court's grant of summary judgment.

CONCLUSION

We conclude that judicial estoppel does not preclude the Delgados from raising the argument that their first-party underinsured motorist claim was based on the concurrent negligence of both drivers involved in the accident (both of whom had insufficient liability policies to suffice Dionicia's damages). Accordingly, we determine that Dionicia was entitled to recover under both the liability and underinsured motorist provisions of Marcelino's policy with American Family.

In addition, because we conclude that this case is factually distinguishable from *Peterson* and *Baker*, we hold that the stacking pro-

hibition set forth in those cases is inapplicable to the facts presented here. Therefore, we reverse the district court's order and remand this matter to the district court for further proceedings consistent with this opinion.

PARRAGUIRRE and DOUGLAS, JJ., concur.

MARTIN RODRIGUEZ, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF FABIAN SANTIAGO, A MINOR CHILD, APPELLANT/CROSS-RESPONDENT, *v.* THE PRIMADONNA COMPANY, LLC, A NEVADA CORPORATION, DBA BUFFALO BILL'S RESORT AND CASINO, AKA PRIMM VALLEY CASINO RESORTS; AND MGM MIRAGE, RESPONDENTS/CROSS-APPELLANTS.

No. 49409

October 1, 2009 216 P.3d 793

Appeal and cross-appeal from a district court's grant of summary judgment in a tort action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez and Stewart L. Bell, Judges.

Seventeen-year-old hotel patron's guardian brought negligence action against hotel alleging hotel security personnel acted unreasonably when they evicted patron who subsequently suffered injuries in an automobile accident. The district court entered summary judgment in favor of hotel, and guardian appealed. The supreme court, HARDESTY, C.J., held that: (1) hotel did not have an affirmative duty to prevent injury to intoxicated patron subsequent to eviction from hotel premises, (2) district court did not abuse its discretion in refusing to award attorney fees to hotel as prevailing party, and (3) hotel had no right to equitable indemnity for attorney fees and costs against mother of patron.

Affirmed.

White, Meany & Wetherall, LLP, and *Peter C. Wetherall*, Las Vegas, for Appellant/Cross-Respondent.

Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Chtd., and *Martin J. Kravitz, Regina M. McConnell*, and *Gina M. Mushmeche-Buras*, Las Vegas, for Respondents/Cross-Appellants.

1. APPEAL AND ERROR.
   The supreme court reviews orders granting summary judgment de novo.

2. JUDGMENT.
   Summary judgment is appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law; general allegations supported with conclusory statements fail to create issues of fact.
3. APPEAL AND ERROR; JUDGMENT.
   The supreme court is reluctant to affirm summary judgment in negligence cases because negligence is ordinarily a question of fact for the jury; however, a defendant is entitled to summary judgment if the defendant is able to show that one of the elements of the plaintiff's prima facie case is clearly lacking as a matter of law.
4. APPEAL AND ERROR.
   Because the question of whether the defendant owes the plaintiff a duty of care is a question of law, if the supreme court determines that no duty exists, it will affirm summary judgment.
5. INTOXICATING LIQUORS.
   Commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron, which are sustained by either the intoxicated patron or a third party; this rule applies equally when the intoxicated patron is a minor.
6. TORTS.
   Individuals, drunk or sober, are responsible for their torts.
7. INNKEEPERS.
   When a hotel proprietor rightly evicts a disorderly, intoxicated patron, the hotel proprietor is not liable for any torts that an evicted patron commits after he or she is evicted that result in injury.
8. INNKEEPERS.
   When evicting a person from the premises, a hotel proprietor has a duty to act reasonably under the circumstances.
9. INNKEEPERS.
   So long as a proprietor does not use unreasonable force in evicting a patron, the hotel proprietor is not required to consider a patron's level of intoxication in order to prevent speculative injuries that could occur off the proprietor's premises.
10. AUTOMOBILES; INNKEEPERS.
    Hotel did not have an affirmative duty to prevent injury to intoxicated 17-year-old minor subsequent to eviction from hotel premises, or to arrange safer transportation, prevent an intoxicated driver from driving, or prevent minor from riding with drunk driver, even though hotel security personnel asked men to leave hotel parking lot and may have known driver was intoxicated and could not safely drive, minor chose to ride with intoxicated driver.
11. INTOXICATING LIQUORS.
    A commercial alcohol vendor is not required to monitor the intoxication level or other factors related to patrons who elect to drive while intoxicated or who engage in other dangerous activity after they are evicted; therefore, absent a legal duty to protect patrons after a reasonable eviction, there can be no actionable claim for negligence.
12. INTOXICATING LIQUORS.
    When a hotel patron sustains injuries due to his intoxication, the proximate cause of those injuries is the consumption of liquor and not the sale.

