REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF NEVADA

Volume 125

MICHAEL LYNN STROMBERG, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE PATRICK FLANAGAN, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 50079

January 29, 2009 200 P.3d 509

Original petition for a writ of mandamus challenging a district court's decision to deny petitioner's request to apply for treatment pursuant to NRS 484.37941.

Defendant charged with third-offense driving under the influence (DUI) moved to plead guilty and applied for treatment, pursuant to statute allowing a district court to accept a plea of guilty to third-offense DUI and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program. The district court denied defendant's request for treatment and stayed the matter. Defendant filed petition for writ of mandamus, seeking to require district court to consider his request to plead guilty and apply for treatment pursuant to statute. The supreme court, CHERRY, J., held that: (1) statute allowed defendant to apply for treatment, and (2) statute did not violate separation-of-powers doctrine.

Petition granted.

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Real Party in Interest.

1. MANDAMUS.
   The supreme court may issue a writ of mandamus 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. NRS 34.160.
2. MANDAMUS.
   The decision to entertain a mandamus petition lies within the discretion of the supreme court, which considers whether judicial economy and sound judicial administration militate for or against issuing the writ. NRS 34.160.
3. MANDAMUS.
   Supreme court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification.
4. CRIMINAL LAW.
   Statute allowing a district court to accept a plea of guilty to third-offense driving under the influence (DUI) and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program allowed defendant entering a plea of guilty after the statute's effective date to apply for treatment, even though offense occurred before statute's effective date. NRS 484.37941.
5. CONSTITUTIONAL LAW; CRIMINAL LAW.
   Statute allowing a district court to accept a plea of guilty to third-offense driving under the influence (DUI) and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program did not give district court powers reserved to prosecutor and, thus, did not violate separation-of-powers doctrine; district court's decision to grant or deny an offender's application for treatment followed the prosecutor's decision to charge an offender for a third-time DUI, and statute did not limit the prosecutor's unfettered discretion to determine whether to charge an offender for a third-time DUI or for a lesser offense. NRS 484.37941.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

In this original petition for a writ of mandamus, we address two issues related to NRS 484.37941, which allows a district court to

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

accept a plea of guilty to a third-offense DUI and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program.[2] First, we consider whether the plain language of NRS 484.37941 allows an offender entering a plea of guilty on or after that statute's effective date to apply for treatment. We conclude that it does, reaffirming our recent decision in *Picetti v. State*, 124 Nev. 782, 192 P.3d 704 (2008). Second, we reject the State's contention that NRS 484.37941 is unconstitutional because it violates the separation-of-powers doctrine by giving the district court powers that are reserved to the prosecutor. Because we conclude that the district court manifestly abused its discretion when it refused to consider petitioner Michael Lynn Stromberg's request to plead guilty and apply for treatment, we grant Stromberg's petition and direct the district court to consider Stromberg's request to plead guilty and apply for treatment pursuant to NRS 484.37941.[3]

FACTS AND PROCEDURAL HISTORY

On May 29, 2007, Stromberg was charged with one count of driving under the influence (DUI), third offense within seven years, a class B felony. On June 1, 2007, Stromberg made his first appearance in the district court and requested that his arraignment be continued to June 8, 2007, so that he and the State could resolve an issue regarding his blood alcohol test. On June 8, 2007, Stromberg made an appearance in district court and entered a plea of not guilty and stated that it was his intention to plead guilty after July 1, 2007, so that he would be eligible to participate in a three-year treatment program pursuant to NRS 484.37941, which be-

[2]Under NRS 484.37941, a third-time DUI offender may seek to undergo a program of treatment for a minimum of three years. Pursuant to the statute, the State may oppose the offender's application and request a hearing on the matter. If the district court grants the application for treatment, it must suspend the proceedings and place the offender on probation for a period not to exceed five years. Probation is conditioned upon the offender's acceptance for treatment by a treatment facility and the completion of that treatment and any other conditions as ordered by the district court. If the offender is not accepted for treatment or if he or she fails to complete any of the district court's conditions, the court will enter a judgment of conviction for a violation of NRS 484.3792(1)(c), a category B felony, and the district court may reduce the amount of time in prison by a time equal to that which the offender spent in treatment. On the other hand, if the offender successfully completes treatment, the district court will enter a judgment of conviction for a violation of NRS 484.3792(1)(b), which is a misdemeanor.

[3]To the extent the State argued at oral argument that NRS 484.37941 is unconstitutional because it takes away the State's power to engage in plea bargaining and allows offenders entering guilty pleas to obtain a benefit not offered to offenders who plead not guilty and proceed to trial, we decline to address this issue here as it is not presented under the facts of this case.

came effective on July 1, 2007. 2007 Nev. Stat., ch. 288, § 6, at 1064.

On July 20, 2007, Stromberg returned to the district court, moved to change his plea to guilty, and applied for treatment. The State opposed Stromberg's application, arguing that NRS 484.37941 does not apply retroactively to offenses that occurred prior to July 1, 2007. Stromberg argued that the plain language of the statute allows defendants who enter a plea after July 1, 2007, the opportunity to apply for the treatment program. The district court ordered briefing on Stromberg's request and on the applicability of NRS 484.37941 and set the matter for hearing.

On August 15, 2007, the district court held a hearing regarding Stromberg's application for treatment. The district court determined that the statute's language did not clearly indicate legislative intent to apply the statute retroactively and therefore denied Stromberg's request. Stromberg's counsel indicated that his client had not yet entered a plea and requested the district court to stay the matter pending this court's review of the issue.[4] The district court granted a stay, and this original petition for a writ of mandamus followed.

DISCUSSION

[Headnotes 1-3]

''This court may issue a writ of mandamus 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.'' *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); *see also* NRS 34.160. The writ will issue where the petitioner has no ''plain, speedy and adequate remedy in the ordinary course of law.'' NRS 34.170; *Redeker*, 122 Nev. at 167, 127 P.3d at 522. The decision to entertain a mandamus petition lies within the discretion of this court, and ''[t]his court considers whether judicial economy and sound judicial administration militate for or against issuing the writ.'' *Redeker*, 122 Nev. at 167, 127 P.3d at 522. ''Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification.'' *Id.* While we acknowledge that writ review is rarely appropriate when a petitioner has an adequate remedy at law through a direct appeal, we conclude that writ review is appropriate here because this case involves important questions of law which require clarification and

[4]The State contends that Stromberg pleaded guilty on July 20, 2007. However, the submissions before this court demonstrate that Stromberg has not yet pleaded guilty.

because public policy interests militate in favor of resolving these questions. *Cf. State of Nevada v. Justice Court*, 112 Nev. 803, 805 n.3, 919 P.2d 401, 402 n.3 (1996) (electing to entertain petition for writ of prohibition even though relief should have been sought first in district court ''due to the exigent circumstances presented and because this case presented an unsettled issue of statewide importance''). Therefore, we exercise our discretion to consider the merits of the petition.

Retroactivity and NRS 484.37941

[Headnote 4]

Stromberg argues persuasively that the plain language of NRS 484.37941 applies to offenders who enter guilty pleas on or after July 1, 2007, the statute's effective date. The State contends that Stromberg is not entitled to apply for treatment pursuant to NRS 484.37941 because his DUI occurred prior to the statute's effective date. At oral argument, the State contended that in order for an offender to apply for treatment pursuant to NRS 484.37941 he or she must have committed the crime after the statute's effective date and pleaded guilty after the statute's effective date. The State further asserted that this court's recent decision in *State v. District Court (Pullin)*, 124 Nev. 564, 188 P.3d 1079 (2008), mandates such a result. We disagree.

In *Pullin*, this court determined that ameliorative amendments to criminal statutes would not apply retroactively unless the Legislature indicated its intent otherwise. *Id.* at 571, 188 P.3d at 1083. This court further concluded that because the Legislature had failed to indicate its intent to apply ameliorative amendments to NRS 193.165 retroactively, Nevada law required the application of the penalty in effect at the time Pullin committed his crime. *Id.* at 567, 188 P.3d at 1081. In contrast, as we recently explained in *Picetti v. State*, the plain language of NRS 484.37941 indicates the Legislature's intent to apply that statute to all offenders pleading guilty on or after July 1, 2007. 124 Nev. 782, 793, 192 P.3d 704, 711 (2008) (citing 2007 Nev. Stat., ch. 288, § 6, at 1064). In particular, as this court observed in *Picetti*, NRS 484.37941 provides that ''[a]n offender *who enters a plea of guilty or nolo contendere* to a violation of NRS 484.379 or NRS 484.379778 that is punishable pursuant to paragraph (c) of subsection 1 of NRS 484.3792 *may, at the time he enters his plea*, apply to the court to undergo a program of treatment.'' *Id.* at 794, 192 P.3d at 712. This statutory language, as we explained in *Picetti*, ''provides that anyone entering a plea of guilty or nolo contendere after the statute's effective date is eligible to apply for treatment.'' *Id.* We reaffirm that

decision. Because Stromberg attempted to plead guilty after the statute's effective date, we conclude that the district court manifestly abused its discretion when it refused to consider his request to plead guilty and apply for treatment pursuant to NRS 484.37941. Accordingly, we grant Stromberg's petition and direct the district court to consider the merits of Stromberg's request to plead guilty and apply for treatment pursuant to NRS 484.37941.

NRS 484.37941 and the separation-of-powers doctrine

[Headnote 5]

Because we conclude that if the district court grants Stromberg's request to plead guilty he may apply for treatment under NRS 484.37941, we find it necessary to address the State's assertion that NRS 484.37941 violates the separation-of-powers doctrine. In its answer to the petition, the State argues that NRS 484.37941 violates the separation-of-powers doctrine by giving the district court the power to determine how to charge a DUI offender, a decision that is exclusively within the province of the executive branch of government represented by the prosecutor. For the reasons set forth below, we disagree with the State's contention.

