IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC, D/B/A WYNN LAS VEGAS, A NEVADA LIMITED LIABILITY COMPANY,
Appellant/Cross-Respondent,
vs.
CRISTIANO AUGUSTO TOFANI, AN INDIVIDUAL,
Respondent/Cross-Appellant.

No. 69936

ORDER AFFIRMING IN PART AND REVERSING IN PART

Wynn Las Vegas, LLC, appeals from a district court order denying its motion for partial summary judgment and a judgment upon a jury verdict. Cristiano Augusto Tofani cross-appeals from the same order and judgment and from an order awarding Wynn attorney fees, costs, and interest. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Tofani, an attorney from Italy, gambled at the Wynn Las Vegas Casino over a few days in September 2011.[1] During that visit, he received credit in the amount of $800,000 in the form of Wynn casino markers. He gambled and lost the entire amount. After Tofani returned to Italy, Wynn began its collection efforts. Wynn's representatives and Tofani exchanged several emails in which Tofani said he wanted to repay his debt but could not because he did not have the money. He asked for more time but the debt was never paid.

A little over a year after Tofani's visit, Wynn filed a lawsuit against him alleging breach of contract, breach of the implied covenant of

[1]The facts are not recounted except as necessary to the disposition.

good faith and fair dealing, conversion, and unjust enrichment. Wynn amended its complaint to add fraud. Tofani asserted a gambling addiction defense. Wynn moved for summary judgment regarding several of its claims. The district court denied the motion and also ruled that Tofani could not assert the gambling addiction defense. At trial, Wynn requested a jury instruction on ratification which the district court refused; instead, the district court provided the jury with its own ratification instruction.

The jury rendered a verdict of $450,000 in favor of Wynn on its breach of contract and conversion claims. The district court ordered Tofani to pay Wynn's attorney fees, costs, and interest for a total of $455,607.95 in addition to the $450,000.

The district court properly denied Wynn's motion for partial summary judgment

Although Wynn argued below that it should be granted summary judgment on its claims for breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, and in the alternative, unjust enrichment, Wynn does not address all of its claims on appeal. Instead, Wynn asserts on appeal that it should have been granted summary judgment on its contract claims. Wynn argues that the evidence available during the litigation of the summary judgment motion showed that Tofani conclusively ratified his debt to Wynn.

This court may review an order denying summary judgment in an appeal from a final judgment. *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001). The court's "review is de novo and without deference to the district court's findings." *Id.* "Summary judgment is appropriate only when there are no material issues of fact and the moving party is entitled to judgment as a matter of law." *Id.*

First, there were material issues of fact as to whether Tofani understood that a valid contract existed as intoxication was an issue. Second, Tofani's actions and intent as to whether he affirmed the full amount of debt claimed by Wynn, and whether he disaffirmed the debt "within a reasonable time," are not clear. *See Seeley v. Goodwin*, 39 Nev. 315, 323, 156 P. 934, 936 (1916); *cf. Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. ___, ___, 335 P.3d 211, 213-14 (2014) (stating that it is a factual determination whether constructive eviction occurred, including whether a tenant vacated in "a reasonable time"). Thus, the district court did not err in denying summary judgment.

The district court abused its discretion by refusing Wynn's jury instruction on ratification

"The district court's decision to give or refuse a particular instruction will not be overturned absent an abuse of the district court's discretion or judicial error." *Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d 765, 778 (2010). "A party is entitled to an instruction on every theory that is supported by the evidence, and it is error to refuse such an instruction when the law applies to the facts of the case." *Id.* (quoting *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001)). "A district court is not bound by the suggested language of the standard instructions and is free to adapt them to fit the circumstances of the case." *Id.* "While the abuse of discretion standard is generally deferential, the reviewing court will not defer to a district court decision that is based on legal error." *Frazier v. Drake*, 131 Nev. ___, ___, 357 P.3d 365, 369 (Ct. App. 2015).

If the district court abused its discretion, this court considers whether the error was harmless. *Wyeth*, 126 Nev. at 465, 244 P.3d at 778. "An error is harmless when it does not affect a party's substantial rights."