13. APPEAL AND ERROR.
    The supreme court reviews an attorney fees decision for an abuse of discretion.
14. COSTS.
    District court did not abuse its discretion in refusing to award attorney fees to hotel as prevailing party in negligence action brought on behalf of 17-year-old minor for injuries sustained after being evicted from hotel, on the basis minor's claim was brought or maintained without reasonable grounds; minor's action presented a novel issue in state law concerning the potential expansion of common law liability to hotel proprietors for injuries sustained by an intoxicated minor guest after he was evicted from the premises. NRS 18.010(2)(b).
15. INDEMNITY.
    Hotel had no right to equitable indemnity for attorney fees and costs against mother of minor who sustained injuries in motor vehicle accident after he was evicted from hotel, for allegedly permitting her 17-year-old minor child to ride with an intoxicated driver, where mother had not been found liable for minor's injuries, and there existed no nexus or special relationship between the parties that would have allowed the application of implied indemnification.
16. INDEMNITY.
    Noncontractual or implied indemnity is an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors whose negligence primarily caused the injured party's harm.
17. INDEMNITY.
    Generally, the remedy of implied indemnity is available after the defendant has extinguished its own liability through settlement or by paying a judgment.
18. INDEMNITY.
    A claimant seeking equitable indemnity must plead and prove that: (1) it has discharged a legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to the third party; and (3) as between the claimant and the party from whom it seeks indemnity, the obligation ought to be discharged by the latter.
19. INDEMNITY.
    Implied indemnification is not a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending litigation.
20. APPEAL AND ERROR.
    A district court's correct result will not be disturbed on appeal even though its decision was reached by relying on different grounds.

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

OPINION

By the Court, HARDESTY, C.J.:

Fabian Santiago, then 17 years old, and his two adult step-uncles Manuel and Daniel Garibay, were asked to leave a hotel property after an evening of drinking and disorderly behavior. Manuel drove the three from the hotel parking lot. Mistaking a frontage road for the freeway, Manuel rolled the vehicle while driving at approxi-

mately 80 miles per hour. Fabian suffered severe spinal injuries in the accident. His guardian brought suit in district court alleging that the hotel acted negligently when it evicted Fabian and his step-uncles from the property by allowing or directing Fabian to be a passenger in a motorized vehicle driven by an intoxicated driver.

In this appeal, we consider whether the district court properly entered summary judgment in favor of the respondent hotel corporations, dismissing appellant's negligence claim. Appellant's claim was grounded, in part, on allegations that respondents' security personnel acted unreasonably when they evicted an intoxicated minor patron, who was injured in a motor vehicle accident. We conclude that the eviction was reasonable as a matter of law. We further conclude that Nevada's rejection of dram-shop liability applies to a claim for damages made by an intoxicated patron that occur after the patron is reasonably evicted.

Second, in this appeal, we are asked to review whether the district court properly denied respondents' motion for attorney fees and costs, which was grounded on an assertion that appellant's negligence action was frivolous. According to respondents, the action was frivolous because it was barred by relevant legal authority. Because appellant's claims are based upon a nonfrivolous argument for the extension of the law defining negligent eviction, we conclude that the district court properly denied respondents' motion for attorney fees and costs.

Finally, we are asked to determine whether a cross-claimant can maintain an implied indemnity claim when the underlying liability action is dismissed through summary judgment without a finding of fault against the proposed indemnitor. Having considered persuasive authority from other jurisdictions, we conclude that a prerequisite to recovery on an implied indemnity claim is a finding that the third-party defendant is liable for damages to the plaintiff on the underlying claim. Implied indemnity cannot be used to allow one innocent party to recover its defense costs from another innocent party. Accordingly, the district court's dismissal of the third-party claim was ultimately proper because no right to implied indemnity exists for defense fees and costs when the district court has dismissed the underlying claim but has not determined the fault of the third-party defendant.