At the outset, we reject the State's contention that the United States Supreme Court's decision in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), supports its argument that NRS 484.37941 impermissibly allows the district court to assume the powers of the prosecution. The State's reliance on *Bordenkircher* is misplaced because that case addressed an entirely different legal question than the one raised here. In *Bordenkircher*, the Supreme Court addressed a defendant's claim that a state prosecutor violated due process when he carried out a threat, made during negotiations, to have the defendant reindicted on more serious charges that were supported by the evidence in the case. *Id.* at 358. The Supreme Court rejected the defendant's claim, determining instead that the prosecutor's actions did not violate due process because ''[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'' *Id.* at 364. Thus, while *Bordenkircher* certainly made clear that a prosecutor has broad discretion in charging a defendant, it did not offer any guidance on whether a provision similar to NRS 484.37941 invades that charging discretion.[5]

[5]The State also cites this court's decision in *Schoels v. State*, 114 Nev. 981, 966 P.2d 735 (1998), in support of its argument that NRS 484.37941 is unconstitutional and thus invalid. We have reviewed this case, and it is unclear how *Schoels* supports the State's argument regarding the constitutionality of NRS 484.37941.

Instead, we find the California Supreme Court's decisions in *Esteybar v. Municipal Court for Long Beach Judicial District*, 485 P.2d 1140 (Cal. 1971), and *People v. Superior Court of San Mateo County*, 520 P.2d 405 (Cal. 1974), to be instructive on the issue of whether NRS 484.37941 is unconstitutional because it violates the separation-of-powers doctrine. In those cases, the California Supreme Court considered the interplay between prosecutorial and judicial authority in circumstances similar to those created by NRS 484.37941. We find particularly compelling the California Supreme Court's analysis drawing a line between the prosecutor's decision in how to charge and prosecute a case and the court's authority to dispose of a case after its jurisdiction has been invoked.

In *Esteybar*, the California Supreme Court considered the question of whether a magistrate was permitted to convict an offender as a misdemeanant without first obtaining the permission of the prosecuting attorney. 485 P.2d at 1141. In that case, the State presented an argument similar to what the State argues here and contended that the magistrate's decision to convict the offender as a misdemeanant, without first obtaining the prosecutor's permission, constituted an invasion of the charging process because it interfered with prosecutorial discretion in deciding what crime to charge. *Id.* at 1145. The court rejected the State's argument, noting that it ignored the crucial fact that the magistrate's determination followed the district attorney's decision to prosecute. *Id.* The court stated that '' '[w]hen the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.' '' *Id.* (quoting *People v. Tenorio*, 473 P.2d 993, 996 (Cal. 1970)).

In *San Mateo County*, the California Supreme Court reviewed the State's challenge, through a petition for writ of mandamus, to a trial court's order of diversion in a drug case. 520 P.2d 405, 406-07 (Cal. 1974). In particular, the court addressed the question of whether it was constitutional for a district attorney to exercise veto power over the trial judge's decision to order a defendant charged with a narcotics offense to be diverted into a pretrial treatment program. *Id.* at 407. In that case, much like the case at bar, the State argued that the decision to divert is an extension of the charging process, which falls entirely within the prosecutor's discretion. *Id.* at 409. The court rejected the State's argument concluding instead that ''when the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the *disposition* of that charge becomes a judicial responsibility.'' *Id.* at 410. The court acknowledged that while trial courts usually dispose of cases by either sentencing or acquitting offenders, those are not the only options for the disposition of a case. *Id.* The court recognized that new and more sophisticated choices for disposition, such as pro-

bation, had been developed to deal with crime and concluded that the trial court's decision to allow an offender to enter a treatment program was a specialized form of probation and therefore a matter fully within the discretion of the judiciary. *Id.* Thus, the court held that a prosecutor did not possess the power to veto a decision that fell within the purview of the judiciary without violating the separation-of-powers doctrine. *Id.* at 409.

We are persuaded by the reasoning in *Esteybar* and *San Mateo County* for two reasons. First, similar to the scenarios discussed above, the district court's decision to grant or deny an offender's application for treatment pursuant to NRS 484.37941 follows the prosecutor's decision to charge an offender for a third-time DUI. After the charging decision has been made, any exercise of discretion permitted by NRS 484.37941 is simply a choice between the legislatively prescribed penalties set forth in the statute. Moreover, we conclude that the district court's decision to allow an offender to enter a program of treatment is analogous to the decision to sentence an offender to probation and therefore is a decision that properly falls within the discretion of the judiciary. *Cf.* NRS 176A.100 (giving the district court broad discretion to suspend a sentence and grant probation).

Second, we conclude that NRS 484.37941 does not limit the prosecutor's unfettered discretion to determine whether to charge an offender for a third-time DUI or for a lesser offense. This charging decision is important because even if an offender is convicted as a second-time DUI offender after successfully completing a treatment program under NRS 484.37941, the conviction is nonetheless treated as a third-time DUI for the purposes of enhancement in the event that the offender commits another DUI. *See* NRS 484.3792(2) (providing that person who has previously been convicted of DUI and sentenced under NRS 484.3792(1)(b) based on NRS 484.37941 and who commits another DUI is guilty of felony and subject to prison term of 2 to 15 years). Therefore, we conclude that NRS 484.37941 does not violate the separation-of-powers doctrine by giving the judiciary powers typically reserved to the executive branch.

CONCLUSION

We reaffirm our decision in *Picetti* that the plain language of NRS 484.37941 permits third-time DUI offenders who entered guilty pleas on or after July 1, 2007, to apply for treatment pursuant to the statute. We further conclude that NRS 484.37941 does not violate the separation-of-powers doctrine. Therefore, we conclude that the district court erroneously failed to consider the merits of Stromberg's request to plead guilty and apply for treat-

ment. Accordingly, we grant the petition. The clerk of this court shall issue a writ of mandamus instructing the district court to consider Stromberg's request to plead guilty and apply for treatment pursuant to NRS 484.37941.

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

LONNIE SAVAGE, PETITIONER, *v.* THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF LYON; THE HONORABLE ROBERT E. ESTES, DISTRICT JUDGE; AND THE HONORABLE LEON ABERASTURI, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 50445

MARCO ANTONIO HERNANDEZ, PETITIONER, *v.* THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO, AND THE HONORABLE ANDREW J. PUCCINELLI, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 51333

January 29, 2009 200 P.3d 77

Consolidated original petitions for writs of mandamus that challenge district court refusals to consider applications for treatment pursuant to NRS 484.37941.

Defendants charged with third-time driving under the influence (DUI) filed mandamus petitions challenging the refusals of the district courts to consider merits of their applications for treatment pursuant to statute permitting third-time DUI offenders who plead guilty to apply for treatment as part of diversion program. The supreme court, CHERRY, J., held that: (1) mandamus review was appropriate, (2) trial court was required to consider merits of defendants' applications for treatment, and (3) statute permitting third-time DUI offenders who plead guilty to apply for treatment for alcoholism as part of diversion program did not violate separation-of-powers doctrine.

Petitions granted.

Pederson and Kalter, P.C., and *Wayne A. Pederson*, Yerington, for Petitioner Lonnie Savage.

Frederick B. Lee, Jr., Public Defender, and *Alina M. Kilpatrick*, Deputy Public Defender, Elko County, for Petitioner Marco Antonio Hernandez.

Catherine Cortez Masto, Attorney General, *Robert E. Wieland*, Senior Deputy Attorney General, and *Heather D. Procter*, Deputy Attorney General, Carson City, for Real Party in Interest in Docket No. 50445.

Gary D. Woodbury, District Attorney, *Mark D. Torvinen*, Chief Deputy District Attorney, and *Robert J. Lowe*, Deputy District Attorney, Elko County, for Real Party in Interest in Docket No. 51333.

1. MANDAMUS.

   Supreme court may issue a writ of mandamus 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. NRS 34.160.

2. MANDAMUS.

   A writ of mandamus will issue where the petitioner has no plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170.

3. MANDAMUS.

   The decision to entertain a mandamus petition lies within the discretion of the supreme court, and in deciding whether to entertain a petition, the court considers whether judicial economy and sound judicial administration militate for or against issuing the writ.

4. MANDAMUS.

   Supreme court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification.

5. MANDAMUS.

   Writ of mandamus was appropriate remedy for defendant charged with third-offense driving under the influence (DUI) to challenge trial court's refusal to consider his application for treatment for alcoholism, filed pursuant to statute permitting third-time DUI offenders who plead guilty to apply for treatment as part of diversion program; defendant's guilty plea, which had not yet been entered, was intrinsically connected to whether he was allowed to apply for treatment, such that he should not be required to proceed to trial before he was allowed to challenge trial court's actions, and motion for bail would not adequately protect defendant's interests because there was no guarantee that if defendant was convicted and filed application for treatment, it would be granted. NRS 484.37941.

6. MANDAMUS.

   Writ of mandamus was appropriate remedy for defendant charged with third-offense driving under the influence (DUI) to challenge trial court's refusal to consider his application for treatment for alcoholism, filed pursuant to statute permitting third-time DUI offenders who plead guilty to apply for treatment as part of diversion program, though defendant did not enter a guilty plea after trial court informed him it would not consider provisions of statute, as trial court's actions prevented defendant from entering guilty plea, such that it would be unfair to preclude him from writ relief on basis that he failed to enter plea. NRS 484.37941.

7. MANDAMUS.

Mandamus review of trial court's refusal to consider defendants' applications for treatment for alcoholism, which had been filed pursuant to statute permitting third-time driving under the influence (DUI) offenders who plead guilty to apply for treatment as part of diversion program, was appropriate, as both defendants and the State raised important questions of law that required clarification, and public policy interests militated in favor of resolving these questions.

8. STATUTES.

The court first examines the plain language of a statute to decipher its meaning.

9. SENTENCING AND PUNISHMENT.

Trial court was required to consider merits of third-time driving under the influence (DUI) offenders' applications for treatment for alcoholism, filed pursuant to statute permitting third-time DUI offenders who plead guilty to apply for treatment as part of diversion program, as statute reflected Legislature's intent that all third-time DUI offenders could apply for treatment; statute provided that, once offender applied for treatment program, the prosecuting attorney could oppose application, and statute further provided that, if prosecuting attorney opposed application, the trial court ''shall'' order a hearing on application, or, if hearing was not held, the trial court ''shall'' decide matter and other information before the court. NRS 484.37941.

10. SENTENCING AND PUNISHMENT.

Counties do not have to create a program of treatment for alcoholism before allowing third-time driving under the influence (DUI) offenders to apply for treatment pursuant to statute permitting third-time DUI offenders who plead guilty to apply for treatment for alcoholism as part of diversion program. NRS 484.37941.