Id. "When an error is harmless, reversal is not warranted." *Id.* "But if the moving party shows that the error is prejudicial, reversal may be appropriate." *Id.* "To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Id.* "The inquiry is fact-dependent and requires us to evaluate the error in light of the entire record." *Id.*

At trial, Wynn requested a jury instruction based on *Seeley* that stated, generally, that an intoxicated person ratifies a contract if he does not disaffirm it within a reasonable time after becoming sober. The district court refused this instruction and gave one that instructed the jury that it "may" consider steps an intoxicated person took to disaffirm a debt.[2]

The district court refused Wynn's instruction because it interpreted the caselaw Wynn relied on differently than Wynn. While this court generally defers to a district court's decision on a jury instruction, the district court abused its discretion because its instruction was erroneous in that it incorrectly stated Nevada law on contract ratification. The language in *Seeley*, while dicta, is an accurate statement of the rule regarding ratification. Further, additional caselaw from this and other jurisdictions supports Wynn's proposed instruction. *See Merrill v. DeMott*, 113 Nev. 1390, 1396-99, 951 P.2d 1040, 1044-45 (1997) (concluding there was ratification by conduct and agreement based on the parties' actions

---

[2]The trial court instructed the jury: "Whether or not someone takes steps to disaffirm a contract within a reasonable time after becoming sober may be considered by you in determining whether that person ratified or consented to the contract(s)."

and "apparent intent"); *see also First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 898 (S.D. 1987) ("[F]ailure of a party to disaffirm a contract over a period of time may, by itself, ripen into a ratification, especially if rescission will result in prejudice to the other party.").[3] The district court's jury instruction of law was permissive when the law is affirmative.

This court must also consider whether the error was harmless. Wynn argues it was prejudiced because the jury did not award the entirety of the $800,000 Tofani borrowed, gambled, and lost. Thus, the issue remains whether but for the jury instruction given, a different result might have reasonably been reached. This is a fact-based inquiry that requires this court to review the record.

Tofani's trial testimony differs in a significant way from his deposition testimony relied upon during the litigation of the summary judgment motion. In his trial testimony, Tofani confirmed that when he left Wynn at the end of his September 2011 trip, it was his understanding that he owed Wynn $800,000. He also testified that he acknowledged Wynn was seeking repayment of markers in his emails between himself and Barbara Conway, Wynn's casino collections manager. He said he only decided not to pay Wynn back when the casino sent a letter about his debt to his house and his wife opened it (not because he did not owe the money).

As caselaw places an affirmative obligation on an intoxicated person who is aware of a contract to disaffirm it within a reasonable time

---

[3]Other courts have ruled similarly regarding ratification. *See Alexander v. Winters*, 23 Nev. 475, 485-86, 49 P. 116, 119 (1897); *Clarke v. Lyon Cty.*, 8 Nev. 181, 189-90 (1873); *see also Matz v. Martinson*, 149 N.W. 370, 370-71 (Minn. 1914); *Stockmen's Guar. Loan Co. v. Sanchez*, 194 P. 603, 605 (N.M. 1920); *Hauge v. Bye*, 201 N.W. 159, 162 (N.D. 1924).

after becoming sober because otherwise it is ratified, it is reasonable that a different result would have been reached if the jury was given the correct legal instruction. Specifically, it is reasonable that the jury would have taken the evidence and the correctly stated law and ruled that Tofani ratified the $800,000 debt and held him liable for the full amount. Therefore, the judgment upon the jury verdict is reversed and remanded for a new trial.

Tofani's cross-appeal

The district court properly precluded Tofani's alleged gambling addiction defense

Tofani argues on appeal and cross-appeal that the district court erred or abused its discretion and he did not receive a fair trial because the district court applied NRS 463.368(6) to the following proceedings: the district court's dismissal of his counterclaim, the district court's order denying Wynn's motion for partial summary judgment including an express finding that Tofani was prohibited from using his gambling addiction defense, the district court's granting of Wynn's motion in limine excluding evidence or argument of Tofani's gambling addiction, and the district court's denial of his proposed jury instruction regarding Tofani's alleged gambling addiction. Tofani further argues on cross-appeal that Wynn is equitably estopped from relying on "NRS 463.368(6) because it preyed on Mr. Tofani's ludomania or gambling addiction" and has unclean hands even though the verdict was one at law and not in equity.[4]

---

[4]Tofani does not cite authority to support his argument that the unclean hands doctrine applies to his legal claims. Claims that are not cogently argued or supported by relevant authority are not considered. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

The district court precluded Tofani's alleged gambling defense in its order denying Wynn's motion for partial summary judgment. The order denying summary judgment is reviewed de novo. *GES*, 117 Nev. at 268, 21 P.3d at 13. Tofani contends he should have been able to argue that he has a gambling addiction. Wynn counters that NRS 463.368(6) bars that defense.