FACTS

On March 6, 2005, Marlene Garibay, her 17-year-old son, Fabian Santiago, and Fabian's adult step-uncles, Manuel and Daniel Garibay, checked into respondent/cross-appellant Primadonna Company, LLC's, hotel in Primm, Nevada. Fabian, Manuel, and Daniel spent the evening gambling and drinking alcoholic beverages on the Primadonna's premises. Daniel, who purchased the alcohol from the

hotel's liquor store, shared it with Manuel and Fabian, who became intoxicated.

Fabian, Manuel, and Daniel admit engaging in disruptive behavior on Primadonna's premises. In particular, Fabian, Manuel, and Daniel were involved in at least two altercations with other hotel guests, and otherwise disturbed guests by kicking and knocking on hotel room doors. During one of the altercations, Manuel punched another hotel guest in the face. Primadonna's security personnel intervened and, at the security officers' request, Fabian, Manuel, and Daniel agreed to leave the hotel property.

Three hotel security officers accompanied Fabian, Manuel, and Daniel to their room to gather their belongings. While waiting outside of the hotel room door while the three men had gathered their belongings, a security officer overheard one of the men tell a woman inside of the room that they had been asked to leave the hotel for fighting. Manuel testified that he told the woman, Marlene Garibay, that the three men were going to sleep in the car in the parking lot. Manuel also testified that Marlene had expressed her concern with his level of intoxication. She then exited the hotel room and spoke with the hotel security officers, telling them that Fabian, Manuel, and Daniel could not leave, and that they would stay in the room and ''sleep it off.'' Nevertheless, the hotel security officers escorted the three men to their vehicle, which was located in the hotel's parking lot.

According to Fabian, the three men were going to leave the hotel premises and ''sleep it off'' in the car. Similarly, the appellate record indicates that Manuel, who did not have a valid driver's license, did not intend to drive because he believed his blood-alcohol concentration level was higher than the legal limit. Once at their vehicle, however, Manuel told Daniel that he was sober enough to drive and sat in the driver's seat. After they were seated in the vehicle, hotel security officers approached, knocked on the window, and informed the young men that they had to leave Primadonna's parking lot.

Consequently, Manuel drove the vehicle out of the Primadonna's parking lot. Mistaking a frontage road for the freeway entrance, Manuel rolled the vehicle while driving at approximately 80 miles per hour. Fabian was seriously injured in the accident, suffering extreme spinal injuries, leaving him a quadriplegic.

PROCEDURAL HISTORY

Fabian's grandfather and guardian ad litem, appellant/cross-respondent Martin Rodriguez, filed a negligence action against Primadonna in both his individual capacity and on Fabian's behalf, seeking damages for Fabian's injuries, based on allegations that the

Primadonna's staff acted unreasonably in evicting Fabian from the premises. During the underlying proceedings, Primadonna filed a third-party complaint against Marlene, Fabian's mother, for indemnity, alleging that Primadonna was entitled to indemnification and contribution of the fees and costs incurred to defend the action because Marlene knowingly permitted Fabian, her minor child, to ride with an intoxicated driver who did not have a valid driver's license.

After the close of discovery, Primadonna filed two summary judgment motions. In its first motion for summary judgment, Primadonna argued that it had a duty and a right to evict disruptive individuals from its premises. Primadonna also contended that even though Fabian was a minor and Manuel was intoxicated, it did not owe a duty to keep Fabian on the premises or to prevent Manuel from driving. Asserting that it did not require Fabian, Manuel, and Daniel to leave by driving their own car, Primadonna maintained that it was not liable for damages related to Fabian's injuries.

In opposition, Rodriguez argued, among other things, that the Primadonna was obligated to act reasonably when evicting Fabian, Manuel, and Daniel. And because the Primadonna directed or allowed Fabian into a vehicle with an intoxicated driver, Rodriguez argued that whether the hotel complied with this duty was a question of fact for the jury.