11. SENTENCING AND PUNISHMENT.

To the extent that statute permitting third-time driving under the influence (DUI) offenders who plead guilty to apply for treatment as part of diversion program mandates that district court ''shall administer the program of treatment,'' this language refers to district court overseeing the procedures and conditions of probation imposed upon the offender at the time district court accepts the offender's application for treatment; district court's administration of the treatment program does not require it to establish or administer a separate program of treatment outside of its normal docket. NRS 484.37941(5).

12. SENTENCING AND PUNISHMENT.

District court has authority to order the Division of Parole and Probation (DOPP) to supervise third-time driving under the influence (DUI) offenders who enter treatment programs pursuant to statute permitting third-time DUI offenders who plead guilty to apply for treatment for alcoholism as part of diversion program, as the statute requires the court to place an offender on probation while he is in treatment, and general statutes regarding probation require that an offender granted probation be placed under supervision of DOPP. NRS 176A.100, 176A.210(1), 176A.400(2), (4), 484.37941(4)(a).

13. CONSTITUTIONAL LAW; SENTENCING AND PUNISHMENT.

Statute permitting third-time driving under the influence (DUI) offenders who plead guilty to apply for treatment for alcoholism as part of diversion program, which required district court to administer program of treatment by overseeing procedures and conditions of probation imposed on offender at time court accepted offender's application for treatment, did not violate separation-of-powers doctrine, as statute did not require

court to fulfill duties reserved to Division of Parole and Probation (DOPP), in that, pursuant to the statute, the actual supervision of offender still rested with the DOPP. NRS 458.320, 458.330, 484.37941(4)(a), (5).

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

In these original proceedings, we primarily consider whether district courts in Elko County and Lyon County manifestly abused their discretion when they refused to consider petitioners' applications for treatment pursuant to NRS 484.37941.[2] In doing so, we also consider the following: (1) whether the statute requires counties to create a treatment program, (2) whether the district court has jurisdiction to order the Division of Parole and Probation (DOPP) to supervise offenders who enter a program of treatment pursuant to NRS 484.37941, and (3) whether NRS 484.37941 violates the separation-of-powers doctrine by requiring the district court to perform duties reserved to the executive branch.

We conclude that the plain language of NRS 484.37941 requires the district court to consider the merits of an offender's application for treatment. In reaching this conclusion, we agree with the State's argument that NRS 484.37941 does not require counties to create a ''program of treatment.'' Rather, a review of NRS 484.37941 reveals that the statute only requires district courts to oversee the procedures and conditions of probation imposed upon the offender at the time the district court accepts the offender's application for treatment; it does not require counties to create treatment facilities or a ''program of treatment.'' We further conclude that the district court has jurisdiction to order the DOPP

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

[2]Under NRS 484.37941, a third-time DUI offender may seek to undergo a program of treatment for a minimum of three years. Pursuant to the statute, the State may oppose the offender's application and request a hearing on the matter. If the district court grants the application for treatment, it must suspend the proceedings and place the offender on probation for a period not to exceed five years. Probation is conditioned upon the offender's acceptance for treatment by a treatment facility and the completion of that treatment and any other conditions as ordered by the district court. If the offender is not accepted for treatment or if he or she fails to complete any of the district court's conditions, the court will enter a judgment of conviction for a violation of NRS 484.3792(1)(c), a category B felony, and the district court may reduce the amount of time in prison by a time equal to that which the offender spent in treatment. On the other hand, if the offender successfully completes treatment, the district court will enter a judgment of conviction for a violation of NRS 484.3792(1)(b), which is a misdemeanor.

to supervise any offenders whose applications for treatment are granted pursuant to NRS 484.37941. And, finally, we conclude that NRS 484.37941 does not violate the separation-of-powers doctrine. The district courts manifestly abused their discretion by refusing to consider petitioners' applications for treatment. We therefore grant these petitions and direct the district courts to consider petitioners' applications for treatment.[3]

RELEVANT FACTS

Savage v. District Court, Docket No. 50445

The State charged petitioner Lonnie Savage with a third-offense DUI. Savage initially pleaded not guilty but later attempted to change his plea from not guilty to guilty pursuant to a plea agreement with the State. In the plea agreement, the State indicated that it would not oppose Savage seeking treatment pursuant to NRS 484.37941. The district court refused to accept the guilty plea, noting that the treatment program set forth in NRS 484.37941 was not available in Lyon County because the DOPP would not oversee the program and the district court would not be able to run a program on its own. The district court informed Savage's counsel that he should discuss the matter with his client and further concluded that the matter could not go forward and continued it until October 15, 2007. On that date, Savage appeared before the district court for a status hearing and announced that he would be filing a writ petition in this court challenging the district court's refusal to consider NRS 484.37941. Savage thereafter filed this original petition for a writ of mandamus.

Hernandez v. District Court, Docket No. 51333

The State charged petitioner Marco Antonio Hernandez with a third-offense DUI. Subsequently, Hernandez and the State entered into a plea agreement in which Hernandez waived his right to a preliminary hearing and agreed to plead guilty to a third-offense DUI. The State reserved the right to litigate any application for treatment filed pursuant to NRS 484.37941.

At Hernandez's arraignment, the district court advised Hernandez's counsel to file a motion for treatment, if he intended to file one, so that the State could have the opportunity to respond. The district court also solicited a response from a DOPP representative, Peggy Hatch, who was present in the district court, regarding the

[3]Because both of the petitioners here attempted to enter guilty pleas after July 1, 2007, we conclude that both are entitled to apply for treatment pursuant to the statute. We therefore reject the State's contention that petitioner Lonnie Savage's petition is moot because he is subject to the punishment applicable at the time he committed his crime. *Stromberg v. Dist. Ct.*, 125 Nev. 1, 200 P.3d 509 (2009); *Picetti v. State*, 124 Nev. 782, 793-94, 192 P.3d 704, 712 (2008).

DOPP's willingness to supervise a defendant under NRS 484.37941. Hatch indicated that she had been advised that the DOPP would not be supervising defendants diverted for treatment pursuant to NRS 484.37941. The district court noted that it was unable to supervise offenders diverted for treatment pursuant to NRS 484.37941. The district court further indicated that it believed that NRS 484.37941 was an unfunded mandate and that it would deny the application on the basis that the DOPP would not provide supervision. Nevertheless, the district court continued Hernandez's arraignment.

On the day of his arraignment, Hernandez filed a motion for treatment pursuant to NRS 484.37941, even though he had yet to enter his guilty plea. The State opposed the motion. Shortly thereafter, the district court heard arguments on the motion for treatment, which it subsequently denied, stating that ''[o]ne, the Court, the way this statute is written, does not have jurisdiction to order Parole and Probation to supervise. There is community supervision under the normal rules of probation. It doesn't exist.'' The district court indicated that it did not have the infrastructure, or budget to properly establish the infrastructure, needed to properly supervise offenders diverted to treatment under NRS 484.37941. The district court further indicated that the Legislature did not require counties to create the treatment program established in the statute. Hernandez then filed this original petition for a writ of mandamus.

DISCUSSION

As an initial matter, the State has challenged the propriety of writ relief in the first instance. After addressing that threshold issue, we will turn to the merits of the claims raised in these writ proceedings.

The propriety of writ relief

[Headnotes 1-4]

''This court may issue a writ of mandamus 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.'' *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); *see also* NRS 34.160. The writ will issue where the petitioner has no ''plain, speedy and adequate remedy in the ordinary course of law.'' NRS 34.170; *Redeker*, 122 Nev. at 167, 127 P.3d at 522. But the decision to entertain a mandamus petition lies within the discretion of this court, and in deciding whether to entertain a petition, ''[t]his court considers whether judicial economy and sound judicial administration militate for or against issuing the writ.'' *Redeker*, 122 Nev. at 167,

127 P.3d at 522. ''Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification.'' *Id.*

[Headnote 5]

In regard to Hernandez, the State argues that he is not entitled to extraordinary relief because he has an adequate remedy at law by way of a direct appeal and by filing a motion for bail pursuant to NRS 177.105, which, if granted, would require a stay of his sentence of imprisonment. We disagree. Hernandez has not yet entered a guilty plea, nor did the district court set the matter for trial. To the contrary, Hernandez attempted to plead guilty to a third-offense DUI and filed a motion for treatment pursuant to NRS 484.37941. However, after hearing arguments on the motion for treatment, the district court indicated that it would deny the motion and invited Hernandez to file an emergency writ petition in this court. Because Hernandez's guilty plea is intrinsically connected to whether he is allowed to apply for treatment pursuant to NRS 484.37941, we conclude that in this narrow circumstance he should not be required to proceed to trial before he is allowed to challenge the actions of the district court. Moreover, we reject the State's contention that a motion for bail would adequately protect Hernandez's interests because there is simply no guarantee that if Hernandez was convicted and filed such a motion, it would be granted. If the application were denied, it is likely that Hernandez would expire his sentence before the resolution of his direct appeal. Under these limited circumstances, we conclude that writ review is appropriate.

[Headnote 6]

In regard to Savage, the State contends that writ relief is inappropriate because he failed to enter a guilty plea after the district court informed him that it would not consider the provisions of NRS 484.37941, and therefore, he is ineligible for treatment. We find this argument to be wholly unpersuasive. Because the district court's actions prevented Savage from entering his guilty plea, it would be unfair to preclude him from writ relief on the basis that he failed to enter his plea. As explained above, the district court unequivocally indicated that it would not consider Savage's application for treatment because the program did not exist in Lyon County and because the State's agreement to allow Savage to enter a treatment program was the basis for his guilty plea, the district court would not allow the matter to go forward on that date. Under these circumstances, we conclude that Savage's failure to enter a guilty plea does not preclude him from seeking extraordinary relief.

[Headnote 7]

Finally, we reject the State's contention that petitioners failed to raise substantial issues of public policy that require this court's intervention. To the contrary, we conclude that writ review is appropriate here because both petitioners and the State have raised important questions of law that require clarification and because public policy interests militate in favor of resolving these questions. *Cf. State of Nevada v. Justice Court*, 112 Nev. 803, 805 n.3, 919 P.2d 401, 402 n.3 (1996) (electing to entertain petition for writ of prohibition even though relief should have been sought first in district court ''due to the exigent circumstances presented and because this case presented an unsettled issue of statewide importance''). Therefore, we exercise our discretion to consider the merits of these petitions.