NRS 463.368(6) states:

> A patron's claim of having a mental or behavioral disorder involving gambling:
>
> (a) Is not a defense in any action by a licensee or a person acting on behalf of a licensee to enforce a credit instrument or the debt that the credit instrument represents.
>
> (b) Is not a valid counterclaim to such an action.

"Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). The language of the statute is clear in prohibiting "a mental or behavioral disorder involving gambling" as "a defense in *any* action . . . to enforce a credit instrument," or as a "counterclaim to such an action," NRS 463.368(6)(a), (b) (emphasis added), and thus, Tofani's argument fails. Therefore, the district court did not err by precluding Tofani's gambling addiction defense.

The district court's award of attorney fees, costs, and interest to Wynn is reversed on remand for a new trial

Tofani also cross-appeals and argues that the district court erred or abused its discretion in awarding attorney fees, costs, and prejudgment interest to Wynn. Wynn counters that Tofani's appeal is

procedurally defective,[5] and regardless, it has no merit because the award is based on the contract between Tofani and Wynn. Because the judgment is reversed and remanded for a new trial, the award of attorney fees, costs, and interest is necessarily reversed. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1119-20, 197 P.3d 1032, 1043 (2008); *see also* NRS 17.130(2) (calculating interest "from the time of the *entry* of the judgment" (emphasis added)).

Accordingly, the district court's order denying summary judgment is affirmed and the judgment upon jury verdict is reversed and remanded for a new trial[6] with instructions to provide a jury instruction on ratification consistent with this order. The award of attorney fees, costs, and interest is also reversed.

Gibbons, J.

---

[5]Tofani's notice of appeal states that he appeals from the judgment from the jury verdict and any foregoing appealable orders entered by the district court. Tofani's notice was filed within 14 days of Wynn's notice of appeal, and thus, is timely. *See* NRAP 4(a)(2); *contra Mahaffey v. Inv'rs Nat'l Sec. Co.*, 102 Nev. 462, 462-64, 725 P.2d 1218, 1218-19 (1986) (concluding that notice of cross-appeal not timely because it was filed more than 14 days after notice of appeal).

[6]Nothing prohibits Wynn from filing a new motion for summary judgment with the evidence made available since the original motion for summary judgment was denied.

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

What happens in Vegas stays in Vegas. As long as your wife never finds out what you were up to.

In this case, Tofani borrowed $800,000 in casino markers from the Wynn, gambled it away, and left town without paying any of it back. When the Wynn contacted him at his home in Italy to collect, he agreed, both orally and in written emails, that he would pay. He repeated that assurance several more times over the next six months. Then Tofani's wife intercepted one of the Wynn's letters and found out how much he owed. After what he characterizes as an argument, Tofani changed his mind and, some 18 months after the markers issued, told the Wynn he wouldn't pay.

The Wynn sued. At trial the jury returned a partial verdict for the Wynn in the amount of $450,000. Both parties cross-appeal. The Wynn alleges that it was owed more as a matter of law and the district court erred in its jury instructions. For his part, Tofani alleges that he owed the Wynn nothing because there was no enforceable contract in the first place because he was so drunk and so deeply in the throes of a gambling addiction that he lacked the legal capacity to enter into a valid contract.

As a starting point, no legal basis exists for the jury's verdict awarding the Wynn only $450,000 when both parties agree that Tofani borrowed $800,000 in casino markers and never paid a penny of it back. Either there were marker contracts for $800,000 plus interest, or there were not; but nobody asserts that Tofani borrowed only $450,000 or that anyone contractually agreed that he only needed to pay that much back.

The question for us is what that means. The principal opinion concludes that a new trial is necessary. I agree that the district court erred, but would conclude that no remand for a new trial is needed. Instead, the Wynn was simply entitled to pre-trial summary judgment under NRCP 56 on its claim for breach of contract because there are no facts in dispute that justify any other verdict.

I.