The district court granted the motion for summary judgment, finding that Primadonna had the right and duty to evict Fabian, Manuel, and Daniel from the hotel premises and that Primadonna used reasonable force in effectuating the eviction. Because the district court entered summary judgment on Rodriguez's negligent-eviction claim, it also dismissed as moot Primadonna's counterclaim for indemnity and contribution against Marlene. Therefore, no further claims remained for the district court's adjudication.

As the prevailing party, Primadonna filed a motion for attorney fees and costs against Rodriguez, arguing that Rodriguez had brought and maintained a frivolous action. In particular, according to Primadonna, Rodriguez instituted and pursued the underlying action despite the absence of a legal duty owed to Fabian and despite clear law negating dram-shop liability in Nevada. Further, Primadonna pointed out that Rodriguez did not attempt to sue all potentially liable parties, but sued only Primadonna, the ''deep pocket'' defendant.

Rodriguez opposed the motion, arguing that the action is not frivolous because there are multiple factual bases upon which to ground liability, and Primadonna erroneously classified the claim as one for dram-shop liability. Ultimately, the district court denied the

motion for attorney fees and costs, finding that the action was based on negligent eviction and not based on the dram-shop liability bar. The district court also found that no legal authority supported Primadonna's contention that the action was frivolous because Rodriguez chose to sue only Primadonna.

Primadonna filed a second motion for summary judgment on its third-party claim for indemnity for its defense fees and costs against Marlene. Primadonna argued that Marlene had an affirmative duty to protect her child from harm and that she breached that duty when she knowingly allowed him to leave the hotel premises with a drunk driver who did not have a valid driver's license. The district court denied Primadonna's motion, finding that any claim for indemnity Primadonna had against Marlene was moot in light of the summary judgment entered in favor of Primadonna on Rodriguez's negligence claims.

Rodriguez appeals as an individual and as the guardian ad litem of Fabian Santiago, challenging the summary judgment dismissing the negligence claims. Primadonna cross-appeals, challenging the district court's denial of its motion for attorney fees and costs against Rodriguez and the dismissal of its claims for indemnity and contribution from Marlene for defense fees and costs.

DISCUSSION

Standard of review

[Headnotes 1, 2]

We review orders granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment was appropriate if the pleadings and other evidence on file, viewed in a light most favorable to the nonmoving party, demonstrated that no genuine issue of material fact remained in dispute and that the moving party was entitled to judgment as a matter of law. *Id*. General allegations supported with conclusory statements fail to create issues of fact. *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1094-95 (1995).

[Headnotes 3, 4]

This court is reluctant to affirm summary judgment in negligence cases because negligence is ordinarily a question of fact for the jury. *Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). However, a defendant is entitled to summary judgment if the defendant is able to show that one of the elements of the plaintiff's prima facie case is '' 'clearly lacking as a matter of law.' '' *Id*. (quoting *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996)). Thus, because the question of whether the defendant owes the plaintiff a duty of care is a question of law, if this court determines that no duty exists, it will affirm summary judgment. *Id*.

Primadonna is not liable for Fabian's injuries on a theory of negligent eviction

On appeal, Rodriguez argues that, as a hotel proprietor, Primadonna owed Fabian a duty to evict him from the premises in a manner reasonable under the circumstances. Thus, Rodriguez argues that the district court erred in entering summary judgment because a genuine issue of material fact exists as to whether Primadonna evicted Fabian in a manner that was reasonable in light of his intoxication and his step-uncle's apparent intent to drive while intoxicated. Primadonna contends that it was entitled to evict Fabian and his step-uncles because of their disruptive behavior and that the method of eviction was reasonable. Therefore, the issue in this appeal is whether Primadonna owed an affirmative duty to ensure Fabian's safety after the eviction process concluded.

[Headnotes 5, 6]

We begin by emphasizing that hotel proprietors have the statutory right to evict from the premises anyone who acts in a disorderly manner or who causes a public disturbance in or upon the premises. NRS 651.020.[1] In addition, it is well settled in Nevada that commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron, which are sustained by either the intoxicated patron or a third party. *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 101, 450 P.2d 358, 359 (1969); *Snyder v. Viani*, 110 Nev. 1339, 1342-43, 885 P.2d 610, 612-13 (1994). This rule applies equally when the intoxicated patron is a minor. *Hinegardner v. Marcor Resorts*, 108 Nev. 1091, 1096, 844 P.2d 800, 803 (1992). In other words, Nevada subscribes to the rationale underlying the nonliability principle—that individuals, drunk or sober, are responsible for their torts. *See id*. at 1093, 844 P.2d at 802.