The district court erred when it failed to consider the merits of the petitioners' applications for treatment pursuant to NRS 484.37941

Petitioners argue that the district courts abused their judicial discretion by refusing to consider the merits of their applications for treatment pursuant to NRS 484.37941. We agree for three reasons. First, the plain language of the statute affords third-time DUI offenders the opportunity to apply for the diversion program. Second, while the statute does not require counties to create a ''program of treatment,'' or a treatment facility, it does require the district court to oversee the procedures and conditions of probation imposed upon the third-time DUI offender at the time the court accepts an application to enter a treatment program. Third, the district court has jurisdiction to order the DOPP to supervise third-time DUI offenders who enter treatment programs pursuant to the statute. We will address each of these conclusions in turn below.

The plain language of NRS 484.37941 requires the district court to consider the merits of a third-time DUI offender's application for treatment

[Headnote 8]

This court has explained that ''[i]n construing a statute, our primary goal is to ascertain the legislature's intent in enacting it, and we presume that the statute's language reflects the legislature's intent.'' *Moore v. State*, 117 Nev. 659, 661, 27 P.3d 447, 449 (2001). Therefore, this court first examines the plain language of a statute to decipher its meaning. *See id.*

[Headnote 9]

The plain language of NRS 484.37941 reflects the Legislature's intent that all third-time DUI offenders may apply for treatment

pursuant to the statute. Specifically, NRS 484.37941(1) provides that an offender who enters a plea of guilty or nolo contendere ''*may, at the time he enters his plea, apply* to the court to undergo a program of treatment for alcoholism,'' as long as he is properly diagnosed an addict or alcoholic by a professional qualified under the statute and agrees to pay the cost of treatment to the best of his ability. (Emphasis added.) Once an offender applies for the treatment program, the prosecuting attorney may oppose the application for treatment. NRS 484.37941(2). If the prosecuting attorney opposes the application, the district court ''*shall* order a hearing on the application.'' *Id*. (emphasis added). NRS 484.37941(3) states that ''[i]f a hearing is not held, the court *shall* decide the matter and other information before the court.'' (Emphasis added.) This statutory language dictates that the district court is required to consider the merits of a DUI offender's application for treatment as well as any opposition proffered by the prosecuting attorney.[4]

Counties do not have to create a program of treatment before allowing third-time DUI offenders to apply for treatment pursuant to NRS 484.37941

[Headnote 10]

In reaching our conclusion that the district courts manifestly abused their discretion by refusing to consider petitioners' applications for treatment, we reject the State's suggestion that to allow diversion under NRS 484.37941, counties must establish a treatment program or facility. There is nothing in the statute to suggest that the district court or county is responsible for creating a treatment facility or program. Instead, NRS 484.37941 allows an offender to apply to participate in a treatment program and requires that offender to be accepted for treatment by a treatment facility that is certified by the Health Division of the Department of Health and Human Services. If the offender fails to be accepted for treatment, the district court may enter a judgment of conviction for a

[4]We reject the State's contention that the legislative history supports the conclusion that the district court has the discretion to refuse to consider an offender's application for treatment. Instead, we conclude that the legislative history supports the conclusion that the Legislature intended the diversion program created in NRS 484.37941 to be available throughout the state. In fact, the Legislature seemed particularly concerned that the lack of treatment facilities available in rural counties would impact the ability of rural offenders to elect treatment under the statute and they would be forced to serve prison sentences instead. Hearing on S.B. 277 Before the Senate Comm. on the Judiciary, 74th Leg. (Nev., April 3, 2007); Hearing on S.B. 277 Before the Senate Comm. on the Judiciary, 74th Leg. (Nev., April 10, 2007). But the scarcity of treatment facilities in some counties does not lead to the conclusion that a qualified offender may not *apply* for treatment when a placement is available.

third-offense DUI. NRS 484.37941(4)(b)(2) (providing that ''[i]f [the defendant] is not accepted for treatment by such a treatment facility, or if he fails to complete the treatment satisfactorily, the court will enter a judgment of conviction for a violation of paragraph (c) of subsection 1 of NRS 484.3792'').

[Headnote 11]

Moreover, to the extent that NRS 484.37941(5) mandates that the district court ''shall administer the program of treatment,'' we conclude that this language refers to the district court overseeing the procedures and conditions of probation imposed upon the offender at the time the district court accepts the offender's application for treatment. A review of NRS 484.37941(5) reveals that the administration of the treatment program does not require the district court to establish or administer a separate program of treatment outside of the district court's normal docket.

Instead, NRS 484.37941(5) instructs the district court to administer the program of treatment pursuant to NRS 458.320 and 458.330. Importantly, neither of these two statutes requires counties to establish treatment programs. The first statute, NRS 458.320, requires the district court to: (1) order an approved facility to conduct an examination of the offender to determine his or her potential for rehabilitation and to provide a report on the results of the examination and recommend whether the offender should receive supervised treatment, (2) sentence the offender if the court determines that the offender is not a good candidate for treatment, (3) impose conditions of probation if the court determines that the offender is a good candidate for treatment, and (4) require whatever progress reports on the offender's treatment it deems necessary. NRS 458.320 also requires an offender to pay for his or her own treatment and requires the district court, to the extent that it is practicable, to arrange for an offender to be treated in a facility that receives state or federal funding. The statute further permits the district court to order the offender to perform community service in lieu of payment for the treatment program.

The second statute, NRS 458.330, provides for the deferment of an offender's sentence pending treatment and sets forth the proper procedures for the district court to follow in the event an offender's treatment facility determines that he or she is not likely to benefit from further treatment. These procedures may include transferring the offender to another facility or terminating treatment and holding a hearing to determine whether the offender should be sentenced. Because neither of these provisions requires rural counties to create their own treatment facilities or programs, we conclude that the State's contention that the establishment of a

treatment program is discretionary is based on a misinterpretation of the requirements of NRS 484.37941.[5]

The district court has jurisdiction to order the DOPP to supervise third-time DUI offenders

Petitioners contend that the district courts erred when they determined that NRS 484.37941 failed to provide the court with the means to supervise third-time DUI offenders who enter treatment programs pursuant to that statute. Specifically, petitioners contend that the district court has the authority to order the DOPP to supervise an offender undergoing treatment pursuant to NRS 484.37941. We agree.

[Headnote 12]

NRS 484.37941(4)(a) not only provides the district court with the authority to place an offender on probation while he is in treatment, the statute requires it. In particular, NRS 484.37941(4)(a) plainly states that if the district court decides to grant an offender's application for treatment, it must, ''without entering a judgment of conviction and with the consent of the offender, suspend further proceedings and place him on probation for not more than 5 years.'' In this respect, NRS 484.37941 is similar to other statutory provisions that allow the district court to divert an offender into treatment. *See* NRS 484.37937; NRS 484.3794; NRS 453.3363. Therefore, we conclude that NRS 484.37941 provides the district court with the authority to order the DOPP to supervise offenders who enter treatment pursuant to the statute.

A review of other statutory provisions further supports our conclusion. As a starting point, NRS 176A.100 broadly authorizes the district court to place an offender on probation, and NRS 176A.400(2) gives the district court the authority to impose conditions of probation, including the power to ''require the person as a condition of probation to participate in and complete to the satisfaction of the court any alternative program, treatment or activity deemed appropriate by the court.'' Upon the entry of an order placing a defendant on probation, NRS 176A.210(1) provides that the defendant ''[s]hall be deemed accepted for probation for all purposes.'' And the Legislature further has directed that

[5]Because we conclude that NRS 484.37941 requires neither the district court nor the counties to establish or administer a separate program of treatment outside of the district court's normal docket, we reject the district court's conclusion that NRS 484.37941 is an unfunded mandate. There is no language in this particular statute to suggest that the district court or the county is responsible for creating a program of treatment that would cost the county $5,000 or more. NRS 354.599; NRS 218.2479.

''[i]n placing any defendant on probation or in granting a defendant a suspended sentence, the court shall direct that he be placed under the supervision of the Chief Parole and Probation Officer.'' NRS 176A.400(4). With these provisions, the Legislature has provided the district court ample authority to place an offender on probation.

The plain language of NRS 484.37941 authorizes the district court to place a third-time DUI offender on probation while the offender is in a treatment program. And the general statutes regarding probation require that an offender granted probation be placed under the supervision of the DOPP. Therefore, we conclude that the district court erred when it determined that it lacked jurisdiction to require the DOPP to supervise offenders who enter treatment programs pursuant to NRS 484.37941.

NRS 484.37941 does not violate the separation-of-powers doctrine

[Headnote 13]

We also reject the district courts' conclusions that NRS 484.37941 violates the separation-of-powers doctrine because it requires the district court to fulfill duties reserved to the DOPP, which is part of the executive branch. NRS 484.37941 does not require the district court to fulfill the role of the DOPP. As discussed above, NRS 484.37941(5) only requires the district court to ''administer the program of treatment pursuant to . . . NRS 458.320 and 458.330'' by overseeing the procedures and conditions of probation imposed upon the offender at the time the district court accepts the offender's application for treatment. Pursuant to NRS 484.37941(4)(a), the actual supervision of the offender still rests with the DOPP. Thus, there is no merging of the judicial and executive power which would offend the separation-of-powers doctrine; to the contrary, there is an overlapping of powers that is permitted by the Nevada Constitution. *See Creps v. State*, 94 Nev. 351, 357-58, 581 P.2d 842, 846-47 (1978) (observing that in context of probation, executive and judicial powers often overlap because Legislature has dually allocated such powers to a large extent).

CONCLUSION

We conclude that the plain language of NRS 484.37941, together with the legislative history, gives all third-time DUI offenders who enter a guilty plea the option to apply for treatment.[6] We further

[6]Because we conclude that the district court must consider the merits of a third-offense DUI offender's application for treatment pursuant to NRS 484.37941, we find it unnecessary to reach the merits of Hernandez's claim that NRS 484.37941 violates the Equal Protection Clause of the Fourteenth

conclude that when the district court grants an offender's application for treatment, it has jurisdiction to order the DOPP to supervise those offenders pursuant to NRS 484.37941. Finally, we reject the district courts' conclusion that NRS 484.37941 violates the separation-of-powers doctrine by requiring the district court to perform duties reserved to the executive branch. In these cases, the district courts erroneously refused to consider the merits of the petitioners' requests to plead guilty and apply for treatment. Accordingly, we grant the petitions. The clerk of this court shall issue writs of mandamus instructing the district courts to consider the petitioners' requests to plead guilty and apply for treatment pursuant to NRS 484.37941.[7]

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

MICHELLE STALK AND URBAN CONSTRUCTION COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANTS, *v.* MICHAEL MUSHKIN, RESPONDENT.