Although the events at issue occurred inside a casino, this case isn't about intoxication, a gambling addiction, or even gaming per se. It's about the simple failure to pay back a credit instrument. Everyone in Nevada knows that the Wynn is licensed to operate as a casino, but its status as a casino isn't what matters here. The Wynn is also a federally-recognized financial institution empowered to loan money pursuant to credit instruments. *See* 31 CFR § 103.11(n)(7)(i) and 31 CFR § 103.11(n)(8)(i). Casino markers are a form of negotiable commercial paper, meaning they are the equivalent of money. *See Zoggolis v. Wynn Las Vegas, LLC*, 768 F.3d 919, 923 (9th Cir. 2014) (stating that markers are checks because "they provided for payment of a specific sum of money drawn from a bank on demand") (citing *Nguyen v. State*, 116 Nev. 1171, 1175, 14 P.3d 515, 518 (2000))). This case is about an unpaid loan.

Unpaid casino markers are collectible debts. *See Mandalay Resort Group v. Miller (In re Miller)*, 292 B.R. 409, 414 (9th Cir. BAP 2003) (concluding that a casino marker, and the gambling debt the marker represents, "'are valid and may be enforced by legal process'") (quoting NRS 463.368(1)). Tofani argues that at the time he borrowed the money he was so incapacitated by alcohol and his gambling addiction that the

loan was void. According to him, that relieves him of the need to repay the loan. But it does no such thing.

On appeal, we review summary judgment de novo, which means we review the materials submitted to the district court ourselves for compliance with NRCP 56 without any deference to the district court's view of things. *See Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Below, the Wynn moved for summary judgment on its claims for breach of contract and conversion, as well as in the alternative on its claim for unjust enrichment. Only its claim for breach of contract is now on appeal. In my view, summary judgment should have been granted because the material facts are undisputed and there is no legal theory under which Tofani gets to keep money he borrowed without having to pay any of it back.

II.

Tofani's defense to the claim for breach of contract was to assert "diminished capacity" based upon alcoholic intoxication and his gambling addiction.

But Tofani's alleged gambling addiction is irrelevant because "[a] patron's claim of having a mental or behavioral disorder involving gambling . . . [i]s not a defense in any action by a licensee or a person acting on behalf of a licensee to enforce a credit instrument or the debt that the credit instrument represents." NRS 463.368(6). The Legislature has unequivocally made it the law that Tofani's alleged addiction is no defense to his obligation to repay the marker.

Tofani nonetheless argues that we should ignore the statute, or at least create some judicial exception to it out of thin air based upon "reason and public policy" because the Wynn "preyed" on Tofani's

addiction and therefore strict application of the law to him would be unfair. But we have no power to do any such thing. Under our Constitutional system of government, the legislative (literally, "law-making") branch of government writes the laws, not the judicial branch. *See* Nev. Const. art. 4 § 1; *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). The statute is the law, and we cannot either ignore or rewrite it even if we happened to agree with Tofani (which I don't) that it may result in an outcome we think foolish or unfair. *See Holiday Ret. Corp. v. State of Nev., Div. of Indus. Relations,* 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute."); *Beazer Homes Nev. Inc. v. Eighth Judicial Dist. Ct.*, 120 Nev. 575, 578 n.4, 97 P.3d 1132, 1134 n.4 (2004) ("When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch."). The text is the law. We must conclude that the Legislature meant what it said and said what it meant when it wrote NRS 463.368(6). If it didn't choose to create any exceptions to the statute, then none exist.

Even if we could permissibly engage in a policy analysis with an eye toward usurping the role of the Legislature and re-writing the statute into a better one, I'm not sure how we would. The difference between a "gambling addiction" and a mere affection for gambling is a subtle psychological one. *See* Ferris Jabr, *Gambling on the Brain: How the Brain Gets Addicted to Gambling*, Scientific American (Nov. 1, 2013). How widespread is this problem, how severely does it affect Nevada casinos, and what's the best way to detect and ameliorate it? I have no

idea. Which is precisely why Tofani's request is so ill-conceived. It's a lot to ask of a court to craft a better rule than the Legislature did on such a complex and nuanced question without the ability to consult with experts in the field, hear from multiple sides in legislative hearings, consider "legislative evidence," or engage in open public debate – things the Legislature can do but courts cannot. And in the end, what is the Wynn supposed to do, require all patrons seeking credit to undergo a psychological examination before being allowed to gamble, or else the loan becomes uncollectible? All of which is reason why courts are poorly suited to make decisions regarding questions of broad public policy that are better left to the political branches of government. The Legislature crafted a perfectly good statute that represents an entirely rational answer to a difficult problem, and its words ought to be followed as written.