[Headnote 7]

Therefore, based on these principles, we conclude that when a hotel proprietor rightly evicts a disorderly, intoxicated patron, the hotel proprietor is not liable for any torts that an evicted patron commits after he or she is evicted that result in injury.

[Headnote 8]

Nevertheless, we acknowledge that when evicting a person from the premises, a proprietor has a duty to act reasonably under the circumstances. *Billingsley v. Stockmen's Hotel*, 111 Nev. 1033, 1037, 901 P.2d 141, 144 (1995). In *Billingsley*, this court reversed the district court's grant of summary judgment after we concluded that a genuine issue of material fact existed as to whether the hotel's se-

[1]NRS 651.005 expands ''premises,'' as used in NRS 651.020, to include parking lots.

curity personnel acted reasonably in evicting the plaintiff, who was intoxicated and belligerent. 111 Nev. at 1037, 901 P.2d at 144. In that case, while being led by security personnel backwards by his lapels through the doors, the plaintiff stumbled, fell, and broke his ankle. *Id*. at 1035-36, 901 P.2d at 143. After the plaintiff stumbled, security personnel placed the patron in a ''choke hold.'' *Id*. at 1037-38, 901 P.2d at 144-45. The *Billingsley* court determined that the hotel owed a duty to the plaintiff to act reasonably when evicting a patron from the premises, and genuine issues of material facts existed as to whether the force used by the hotel to evict the patron was reasonable. *Id*. at 1038, 901 P.2d at 145.

[Headnote 9]

Today, however, we conclude that *Billingsley* is limited to its facts. Although a hotel proprietor has the duty to effectuate a reasonable eviction, the proprietor does not have the duty to prevent injuries caused by the intoxicated patron that are sustained either by the patron or by third parties after the eviction has been executed. To that end, and in accordance with the principles underlying Nevada's rejection of dram-shop liability, we conclude that so long as a proprietor does not use unreasonable force in evicting a patron, the hotel proprietor is not required to consider a patron's level of intoxication in order to prevent speculative injuries that could occur off the proprietor's premises. *See Mills v. Continental Parking Corp.*, 86 Nev. 724, 725-26, 475 P.2d 673, 674 (1970) (applying the policies underlying the rejection of dram-shop liability to conclude that imposing civil liability on a parking garage attendant for failing to prevent an intoxicated driver from leaving the premises would lead to unimaginable consequences).

Other jurisdictions that reject dram-shop liability have come to similar conclusions when a proprietor evicts a patron for disruptive behavior and the patron later sustains injuries off the proprietor's premises. *See McCall v. Villa Pizza, Inc.*, 636 A.2d 912, 912-15 (Del. 1994); *DeBolt v. Kragen Auto Supply, Inc.*, 227 Cal. Rptr. 258, 260-61 (Ct. App. 1986). The Delaware Supreme Court, in *McCall, Inc.*, declined to allow the appellant to circumvent the absence of dram-shop liability by alleging negligence for the proprietor's failure to provide transportation to an evicted patron, despite the proprietor's knowledge that the patron was highly intoxicated and would attempt to operate a motor vehicle. 636 A.2d at 915. Although the plaintiff alleged that the proprietor's negligence was not related to its serving of alcohol, but rather, its removal of him from the premises without providing safe transportation, the *McCall* court stressed that the proprietor did not have the duty to prevent injury that was sustained off the proprietor's premises. *Id*. at 914.