No. 48201

January 29, 2009 199 P.3d 838

Appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Client sued attorney for negligence, intentional interference with prospective business advantage, intentional interference with contractual relations, and breach of fiduciary duty, all relating to actions taken by attorney on behalf of another company. The district court granted summary judgment to attorney on all claims. Client appealed. The supreme court, HARDESTY, C.J., held that: in matters of first impression, (1) claims for intentional interference with prospective business advantage and for contractual relations were subject to three-year limitations period, and (2) claim of breach of fiduciary duty against client's attorney was subject to four-year statute of limitations.

Affirmed in part, reversed in part, and remanded.

Amendment because it allows offenders who reside in Washoe and Clark County to participate in a treatment program while excluding offenders who reside in rural counties from participating in that same treatment program.

[7]We vacate the stay imposed by this court's November 9, 2007, order in Docket No. 50445.

Kenneth L. Hall, Las Vegas, for Appellants.

Patti, Sgro & Lewis and *Mark C. Hafer*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court order granting a motion for summary judgment de novo.
2. JUDGMENT.
   Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.
3. JUDGMENT.
   Summary judgment is proper when a cause of action is barred by the statute of limitations.
4. APPEAL AND ERROR.
   Issues of statutory interpretation are reviewed de novo.
5. ACTION; TORTS.
   Claims for interference with prospective business advantage and with contractual relations are recognized as actions in tort, not in contract, and will be governed by the statute of limitations relating to torts.
6. TORTS.
   Claims for intentional interference with a prospective business advantage and contractual relations seek compensation for damage to business interests, which are personal property.
7. TORTS.
   Plaintiff's claims for intentional interference with prospective business advantage and contractual relations were actions for taking personal property rather than actions for injuries to a person, and thus, such claims were subject to three-year statute of limitations. NRS 11.190(3)(c).
8. FRAUD.
   A breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship.
9. ATTORNEY AND CLIENT.
   Client's breach of fiduciary duty claim against its attorney, who, while representing another employer in a wrongful discharge matter, alerted plaintiff that client was an indispensable party as the true employer, was subject to limitations period for malpractice actions against attorneys, rather than an action for fraud subject to a three-year limitations period. NRS 11.190(3)(d), 11.207(1).

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

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we consider which statutes of limitation apply to claims for intentional interference with prospective business advantage, intentional interference with contractual relations, and breach of fiduciary duty arising from an attorney-client relation-

ship. We determine that claims for intentional interference with prospective business advantage and contractual relations are claims for injuring personal property and are subject to the three-year statute of limitations in NRS 11.190(3)(c). A claim for breach of fiduciary duty arising from an attorney-client relationship is a legal malpractice claim and is therefore subject to the statute of limitations contained in NRS 11.207(1). Based on these determinations, we affirm the district court's summary judgment on the claims for intentional interference with prospective business advantage and contractual relations, and we reverse the district court's summary judgment on the claim for breach of fiduciary duty arising from the attorney-client relationship.

FACTS AND PROCEDURAL HISTORY

This case involves numerous legal and business relationships between respondent Michael Mushkin; appellants Michelle Stalk and her company, Urban Construction Company, LLC; and Allan Bird and his corporation, Real Property Services Corporation (RPSC). Bird and RPSC are not parties to this appeal. Mushkin, an attorney, served as legal counsel to Stalk, Bird, and their respective entities. Mushkin also had a business relationship with Bird, during which he presented Bird with investment opportunities. Stalk and Urban Construction also had a 30-year business relationship with Bird and RPSC developing various parcels of real property.

Beginning in May 2001, Mushkin served as defense counsel for Stalk and Urban Construction in various mechanic's lien matters. While the mechanic's lien claims were being litigated, Mushkin began representing RPSC in an employment wrongful termination action. On behalf of RPSC, Mushkin filed a motion to dismiss or for summary judgment, arguing that the employee who brought the action actually had been employed by Urban Construction and that Stalk had made the decision to terminate that employee. Mushkin asserted that Stalk and Urban Construction were therefore ''indispensable parties'' to the employee's suit for wrongful discharge. Although the motion was denied, in January 2002, the employee amended her complaint to name Urban Construction as a defendant. Subsequently, in May 2003, Stalk attended a settlement conference in the wrongful termination case. According to Stalk, it was at this conference that she learned that Urban Construction had been added as a defendant because of Mushkin's summary judgment motion. Stalk ultimately settled with the employee for $2,000.

In the meantime, Urban Construction and RPSC were parties to several contracts for the performance of construction services, and they had started the preliminary stages of development on two other projects. However, Bird later terminated Urban Construction

as general contractor for RPSC by letter dated June 7, 2001. Stalk and Urban Construction alleged that shortly before Bird terminated the general construction agreements it had with Urban Construction, Mushkin solicited a personal friend to bid on the construction projects that RPSC had contracted with Urban Construction to complete. According to Stalk and Urban Construction, Mushkin's actions caused Bird to terminate its contracts with Urban Construction.

Stalk and Urban Construction ultimately filed the underlying suit against Mushkin on August 26, 2004, asserting claims for negligence, intentional interference with prospective business advantage, intentional interference with contractual relations, and breach of fiduciary duty. The claims for intentional interference with prospective business advantage and contractual relations were predicated on Mushkin's alleged interference with the contracts Urban Construction had with RPSC, and the breach of fiduciary duty claim was based on Mushkin's actions in the employment action, specifically, alerting the employee that Stalk and Urban Construction were indispensible defendants.

Finding that Stalk and Urban Construction sought damages for injuries caused by Mushkin's negligence or wrongful acts, the district court granted summary judgment on the negligence cause of action for failure to state a claim and granted summary judgment on the three remaining claims on the ground that they were time-barred by the two-year statute of limitations under NRS 11.190(4)(e). Stalk and Urban Construction now appeal from the summary judgment as to the claims for intentional interference with prospective business advantage, intentional interference with contractual relations, and breach of fiduciary duty.

DISCUSSION

This matter presents two issues of first impression, as we have not previously announced the statutes of limitation applicable to claims for intentional interference with prospective business advantage and contractual relations or for breach of fiduciary duty in the context of an attorney-client relationship. We take this opportunity to do so.

Standard of review

[Headnotes 1-4]

This court reviews a district court order granting a motion for summary judgment de novo. *Sustainable Growth v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006). ''Summary judgment is . . . appropriate [only] when no genuine issues of material fact [exist] and the moving party is entitled to judgment as a matter of

law.'' *Clark v. Robison*, 113 Nev. 949, 950, 944 P.2d 788, 789 (1997). Thus, ''[s]ummary judgment is proper when a cause of action is barred by the statute of limitations.'' *Id.* at 950-51, 944 P.2d at 789. We also review issues of statutory interpretation de novo. *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008).

Claims for intentional interference with prospective business advantage and intentional interference with contractual relations are claims for injury to personal property and are therefore subject to the three-year statute of limitations in NRS 11.190(3)(c)

Stalk and Urban Construction argue on appeal that NRS 11.190(2)(c)'s four-year statute of limitations applies to both of their intentional interference claims because those claims are grounded on damage to intangible or inchoate interests in obtaining future benefits. In response, Mushkin maintains that the district court properly applied NRS 11.190(4)(e)'s two-year statute of limitations. He alternatively argues that NRS 11.190(3)(c)'s three-year limitation period applies because a contract right is personal property. Under either statute, Mushkin asserts that summary judgment was appropriate because more than three years elapsed before Stalk and Urban Construction filed their complaint.

Here, the district court concluded that NRS 11.190(4)(e) applied to Stalk and Urban Construction's claims for intentional interference with a prospective business advantage and with contractual relations. NRS 11.190(4)(e) provides a two-year statute of limitations for ''action[s] to recover damages for injuries to a person . . . caused by the wrongful act or neglect of another.'' Although Mushkin asserts that this provision provides the statute of limitations for all wrongful act torts generally, we have previously addressed and rejected this argument.[1]

To determine the statute of limitations applicable to claims for intentional interference with prospective business advantage and contractual relations, we must first determine the true nature of those claims. *See Hartford Ins. v. Statewide Appliances*, 87 Nev. 195, 197, 484 P.2d 569, 571 (1971) (explaining that the object of the action, rather than the legal theory under which recovery is sought, governs when determining the type of action for statute of

[1]In *Hanneman v. Downer*, we explained that NRS 11.190(4)(e) ''applies only to personal injury and wrongful death actions'' and that other tort causes of action, such as those for fraud and damage to real property, are governed by other, more specific statute of limitations provisions. 110 Nev. 167, 180 n.8, 871 P.2d 279, 287 n.8 (1994). Following the *Hanneman* court, we determine that NRS 11.190(4)(e) is limited to personal injury and wrongful death actions and does not apply to claims for intentional interference with prospective business advantage and contractual relations.

limitations purposes). Claims for intentional interference with a prospective business advantage and contractual relations seek compensation for damage to business interests. *See Zimmerman v. Bank of America National T. & S. Ass'n*, 12 Cal. Rptr. 319, 321 (1961) (''The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.''). Business interests include intangible assets and inchoate rights, as well as other rights incidental to business ownership. *See Teller v. Teller*, 53 P.3d 240, 248 (Haw. 2002) (indicating that goodwill and trade secrets are intangible assets in which business owners have property rights). *See also Clark v. Figge*, 181 N.W.2d 211, 215 (Iowa 1970) (citing *Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928), *overruled on other grounds by North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 167 (1973)). Such interests are personal property.

[Headnote 5]

Generally, claims for interference with prospective business advantage and with contractual relations are recognized as actions in tort, not in contract, and will be governed by the statute of limitations relating to torts. Maurice T. Brunner, Annotation, *What Statute of Limitations Governs Action for Interference with Contract or Other Economic Relations*, 58 A.L.R.3d 1027, § 2[a] (1974). However, in some jurisdictions, including Nevada, where separate statutes govern injuries to persons and injuries to property, there is a split of authority as to which statute of limitations applies to claims for intentional interference with prospective business advantage and contractual relations. *Id.*; *see also* NRS 11.190(3)(c) and 11.190(4)(e). We therefore must determine whether Nevada's statute of limitations governing injuries to persons or the statute of limitations governing property damage apply to claims for intentional interference with a prospective business advantage and contractual relations.