III.

Tofani's alleged drunkenness fares slightly better; at least voluntary intoxication is a recognized common-law defense in an action for breach of contract.[7] *See General Motors v. Jackson*, 111 Nev. 1026, 1031,

---

[7]Intoxication is not, however, a defense to claims for either conversion or unjust enrichment because "capacity" isn't an element of those claims. Conversion is a tort of mere general intent that occurs whenever someone exercises dominion over property that doesn't legally belong to them. *See Evans v. Dean Whitter Reynolds Inc.*, 116 Nev. 598, 606 5 P.3d 1043, 1048 (2000) (holding that conversion is an act of general intent, which does not require wrongful intent and is not excused by care, good faith, or lack of knowledge). An equitable claim like unjust enrichment requires no proof whatsoever of intent or state of mind; it's a strict liability claim based solely on notions of equity. *See Limbach Co., LLC v. City of Phila.*, 905 A.2d 567, 577 (Pa. Commw. Ct. 2006) ("The polestar of the unjust enrichment inquiry is whether the defendant has been *unjustly* enriched; the intent of the parties is irrelevant."); *see also*

continued on next page...

900 P.2d 345, 348-49 (1995) (adopting the position of the Restatement (Second) of Contracts §12 on the effect of intoxication on capacity to contract). But it's a defense only if the Wynn had reason to know of it. *See* Restatement (Second) of Contracts, § 16 cmt. a (Am. Law Inst. 2017) ("[A] contract made by an intoxicated person is enforceable by the other party even though entirely executory, unless the other person has reason to know that the intoxicated person lacks capacity"); John D. Calamari & Joseph M. Perrillo, Contracts, § 8-14 at 329-30 (West 3d ed. 1987) (stating that "contracts made by an intoxicated party are voidable only if the other party has reason to know that the intoxicated party is unable to act in a reasonable manner in relation to the transaction or lacks understanding of it").

Here, we don't have to address whether the record sufficiently establishes that Tofani was so drunk that he lacked the capacity to contract or whether the Wynn should have known of his condition. None of that matters. Even if we assume all of that to be true, the legal consequence of Tofani's assertions would be that the contract is *voidable*, not automatically *void*. *See Robinson v. Kind*, 25 Nev. 261, 291, 59 P. 863

...continued
Unionamerica Mortg. & Equity Tr. v. McDonald, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981) ("The essential elements of [unjust enrichment] are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." (quoting *Dass v. Epplen*, 424 P.2d 779, 780 (Colo. 1967) (quotation marks omitted)). Had the Wynn appealed denial of summary judgment on these claims, I would conclude that it would have been entitled to it in the principal amount of $800,000 based on the facts that Tofani does not dispute.

(1900). That means the intoxicated person must take steps to disaffirm the contract (technically, rescind it) within a reasonable time after becoming sober or else the contract is valid. *See* Restatement (Second) of Contracts § 16 cmt. c ("On becoming sober, the intoxicated person must act promptly to disaffirm [the contract]"). Here, Tofani didn't attempt to disaffirm the contract until eighteen months after becoming sober – and, notably, after expressly informing the Wynn that he would abide by it – which I would conclude comes very close to being unreasonable as a matter of law. *See Bobby Floars Toyota, Inc. v. Smith*, 269 S.E.2d 320, 322-23 (N.C. App. 1980) (concluding that a voidable contract was valid when party did not disaffirm it for ten months). I do, however, agree that reasonableness is at heart a factual question. Thus, if this were the only important issue then a remand for a new trial would be necessary. *See Keser v. Chagnon*, 410 P.2d 637, 640 (Col. 1966) (canvassing cases from various states finding different lengths of time to be "reasonable" or "unreasonable").