Similarly, a California Court of Appeal affirmed a judgment of dismissal by concluding that a social host did not have a duty to pro-

vide alternative and safer means of transportation to an intoxicated social guest who was ejected from the premises. *DeBolt*, 227 Cal. Rptr. at 260-61. In *DeBolt*, after a social host ordered an intoxicated and disorderly guest to leave a party, the guest collided with a motorcyclist, killing the driver. *Id.* at 258-59. The heirs of the deceased brought a negligence action against the social host, alleging that the host was liable for demanding that the guest leave the premises knowing that the guest was intoxicated and would not be able to safely drive. The *DeBolt* court reasoned that imposing liability on the host would defeat the clear common law rules immunizing social hosts from liability for the consequences of serving alcohol. *Id.* at 261. And the court recognized that if it imposed liability, it would open the doors for plaintiffs to draft complaints for injuries and deaths that are ultimately caused by the consumption of alcohol. *Id.*[2] We conclude that the reasoning expressed in *DeBolt* is persuasive because it is consistent with this court's jurisprudence in *Hamm*, *Snyder*, and *Hinegardner*.

[Headnote 10]

In this case, Primadonna had the statutory right to evict Fabian and the other young men from the premises based on their disorderly conduct. However, because Nevada commercial alcohol vendors are not liable for injuries sustained by intoxicated patrons, Primadonna did not have a duty to ensure safe transportation for the young men, keep Fabian on the premises, or otherwise prevent injuries subsequent to their eviction. When Primadonna security officers asked the three men to leave the premises, the three men agreed, and, in ensuring that the men complied, the security officers did not act forcefully or personally cause injury to the men during the eviction. Although the Primadonna asked the men to leave while the men were sitting in their vehicle, Manuel drove at his own election, and likewise, Fabian chose to drive with Manuel. At the moment the men left the parking lot, the eviction had been effectuated, and the Primadonna had no further duty to ensure Fabian's safety. Therefore, although the Primadonna may have known that Fabian's step-uncle was intoxicated and could not safely drive, we conclude, as a matter of law, that Primadonna did not have the duty to arrange safer transportation, prevent an intoxicated driver from driving, or prevent Fabian, a passenger, from riding with a drunk driver.

[Headnotes 11, 12]

In so concluding, we note that it would be contrary to existing authority for this court to hold otherwise and require a proprietor to monitor the intoxication level or other factors related to patrons who elect to drive while intoxicated or who engage in other dangerous activity after they are evicted. Therefore, absent a legal duty to pro-

[2]Our reliance on *DeBolt* here does not constitute an interpretation of NRS 41.1305 and should not be relied upon as such.

tect patrons after a reasonable eviction, there can be no actionable claim for negligence.[3] *Merluzzi v. Larson*, 96 Nev. 409, 412-13, 610 P.2d 739, 741-42 (1980), *overruled on other grounds by Smith v. Clough*, 106 Nev. 568, 570, 796 P.2d 592, 594 (1990). Therefore, we perceive no error in the district court's order granting summary judgment in favor of Primadonna.

Primadonna is not entitled to attorney fees from Rodriguez

Primadonna argues that the district court abused its discretion by denying its motion for attorney fees and costs against Rodriguez. According to Primadonna, Rodriguez's action was frivolous because he sued only the ''deep pocket'' defendant but did not file suit against Fabian's mother (Marlene) or Manuel, the intoxicated driver. Primadonna further contends that Rodriguez pursued a frivolous claim in light of clear statutory law permitting the eviction of disruptive patrons and caselaw negating liability for commercial vendors of liquor. We disagree with Primadonna.

[Headnote 13]

This court reviews an attorney fees decision for an abuse of discretion. *Baldonado v. Wynn Las Vegas*, 124 Nev. 951, 967, 194 P.3d 96, 106 (2008). A district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds. NRS 18.010(2)(b). For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993).

[Headnote 14]

Initially, Primadonna cites no authority and we have found none to support its argument that a litigant's tactical decision to sue one alleged tortfeasor and not others renders Rodriguez's claim frivolous. Under NRS 18.010(2)(b), we consider whether the claim pursued by the losing party against the prevailing party was based on reasonable grounds.

Here, we conclude that Rodriguez's civil action presented a novel issue in Nevada law concerning the potential expansion of common law liability to hotel proprietors for injuries sustained by an intoxicated minor guest after he is evicted from the premises. Therefore,

[3]In addition, Primadonna's sale of liquor to Fabian, Manuel, or Daniel does not constitute the proximate cause of Fabian's injuries. It is well-settled that when a patron sustains injuries due to his intoxication, the proximate cause of those injuries is the consumption of liquor and not the sale. *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 101, 450 P.2d 358, 359 (1969).

we conclude that the district court properly denied Primadonna's motion for attorney fees.