[Headnote 6]

As explained above, claims for intentional interference with a prospective business advantage and contractual relations seek compensation for damage to business interests, which are personal property. *See Teller*, 53 P.3d at 248; *see also Clark*, 181 N.W.2d at 215 (citing *Liggett*, 278 U.S. at 111).

[Headnote 7]

Because we have determined that business interests are personal property, we conclude that intentional interference with these business interests are actions for taking personal property and not actions for injuries to a person. *See Clark*, 181 N.W.2d at 216 (concluding that a claim for interference in business relationships was

''fundamentally proprietary in character although incidental injuries may have been of a different nature''). Thus, we conclude that intentional interference with business interests are subject to the three-year statute of limitations set forth in NRS 11.190(3)(c).

Nevertheless, despite the district court's application of an incorrect two-year statute of limitations, summary judgment was appropriate on Stalk and Urban Construction's claims for intentional interference with a prospective business advantage and with contractual relations because those claims are time-barred by the correct three-year statute of limitations set forth in NRS 11.190(3)(c). In particular, the statutes of limitation began running on Stalk and Urban Construction's claims when Bird terminated Urban Construction as the general contractor for RPSC by letter dated June 7, 2001. While Stalk and Urban Construction offer various events as triggering the beginning of the limitations period on their claims for intentional interference with prospective advantage and contractual relations, the letter from Bird occurred last in time among the proposed triggering events. Stalk and Urban Construction filed this action on August 26, 2004, more than three years after Urban Construction was terminated as general contractor. Since Stalk and Urban Construction failed to file this action within three years of the triggering event, their claims are time-barred under NRS 11.190(3)(c), and the district court therefore properly entered summary judgment on their claims for intentional interference with a prospective business advantage and intentional interference with contractual relations. *See Butler v. Bayer*, 123 Nev. 450, 460 n.22, 168 P.3d 1055, 1062 n.22 (2007) (''[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.'' (quoting *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987))).

A claim for breach of fiduciary duty arising from an attorney-client relationship is a legal malpractice claim subject to NRS 11.207(1)'s limitation period

The district court granted summary judgment on Stalk and Urban Construction's claim for breach of fiduciary duty on the ground that the claim was barred by the two-year statute of limitations in NRS 11.190(4)(e), which applies to claims for damages based on the defendant's wrongful or negligent conduct. On appeal, pointing to this court's earlier decisions addressing breach of fiduciary duty claims, Urban Construction, Stalk, and Mushkin all maintain that NRS 11.190(3)(d)'s three-year statute of limitations, which governs fraud claims, should apply to Urban Construction and Stalk's breach of fiduciary duty claim. *See Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990); *Golden Nugget, Inc. v. Ham*, 98 Nev. 311, 313, 646 P.2d

1221, 1223 (1982); *Shupe v. Ham*, 98 Nev. 61, 64, 639 P.2d 540, 542 (1982). As explained above, however, we first must determine the true nature of the claim for breach of fiduciary duty before determining the applicable statute of limitations. *See Hartford Ins. v. Statewide Appliances*, 87 Nev. 195, 197, 484 P.2d 569, 571 (1971) (explaining that the object of the action, rather than the legal theory under which recovery is sought, governs when determining the type of action for statute of limitations purposes).

In asserting a claim for breach of fiduciary duty, Stalk and Urban Construction claimed that Mushkin breached his fiduciary duty to them by disclosing information harmful to their interests while he was acting as their attorney and also representing RPSC in the employment discrimination action. In their complaint, Stalk and Urban Construction essentially alleged that Mushkin, as their attorney, owed them an undivided duty of loyalty and a duty of confidentiality. They claimed that Mushkin breached those duties when he revealed information that subjected them to tort liability during the employment action filed against Bird.

[Headnote 8]

Under the Restatement (Second) of Torts, a ''fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'' Restatement (Second) of Torts § 874 cmt. a (1979). Thus, a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship. *Id.* We previously have declared that Nevada Rule of Professional Conduct (RPC) 1.7 imposes a duty of loyalty on lawyers that prohibits representation of more than one client if the ''representation involves a concurrent conflict of interest or a significant risk that the dual representation will materially limit the lawyer's ability to represent one or both clients.''[2] *Ryan v. Dist. Ct.*, 123 Nev. 419, 430, 168 P.3d 703, 710 (2007). The duty of loyalty is based in the contractual relationship between attorney and client and correspondingly invokes the duty of confidentiality. *See* RPC 1.6; *Warmbrodt v. Blanchard*, 100 Nev. 703, 707, 692 P.2d 1282, 1285 (1984) (''It is the 'contractual relationship creating a duty of due care upon an attorney [which is] the primary essential to a recovery for legal malpractice.' '' (alteration in original) (quoting *Ronnigen v. Hertogs*, 199 N.W.2d 420, 421 (Minn. 1972))), *su-*

[2]Although the codification of fiduciary duties in the Nevada Rules of Professional Conduct does not provide an individual with a private right of action, the rules serve as evidence of the duty of care owed by an attorney to his or her client. *See Mainor v. Nault*, 120 Nev. 750, 769, 101 P.3d 308, 321 (2004).

perseded in part by statute, NRS 42.001, *as explained in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 741-43, 192 P.3d 243, 253-55 (2008); *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. Ct. App. 2000).

A cause of action for legal malpractice encompasses breaches of contractual as well as fiduciary duties because both ''concern[ ] the representation of a client and involve[ ] the fundamental aspects of an attorney-client relationship.'' 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 14:2 (2007). Thus, NRS 11.207, which sets forth the statute of limitations for ''[m]alpractice actions against attorneys,'' is applicable to legal malpractice claims, whether based on breach of contractual obligations or breach of fiduciary duties:

> An action against an attorney . . . to recover damages for malpractice, *whether based on a breach of duty* or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.

NRS 11.207(1) (emphasis added).

Such claims are subject to the statute of limitations in NRS 11.207(1). Here, Stalk and Urban Construction's breach of fiduciary duty claim is, in essence, a legal malpractice claim, since it is grounded on allegations that Mushkin breached certain duties, namely, confidentiality and loyalty, that would not exist but for the attorney-client relationship.

[Headnote 9]

Accordingly, the district court's conclusion that NRS 11.190(4)(e) applied to Stalk's breach of fiduciary duty claim was in error. Based on our assessment of the true nature of Stalk and Urban Construction's claim, we likewise reject the parties' contention that NRS 11.190(3)(d) governs the breach of fiduciary duty claim at issue here. While the parties rely on a line of Nevada cases holding that claims for breach of fiduciary duty are akin to claims for fraud and are therefore subject to the three-year limitation on actions in NRS 11.190(3)(d), those cases do not control our analysis here because none involved an attorney-client relationship. *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990); *Golden Nugget, Inc. v. Ham*, 98 Nev. 311, 313, 646 P.2d 1221, 1223 (1982); *Shupe v. Ham*, 98 Nev. 61, 64, 639 P.2d 540, 542 (1982). Accordingly, we clarify now that claims for breach of fiduciary duty arising out of an attorney-client relationship are legal malpractice claims subject

to NRS 11.207(1)'s limitation period, and claims for breach of fiduciary duty based on fiduciary relationships other than attorney-client are akin to fraud claims, subject to the limitation period set forth under NRS 11.190(3)(d).[3]

Although we have determined that Stalk and Urban Construction's breach of fiduciary duty claim asserts legal malpractice, the question remains whether summary judgment was appropriate under the statute of limitations that governs such claims. In the district court, the parties disputed what event triggered the running of the statute of limitations. Specifically, Stalk and Urban Construction argued that the limitations period began to run in May 2003, when Stalk learned of the motion filed by Mushkin naming Stalk and Urban Construction as indispensable parties in the wrongful termination action that was filed against RPSC. Mushkin, on the other hand, argued that various earlier events triggered the statute of limitations and that Stalk and Urban Construction's claim would be time-barred if any of these events marked the beginning of the statute of limitations period. Because genuine issues of material fact exist concerning the date on which the statute of limitations began to run, and thus whether Stalk and Urban Construction's claim for breach of fiduciary duty is time-barred, the district court erred by entering summary judgment on that claim.

CONCLUSION

Although the district court erred by determining that Stalk and Urban Construction's claims for intentional interference with a prospective business advantage and intentional interference with contractual relations were barred by the two-year statute of limitations under NRS 11.190(4)(e), those claims nevertheless were time-barred under the appropriate three-year statute of limitations, and the district court therefore properly entered summary judgment on those claims. Claims for intentional interference with a prospective business advantage and intentional interference with contractual relations are claims for injury to personal property, subject to the three-year statute of limitations contained in NRS 11.190(3)(c). Accordingly, we affirm the summary judgment on the claims for intentional interference with a prospective business advantage and intentional interference with contractual relations.

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[3]Claims subject to NRS 11.190(3)(d) include those brought against attorneys in which the plaintiff alleges a breach of a fiduciary duty owed outside of the scope of an attorney-client relationship. That is, ''[w]hen an attorney becomes involved in nonlegal business activities, he may not claim protection of the legal malpractice statute because the basis for a legal malpractice action is a claim of *professional* negligence.'' *Quintilliani v. Mannerino*, 72 Cal. Rptr. 2d 359, 365 (Ct. App. 1998).

The district court also erred by finding that Stalk and Urban Construction's breach of fiduciary duty claim was subject to NRS 11.190(4)(e)'s two-year statute of limitations. Instead, claims for breach of fiduciary duty arising from an attorney-client relationship are claims for legal malpractice subject to the statute of limitations contained in NRS 11.207(1). Because Stalk and Urban Construction allege that, by disclosing information harmful to their interests, Mushkin breached his duties of loyalty and confidentiality to them by virtue of the fact that he was their attorney, we conclude that the claim is essentially a legal malpractice claim, subject to NRS 11.207(1). Since genuine issues of material fact exist regarding when the statute of limitations began to run on that claim, summary judgment was not appropriate. Accordingly, we reverse the summary judgment on Stalk and Urban Construction's claim for breach of fiduciary duty arising from an attorney-client relationship, and remand this matter to the district court for further proceedings.

PARRAGUIRRE and DOUGLAS, JJ., concur.