But it's not the only important point. Here, there's the extra fact that Tofani didn't merely fail to disaffirm the contract promptly, he did more: while sober he affirmatively and repeatedly ratified it in writing over the course of six months. Once he did that, he made the contract immediately valid whether or not a "reasonable time" for the alternative act of disaffirmance had yet elapsed. *See Merrill v. DeMott*, 113 Nev. 1390, 1396-97, 951 P.2d 1040, 1045 (1997) (stating the doctrine of ratification "operates to make the contract legally valid rather than simply preventing a party from challenging the contract's validity"). Moreover, whether Tofani intended in his own mind to ratify the contract matters not at all; "the making of a contract depends not on the agreement of two

minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having said the same thing." *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981) (quoting Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897)). Once Tofani uttered (here, wrote) words legally sufficient to ratify the contract, then the contract became ratified in that instant regardless of whatever he might have subjectively intended in his mind.

Tofani doesn't dispute that he said the words of ratification; indeed, he admitted during his deposition that he informed the Wynn that he would pay his obligation but then subsequently changed his mind after an argument with his wife. But once he ratified the contract, it instantly and automatically became valid; he doesn't get to change his mind and undo it later on a whim. Quite to the contrary, informing the other party afterwards that one no longer intends to comply with the terms of a fully formed contract is the literal definition of repudiating the contract and thereby breaching it. *See Kahle v. Kostiner*, 85 Nev. 355, 358, 455 P.2d 42, 44 (1960) (repudiation is "a definite unequivocal and absolute intent not to perform a substantial portion of the contract"); Restatement (Second) of Contracts § 250 (Am. Law. Inst. 1981) ("A repudiation is . . . a statement by the obligor to the obligee indicating that the obligor will commit a breach . . . ."); *State Dep't of Transp. v. Eighth Judicial Dist. Court*, No. 70098, 402 P.3d 677, 682 (Nev. 2017) (quoting *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987)) ("Breach of contract is the material failure to perform 'a duty arising under or imposed by agreement.'"). I would thus conclude that no genuine issue of fact exists regarding whether the contract was valid or whether it was breached. It

was valid, and Tofani must honor it in full or else pay damages for his breach.

IV.

Even if we ignore what's undisputed and somehow assume, against Tofani's own admissions, that the contract was voidable because of drunkenness and actually voided rather than ratified, Tofani still owes the Wynn $800,000 and summary judgment should still have been granted in part.

Why? Because when a party "elects to disaffirm and avoid his contract, the 'contract' becomes invalid ab initio and . . . the parties thereto then revert to the same position as if the contract had never been made." *Keser v. Chagnon*, 410 P.2d 637, 639 (Col. 1966); *see Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993) (rescission "place[s] the parties in the position they occupied prior to executing the contract"). That means that the principal borrowed must be repaid or else the Wynn has not been restored to its pre-contract condition. *See White v. Moore*, 84 Nev. 708, 708, 448 P.2d 35, 35 (1968) (after rescission of contract for sale of house, the property must be restored to the original owners).

Assume that, rather than borrowing the money from the Wynn, Tofani instead borrowed it from a bank while so obviously intoxicated that the loan was invalid. In that event the loan might be voidable at common law. *But Tofani would still have to pay the money back.* He doesn't get to keep the money forever just because the contract is void; it doesn't magically morph into a Christmas gift with no strings attached just because he was drunk. Quite the opposite: "[o]n becoming

sober, the intoxicated person must . . . offer to restore consideration received." Restatement (Second) of Contracts § 16 cmt c.

Thus, whether Tofani was drunk or not and whether the contract was voided or ratified, the Wynn gets at least its principal back – all of it – under every legal theory at issue here.

V.

As I see it, there were only two outcomes to this case that were ever possible, and neither favors Tofani. If the contract is valid, then Tofani has to honor it in full. If the contract is void, then he has to return the principal that he borrowed as if the loan had never happened. The only difference between the two is whether he also has to pay interest and penalties as required by the contract. In this case, that's a substantial difference since the Wynn charges 18% interest on markers, a rate much higher than judicially-imposed prejudgment interest rates, so I'm sure Wynn prefers the contract be honored rather than voided. But whether valid or void, there is simply no scenario in which Tofani just gets to keep the money he borrowed and convert it to his own use without paying back even a single dollar.

Summary judgment was warranted on the full amount of $800,000 plus contractual interest because none of the facts that Tofani can, or did, legitimately dispute before (or, for that matter, even during) trial are "material" under NRCP 56. "Material" means that some factual dispute could possibly change the outcome of the case depending on which set of facts you choose to believe. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Wood v. Safeway*, 121 Nev.