Primadonna is not entitled to indemnification from Marlene because the potential indemnitor's liability has not been established

[Headnote 15]

Primadonna also asserts that the district court erred as a matter of law by denying its summary judgment motion in the indemnity and contribution action it filed against Marlene, a third-party defendant. The district court determined that the indemnity action was moot because summary judgment was previously granted on the underlying negligence claim and Primadonna was not required to make a payment for damages. Primadonna contends that it is entitled to indemnification and contribution for defense fees and costs because Marlene knowingly permitted Fabian, her minor child, to ride with an intoxicated driver who did not have a valid driver's license. Thus, according to Primadonna, Marlene is primarily responsible for Fabian's injuries and should be required to reimburse Primadonna for attorney fees and costs associated with defending Rodriguez's action.

Although Marlene did not file a brief in this cross-appeal, Rodriguez argues that because the district court granted summary judgment to Primadonna, it has no liability for damages and cannot seek indemnification. The question of whether a party for whom summary judgment has been entered may be entitled to indemnification for attorney fees and costs for defending the action is an issue of first impression in Nevada.

[Headnote 16]

Noncontractual or implied indemnity is an equitable remedy that allows a defendant to seek recovery from other potential tortfeasors whose negligence primarily caused the injured party's harm. *Doctors Company v. Vincent*, 120 Nev. 644, 650, 98 P.3d 681, 686 (2004). ''At the heart of the doctrine is the premise that the person seeking to assert implied indemnity—the indemnitee—has been required to pay damages caused by a third party—the indemnitor.'' *Harvest Capital v. WV Dept. of Energy*, 560 S.E.2d 509, 513 (W. Va. 2002). Implied indemnification has been developed by the courts to address the unfairness which results when one party, who has committed no independent wrong, is held liable for the loss of a plaintiff caused by another party. *Id.* at 512.

[Headnotes 17, 18]

Generally, the remedy is available after the defendant has extinguished its own liability through settlement or by paying a judgment.

Doctors Company, 120 Nev. at 651, 98 P.3d at 686. This court has stated that ''a cause of action for indemnity . . . accrues when payment has been made.'' *Aetna Casualty & Surety v. Aztec Plumbing*, 106 Nev. 474, 476, 796 P.2d 227, 229 (1990) (citing *Southern Maryland Oil Co. v. Texas Co.*, 203 F. Supp. 449, 452 (D. Md. 1962)). A claimant seeking equitable indemnity must plead and prove that: (1) it has discharged a legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to the third party; and (3) as between the claimant and the party from whom it seeks indemnity, the obligation ought to be discharged by the latter. 41 Am. Jur. 2d *Indemnity* § 20 (2005).

We previously recognized that there is a split of authority whether a party entitled to indemnity may also recover from the indemnitor reasonable attorney fees and costs incurred in defending the primary tort action. *Piedmont Equip. Co. v. Eberhand Mfg.*, 99 Nev. 523, 526, 665 P.2d 256, 258 (1983). We determined that a party is entitled to recover through indemnification at least some of the attorney fees and court costs incurred in defending an action. *Id.* at 529, 665 P.2d at 260. ''However, the right to fees and costs remains limited.'' *Id.* We restricted the recovery of attorney fees and costs through indemnification to those ''fees and expenses attributable to the making of defenses which are not primarily directed toward rebutting charges of active negligence.'' *Id.*

Additionally, we also required some nexus or relationship between the indemnitee and indemnitor. *Id.* at 528, 665 P.2d. at 259. We adopted the warning found in *Pender v. Skillcraft Industries, Inc.*, 358 So. 2d 45, 47 (Fla. Dist. Ct. App. 1978), that implied indemnification '' 'should not be construed as permission to open a floodgate for cross-claims seeking indemnification where there is no connection between the cross-claimant and the party from whom indemnification is sought.' '' *Piedmont Equip. Co.*, 99 Nev. at 527-28, 665 P.2d at 259 (quoting *Pender*, 358 So. 2d at 47).