THE STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT, *v.* TRACY LYNN TERRACIN, RESPONDENT.

No. 48598

THE STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT, *v.* MATTHEW CASEY, RESPONDENT.

No. 50049

January 29, 2009 199 P.3d 835

Consolidated appeals from district court orders granting petitions for judicial review concerning the administrative revocation of respondents' driving privileges. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge (Docket No. 48598), and Michelle Leavitt, Judge (Docket No. 50049).

Motorists who were convicted of driving under the influence of intoxicating liquor (DUI) as first-time offenders sought reduction in revocation of their respective driver's licenses from 1 year to 90 days. The district courts reduced the periods of revocation. State appealed. The supreme court, DOUGLAS, J., held that revocation of driver's licenses for DUI offenders was based on the level of pun-

ishment assigned as opposed to the number of offenses within a 7-year period.

Affirmed.

Catherine Cortez Masto, Attorney General, and *Binu G. Palal* and *Kimberly A. Buchanan*, Deputy Attorneys General, Carson City, for Appellant.

Law Offices of John G. Watkins and *John Glenn Watkins*, Las Vegas, for Respondents.

1. STATUTES.
   The construction of a statute is a question of law, which is reviewed de novo, even in the administrative context.
2. STATUTES.
   When the language of a statute is plain and unambiguous, its intention must be deduced from such language, and the court has no right to go beyond it.
3. AUTOMOBILES.
   Motorists who were convicted as first-time driving while under the influence of intoxicating liquor (DUI) offenders, even though it was in each case the second offense in 7 years, were subject to revocation of their driving privileges for only 90 days, rather than for 1 year as applicable to second-time offenders; revocation was based on the punishment assigned rather than the number of offenses in a 7-year period. NRS 484.379, 484.3792.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

NRS 483.460 provides for the mandatory revocation of a person's driver's license if that person has been convicted of driving under the influence of intoxicating liquor (DUI). The length of the revocation period depends on the particular subsection of NRS 483.460 under which the conviction falls. In this case, respondents' driver's licenses were revoked under NRS 483.460(1)(b)(5), which provides for a 1-year revocation period, because they previously had been convicted of DUIs. The 1-year revocation period was imposed even though respondents were most recently charged, convicted, and sentenced as first-time DUI offenders, which typically requires only a 90-day revocation period. Disagreeing that the statute required a 1-year revocation period under these circum-

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

stances, however, the district court granted respondents' petitions for judicial review. These appeals followed.

In these consolidated appeals, we consider whether NRS 483.460, as amended in 2005, bases the period of revocation on the number of DUI convictions within a 7-year period or on the level of punishment prescribed by NRS 484.3792. We conclude that the plain and unambiguous language of NRS 483.460 bases the period of revocation on the level of punishment prescribed by NRS 484.3792, and thus, we affirm the district court's orders granting judicial review and reducing the period of revocation of respondents' driver's licenses from 1 year to 90 days.

FACTS AND PROCEDURAL HISTORY

These appeals have been consolidated because they each address the Nevada Department of Motor Vehicles' (DMV) concern regarding the interpretation of recently amended NRS 483.460(1).

In 2001, respondent Tracy Lynn Terracin was arrested and convicted of DUI. After receiving the record of Terracin's first DUI conviction, appellant DMV revoked her driver's license for 90 days under the former version of NRS 483.460(1)(c), which imposed upon the DMV a mandatory duty to revoke an individual's driving privileges ''[f]or a period of 90 days, if the offense is a first violation within 7 years.'' 2003 Nev. Stat., ch. 206, § 365, at 1154-55.

Then, in 2005, shortly after the Legislature amended NRS 483.460(1), Terracin was again arrested for DUI. Despite this being her second DUI offense within a 7-year period, Terracin was charged, convicted, and sentenced as a first-time DUI offender under NRS 484.3792(1)(a). After receiving the record of Terracin's second DUI conviction, the DMV revoked her driving privileges for 1 year under the amended version of NRS 483.460(1)(b)(5), which imposes upon the DMV a mandatory duty to revoke an individual's driving privileges ''[f]or a period of 1 year if the offense is . . . punishable pursuant to'' NRS 484.3792(1)(b).

Similarly, in 2004, respondent Matthew Casey was arrested and convicted of DUI. Upon receiving the record of Casey's first DUI conviction, the DMV revoked his license for a period of 90 days under the former version of NRS 483.460(1)(c). Less than 2 years later, Casey was again arrested for driving under the influence. Following his second DUI offense, Casey was charged as a second-time DUI offender under NRS 484.3792(1)(b). However, this charge was later reduced, and Casey was convicted as a first-time DUI offender under NRS 484.3792(1)(a). After receiving the

record of Casey's second DUI conviction, the DMV revoked his driving privileges for 1 year pursuant to NRS 483.460(1)(b)(5).

Review of revocation

Respondents each requested an administrative hearing to review the 1-year revocation of their driving privileges. The DMV hearing officers upheld the 1-year revocations and concluded that the period of revocation under NRS 483.460(1) is based upon the number of DUI convictions within a 7-year period. Therefore, according to the hearing officers, respondents were subject to a 1-year revocation of their driving privileges because they had received two DUI convictions within a 7-year period.

Respondents then filed petitions for judicial review with the district court, arguing that the hearing officers improperly interpreted NRS 483.460(1). The district court granted respondents' petitions for judicial review and reduced the 1-year period of revocation to 90 days. In its orders, the district court concluded that NRS 483.460(1), as amended, bases the period of revocation not upon the number of DUI convictions within a 7-year period but upon the level of punishment prescribed by NRS 484.3792. Following their second DUI offenses, respondents were convicted as first-time DUI offenders under NRS 484.3792(1)(a). Under the amended version of NRS 483.460(1)(c), if the offense is punishable pursuant to NRS 484.3792(1)(a), the period of revocation is 90 days. Therefore, the district court found that respondents were subject to a 90-day revocation of their driving privileges and granted these petitions for judicial review. These appeals followed.

DISCUSSION

[Headnotes 1, 2]

The question before this court is purely one of statutory construction, namely, whether NRS 483.460(1) bases the period of revocation of an individual's driver's license on the number of DUI convictions within a 7-year period or on the level of punishment prescribed by NRS 484.3792. The construction of a statute is a question of law, which we review de novo, even in the administrative context. *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 476, 874 P.2d 1247, 1249 (1994). '' 'When the language of a statute is plain' '' and unambiguous, '' 'its intention must be deduced from such language, and the court has no right to go beyond it.' '' *Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979) (quoting *State of Nevada v. Washoe County*, 6 Nev. 104, 107 (1870)).

NRS 483.460(1) imposes upon the DMV a mandatory duty to revoke an individual's driving privileges for a specified period of

time upon receiving a record of conviction for DUI. Before NRS 483.460 was amended to its current form, this court, in *Yohey v. State, Department of Motor Vehicles*, reviewed the statute and concluded that the period of revocation was clearly and unambiguously based upon the number of DUI convictions within a 7-year period. 103 Nev. 584, 586, 747 P.2d 238, 239 (1987). In that case, the driver had been convicted as a first-time DUI offender twice within a 7-year period. *Id.* at 585-86, 747 P.2d at 239. After receiving the record of the driver's second DUI conviction, the DMV revoked his driving privileges for 1 year. *Id.* at 586, 747 P.2d at 239. On appeal, this court affirmed the 1-year revocation of his driver's license because he had received two DUI convictions within a 7-year period. *Id.* at 587-88, 747 P.2d at 239-40.

Subsequent to our decision in *Yohey*, in 2005, the Legislature amended NRS 483.460. 2005 Nev. Stat., ch. 193, § 1, at 604-05. NRS 483.460 now reads, in pertinent part, as follows:

> 1. Except as otherwise provided by statute, the department shall revoke the license, permit or privilege of any driver upon receiving a record of his conviction . . . .
>
> (a) For a period of 3 years if the offense is:
>
> . . . .
>
> (2) A ~~[third or subsequent violation within 7 years]~~ **violation** of NRS 484.379 ~~[.]~~ **that is punishable as a felony pursuant to NRS 484.3792.**
>
> . . . .
>
> (b) For a period of 1 year if the offense is:
>
> . . . .
>
> (5) A ~~[second violation within 7 years]~~ **violation** of NRS 484.379 **that is punishable pursuant to paragraph (b) of subsection 1 of NRS 484.3792** . . . .
>
> . . . .
>
> (c) For a period of 90 days, if the offense is a ~~[first violation within 7 years]~~ **violation** of NRS 484.379 ~~[.]~~ **that is punishable pursuant to paragraph (a) of subsection 1 of NRS 484.3792.**

Id. (bold indicates language added and strikethrough indicates language removed). Thus, NRS 483.460 no longer bases the period of revocation on the number of DUI convictions within a 7-year period. Rather, the plain and unambiguous language of the statute, in its current form, bases the period of revocation on the level of punishment prescribed by NRS 484.3792. NRS 484.3792, in turn, provides a graduated penalty scheme for repeat DUI offenders.

[Headnote 3]

Under NRS 483.460(1) and the graduated penalty provisions of NRS 484.3792, the DMV must revoke an individual's driving

privileges for 90 days if the driver is punishable as a first-time DUI offender pursuant to NRS 484.3792(1)(a). *See* NRS 483.460(1)(c). If the driver is punishable as a second-time DUI offender under NRS 484.3792(1)(b), the DMV must revoke the individual's driver's license for a period of 1 year. *See* NRS 483.460(1)(b)(5). Finally, if the driver is punishable pursuant to a felony under NRS 484.3792, the DMV must revoke the individual's driver's license for a period of 3 years. *See* NRS 483.460(1)(a)(2).

Regarding these matters, Terracin was arrested for her first DUI offense in 2001. Then, in 2005, Terracin was again arrested for DUI. As this was Terracin's second DUI offense within a 7-year period, Terracin could have been charged as a second-time DUI offender under NRS 484.3792(1)(b). However, Terracin was charged, convicted, and sentenced as a first-time DUI offender under NRS 484.3792(1)(a).

Likewise, Casey was arrested for DUI in 2004. Then, approximately 1½ years later, Casey was again arrested for DUI. Since this was Casey's second DUI offense within a 7-year period, Casey was charged as a second-time DUI offender under NRS 484.3792(1)(b). However, this charge was later reduced to a first-time DUI offense under NRS 484.3792(1)(a). Casey was subsequently convicted and sentenced as a first-time DUI offender under NRS 484.3792(1)(a).