724, 730, 121 P.3d 1026, 1030 (2005), *quoting Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). But there are no material factual disputes here because the range of available outcomes was never more than two regardless of whose version of the facts we believe: Tofani either pays back $800,000 plus contractual interest, or he pays back $800,000 without contractual interest. No other outcome is recognized by law.

Of the two permitted outcomes, I think the former was justified and summary judgment should have been granted in full. Either Tofani was so drunk that he lacked capacity or he wasn't that drunk; if he wasn't, then the contract was valid. But even if he was, he indisputably and repeatedly ratified the contract after becoming sober, and the contract is valid anyway. But even if we stretch things beyond what NRCP 56 contemplates and conclude that perhaps the contract may not have been fully ratified for some reason, that still means summary judgment should have been granted at least in part because Tofani must pay back the principal on an invalid contract in order to restore the Wynn to its pre-contract state. Either way, the Wynn was entitled to judgment as matter of law on at least parts of its case if not all of it, and in an amount no less than $800,000. The district court should never have sent it all to the jury.

VI.

Tofani makes two arguments in an effort to avoid paying back even the principal that he borrowed. First, he argues that he never received actual money from the Wynn but only a credit redeemable for gambling chips. But he concedes that he redeemed the entire value of the markers by gambling at the Wynn, an activity that, without the markers, would have required him to pay cash. Thus, Tofani concedes that he used the markers in lieu of his own cash, which is legally the same thing as

receiving cash. *Cf. Zoggolis v. Wynn Las Vegas, LLC*, 768 F.3d 919, 923 (9th Cir. 2014) (stating in the context of Nevada's bad check statute, the Nevada Supreme Court has held that markers are checks because "they provided for payment of a specific sum of money drawn from a bank on demand") (citing *Nguyen v. State*, 116 Nev. 1171, 1175, 14 P.3d 515, 518 (2000)).

Second, Tofani argues that in effect he did repay the money, because he lost it all back to the Wynn while gambling there. But this argument doesn't make sense except on the most superficial level. Losing money gambling is not the same thing as giving that money back unconditionally in order to repay a loan. Gambling isn't paying money back; gambling is *spending the money*. Simply by gambling, Tofani enjoyed the possibility of winning more money. Indeed, that was the whole point. It was never his intent to repay the loan by slowly giving the money back to the Wynn one chip at a time at the tables or in the slot machines. Quite the opposite: he intended to use the money to win even more money from the Wynn. That's why people get casino markers: they hope to win in order to pay the marker back yet still walk away with some house money in their pocket.

Once Tofani gambled with the money, he spent it in order to reap a benefit from it, namely, the possibility of winning more money, as well as the entertainment experience that comes with high-stakes gambling. And he got what he paid for: over the course of his gambling spree, he lost some games, and won some games; sometimes he was up, and sometimes he was down. He experienced the thrill of victory and the agony of defeat and walked away with a pretty good Vegas story to tell. He ended up losing more than he won, but with every dollar gambled he

received a tangible benefit in the form of the opportunity to win and the ride on Lady Luck's roller coaster. The mere fact that he happened to lose it all in the end doesn't change the analysis. Losing doesn't convert the act of gambling into something different that it was when he was winning and turn what was always a bet into a loan repayment to the casino's credit department.

VII.

For these reasons, I would reverse with directions to enter summary judgment in favor of the Wynn on its claim for breach of contract for all of its asserted damages, including the principal amount of $800,000 plus contractual interest and penalties. Alternatively, the only other legally valid outcome of this appeal (though not one I believe justified by the undisputed factual record) would be entry of partial summary judgment in favor of the Wynn in the principal amount of $800,000, with the question of whether Tofani also owes additional contractual interest and penalties to be remanded and re-tried with appropriate jury instructions on voidability, disaffirmation, and ratification.

_____, J.
Tao

SILVER, C.J., dissenting:

I would affirm the district court on all issues raised on both the appeal and cross-appeal in this case.

_____, C. J.
Silver

cc: Hon. Jennifer P. Togliatti, District Judge
Ara H. Shirinian, Settlement Judge
Semenza Kircher Rickard
Jeffrey R. Albregts, LLC
Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson/Las Vegas
Eighth District Court Clerk