Our previous opinions concerning implied indemnification addressed appeals in which a trial had been conducted on the merits and apportioned liability to each party. However, we have not addressed the issue of indemnity when the underlying liability claim is resolved through summary judgment without a finding of fault on behalf of the third-party defendant from whom the claimant seeks indemnity.

On this point, the West Virginia Supreme Court has provided persuasive reasoning that comports with our general authority concerning implied indemnity. In particular, the West Virginia Supreme Court, in *Harvest Capital*, held that a claimant is entitled to indemnity from a third-party defendant for attorney fees and costs only after it is established that the plaintiff in the original action has sustained an injury for which the third-party defendant is responsible. 560 S.E.2d at 514. '' '[T]he fact that the party charged may be in-

nocent of the claimed wrong and can successfully defend against such a suit does not entitle [the party] to pass the burden on to some equally innocent [ ] party.' '' *Id*. (quoting *Bettilyon Const*. *Co*. *v. State Road Commission*, 437 P.2d 449, 450 (Utah 1968)). Thus, to prevent one innocent party from passing its burden on to an equally innocent party, a prerequisite to the recovery of attorney fees from a potential indemnitor is a finding of liability to the plaintiff by the potential indemnitor on the underlying claim. *Harvest Capital*, 560 S.E.2d at 514. Therefore, when a district court has disposed of the underlying liability claim, but has not established that the potential indemnitor was at fault, no right to equitable indemnity exists. *Id*.

In this case, the district court entered summary judgment in favor of the defendant, Primadonna, on the underlying negligence claim and subsequently concluded that the indemnity action was rendered moot by the termination of the underlying claim. Although we agree with the ultimate decision of the district court and conclude that the indemnity action should have been dismissed, we do not agree that it was rendered moot simply by granting summary judgment on the underlying negligence claim. Rather, the indemnity claim should have been dismissed because Marlene has not been found liable for the injuries sustained by Fabian. It is an established principle of implied indemnity that the potential indemnitor must be liable for the injuries to the plaintiff. *Id.*; 41 Am. Jur. 2d § 20 (2005). We see no compelling reason to transfer the costs of defending the claim from one innocent party to another without an adjudication of liability against the indemnitor. *Harvest Capital*, 560 S.E.2d at 514.

[Headnote 19]

Furthermore, there exists no nexus or special relationship between the parties that would allow the application of implied indemnification in this case. *Piedmont Equip*. *Co.*, 99 Nev. at 528, 665 P.2d at 259. Implied indemnification is not a license to assert a cross-claim against any third party in hope of alleviating the burden of costs associated with defending litigation. *Id*. at 527-28, 665 P.2d at 259. Primadonna failed to demonstrate any nexus or relationship with Marlene, and we see none.

[Headnote 20]

We therefore conclude that the district court's order denying the motion for summary judgment was correct although not because the motion was moot. A district court's correct result will not be disturbed on appeal even though its decision was reached by relying on different grounds. *St*. *James Village, Inc. v. Cunningham*, 125 Nev. 211, 221, 210 P.3d 190, 196 (2009); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981). Rather, we conclude that the motion for summary judgment was properly denied in this case because implied indemnification may not be asserted without determined liability of the third party to the injured party and the

showing of a nexus or special relationship between the indemnitee and proposed indemnitor. Therefore, we conclude that the district court's denial of Primadonna's motion for summary judgment was proper.

CONCLUSION

In accordance with the common law rule that a proprietor's sale of alcohol is not the proximate cause of an intoxicated plaintiff's injuries that are sustained after a rightful and reasonable eviction, we conclude that a proprietor does not, as a matter of law, have an affirmative duty to prevent injury to an intoxicated patron subsequent to an eviction. Therefore, we affirm the district court's summary judgment in favor of Primadonna on Rodriguez's negligence claim. Next, because we conclude that Rodriguez's claim was not frivolous, we affirm the district court's decision denying Primadonna's motion to recover attorney fees and costs against Rodriguez. And finally, although we conclude that Primadonna's motion for summary judgment for indemnification against Marlene is not moot, we affirm the district court's dismissal of the motion because implied indemnity is not applicable to this case.

PARRAGUIRRE and DOUGLAS, JJ., concur.