In each of these cases, respondents were convicted as first-time DUI offenders under NRS 484.3792(1)(a). Therefore, respondents were punishable pursuant to NRS 484.3792(1)(a). The mandatory period of revocation under NRS 483.460(1)(c), following a violation that is punishable pursuant to NRS 484.3792(1)(a), is 90 days. *See* NRS 483.460(1)(c). Accordingly, as the Legislature has clearly set forth the period for which a license must be revoked for a DUI in terms of punishability, we conclude that it was improper for the DMV to revoke respondents' driving privileges for 1 year.

CONCLUSION

Upon receiving records of conviction, the DMV must first determine whether the DUI offenders were punishable pursuant to NRS 484.3792(1)(a), (b), or (c). Then, the DMV must apply the level of punishment under NRS 484.3792(1) to the corresponding period of revocation under NRS 483.460(1).

Here, respondents were punishable pursuant to NRS 484.3792(1)(a). The period of revocation under NRS 483.460(1)(c), following a DUI violation that is punishable pursuant to NRS 484.3792(1)(a), is 90 days. Therefore, the DMV was required to revoke respondents' driving privileges for a period of

90 days. For the foregoing reasons, we affirm the district court's orders granting judicial review.

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

THE STATE OF NEVADA, BY ITS ATTORNEY GENERAL, CATHERINE CORTEZ MASTO, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE BRENT T. ADAMS, DISTRICT JUDGE, RESPONDENTS, AND PHILIP MORRIS USA; R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; ANDERSON TOBACCO COMPANY LLC; CANARY ISLAND CIGAR COMPANY; CHANCELLOR TOBACCO COMPANY UK LIMITED; COMPANIA INDUSTRIAL DE TABACOS MONTE PAZ, S.A.; DAUGHTERS AND RYAN, INC.; FARMERS TOBACCO COMPANY; GENERAL TOBACCO; HOUSE OF PRINCE A/S; INTERNATIONAL TOBACCO GROUP (LAS VEGAS), INC.; JAPAN TOBACCO INTERNATIONAL USA, INC.; KING MAKER MARKETING, INC.; KONCI G&D MANAGEMENT; KRETEK INTERNATIONAL; LIBERTY BRANDS, LLC; LIGGETT GROUP, INC.; M/S DHANRAJ INTERNATIONAL, INC.; PACIFIC STANFORD MANUFACTURING CORPORATION; PETER STOKKEBYE INTERNATIONAL A/S; PT DJARUM; SANTA FE NATURAL TOBACCO COMPANY, INC.; SHERMAN 1400 BROADWAY N.Y.C., INC.; TOP TOBACCO, L.P.; VIRGINIA CAROLINA CORPORATION, INC.; VON EICKEN GROUP; AND WIND RIVER TOBACCO COMPANY, LLC, REAL PARTIES IN INTEREST.

No. 49426

January 29, 2009 199 P.3d 828

Original petition for a writ of mandamus challenging a district court order granting a motion to compel arbitration.

State filed complaint for an enforcement order or declaratory order under master settlement agreement (MSA) with tobacco companies to preclude application of a downward adjustment in monies owed to State for State's failure to diligently enforce qualifying statutes that imposed certain escrow contributions on

tobacco companies that did not participate in the MSA. Tobacco companies moved to compel State to arbitrate issue of whether qualifying statute was diligently enforced. The district court granted the motion, and State petitioned for writ of mandamus to vacate the order. The supreme court, CHERRY, J., held that: (1) plain language of arbitration clause included arbitration of dispute over State's enforcement of its qualifying statute, and (2) plain language of MSA precluded State from submitting dispute over diligent enforcement of qualifying statute to state court.

Petition denied.

Catherine Cortez Masto, Attorney General, and *Victoria Thimmesch Oldenburg*, Senior Deputy Attorney General, Carson City, for Petitioner.

Bailey Kennedy and *Dennis L. Kennedy*, Las Vegas; *Kirkland & Ellis* and *Stephen R. Patton*, Chicago, Illinois, for Real Party in Interest R.J. Reynolds Tobacco.

Guild Russell Gallagher & Fuller and *John K. Gallagher*, Reno, for Real Parties in Interest Anderson Tobacco Company, Canary Island Cigar Company, Chancellor Tobacco Company UK, Compania Industrial de Tabacos Monte Paz, Daughters & Ryan, House of Prince, International Tobacco Group (Las Vegas), Japan Tobacco International USA, King Maker Marketing, Konci G&D Management, Kretek International, Liberty Brands, Liggett Group, M/S Dhanraj International, Pacific Stanford Manufacturing, Peter Stokkebye International, PT Djarum, Santa Fe Natural Tobacco Company, Sherman 1400 Broadway N.Y.C., Top Tobacco, Virginia Carolina Corporation, Von Eicken Group, and Wind River Tobacco Company.

Holland & Hart, LLP, and *J. Stephen Peek*, Reno, for Real Party in Interest Lorillard Tobacco Company.

McDonald Carano Wilson, LLP, and *Thomas R.C. Wilson II*, Reno, for Real Party in Interest Philip Morris USA.

Shea & Carlyon and *Candace C. Carlyon* and *Shawn W. Miller*, Las Vegas, for Real Parties in Interest General Tobacco and Farmers Tobacco Company.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control a manifest abuse of discretion.
2. MANDAMUS.
   Mandamus is an extraordinary remedy, and the decision to entertain such a petition is addressed solely to the court's discretion.

3. ALTERNATIVE DISPUTE RESOLUTION.
   Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law subject to de novo review.
4. CONTRACTS.
   In interpreting a contract, the court construes a contract that is clear on its face from the written language, and it should be enforced as written.
5. CONTRACTS.
   A contract is ambiguous only when it is subject to more than one reasonable interpretation.
6. ALTERNATIVE DISPUTE RESOLUTION.
   As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration.
7. ALTERNATIVE DISPUTE RESOLUTION; STATES.
   Plain language of arbitration clause in master settlement agreement (MSA) between State and tobacco companies included determination of whether State diligently enforced its qualifying statute to force nonparticipating manufacturers (NPM) to contribute to escrow fund as well as MSA companies, as required for State to avoid downward adjustment to annual payments from participating companies; arbitration clause broadly provided that all disputes arising out of or relating to annual payment audit be subject to arbitration.
8. ALTERNATIVE DISPUTE RESOLUTION; STATES.
   Plain language of master settlement agreement (MSA) between tobacco companies and settling states precluded State from submitting dispute over whether State was exempt from downward adjustment in annual payments to state court, as such dispute was subject to arbitration provision of the MSA.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

In 1997, the State of Nevada instituted an action against four major tobacco companies stemming from allegations of wrongdoing in the manner that the tobacco companies marketed and advertised their products. The parties ultimately settled during the litigation when, in 1998, they entered into a Master Settlement Agreement (MSA). The MSA is a settlement agreement between tobacco manufacturers and 46 states,[2] including Nevada, which instituted similar actions against certain tobacco manufacturers.

Under the MSA, tobacco companies that were party to the settlement were required to make annual payments to states that were

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

[2]The District of Columbia, American Samoa, the Northern Mariana Islands, Guam, the United States Virgin Islands, and Puerto Rico are also parties to the MSA.

party to the settlement. The amount of the tobacco companies' annual payment to a state depended, in part, on whether the state enacted and ''diligently enforced'' a so-called qualifying statute. Under the MSA, a qualifying statute is one that requires tobacco manufacturers selling cigarettes in a state to either join the MSA or place funds into an escrow account to help cover any of the state's future tobacco-related liability. A state's failure to enact and diligently enforce a qualifying statute may substantially reduce the annual payment it is otherwise entitled to receive under the MSA.

In April 2006, in response to allegations by certain tobacco companies that Nevada was not diligently enforcing its qualifying statute during 2003 and, thus, subject to a reduction in the annual payment amount that it received under the MSA, the State filed a complaint for an enforcement order or a declaratory order. Specifically, the State sought an enforcement order or declaration that Nevada had diligently enforced its qualifying statute during the 2003 calendar year.

In response, the tobacco companies moved the district court to compel arbitration to settle the matter. According to the tobacco companies, the clear terms of the MSA required the parties to arbitrate whether Nevada was diligently enforcing its qualifying statute. The district court ultimately granted the motion to compel arbitration. The State now petitions us for a writ of mandamus, directing the district court to vacate its order compelling arbitration and to consider the issues raised in the State's complaint on their merits.

In considering this petition, we determine whether Nevada state courts can resolve disputes arising under the MSA with respect to diligent enforcement of Nevada's qualifying statute or whether the MSA compels arbitration of such disputes. *See generally* NRS Chapter 370A and NRS 370A.140 (detailing that tobacco companies selling products in the State of Nevada must either become participating manufacturers under the MSA or must make deposits into a qualified escrow fund based on the number of units sold). In so doing, we first address the State's argument that the MSA's arbitration clause does not include such issues within its scope. We next address the State's corresponding contention that a separate provision of the MSA expressly requires that the parties submit such issues to state court.

We conclude that under the MSA's plain language, issues concerning the adjustment of Nevada's annual payment from the tobacco companies based on Nevada's enforcement of its qualifying statute must be arbitrated. Accordingly, we deny the State's petition.

FACTS

Nevada instituted an action against several major tobacco companies, real parties in interest R.J. Reynolds Tobacco Company, Philip Morris USA, and Lorillard Tobacco Company, in 1997.[3] On December 10, 1998, the parties settled the litigation and entered into a consent decree that was essentially a stopgap measure until the MSA was formalized and that enjoined tobacco companies from targeting youth within the State of Nevada with their promotions, marketing, or advertising. Subsequently, Nevada participated in the formation of, and ultimately joined, the MSA, a settlement agreement between the tobacco companies and other states that had already instituted similar litigation against those and other tobacco companies. Under the MSA, the tobacco companies that are party to it are divided into two groups: (1) Original Participating Manufacturers, and (2) Subsequent Participating Manufacturers. The Subsequent Participating Manufacturers, as their designation suggests, agreed to be bound by the MSA after the Original Participating Manufacturers and settling states already had formed the agreement.

The linchpin of the MSA is that the settling states agreed to release any future claims against participating tobacco companies, based on the health-care costs attributed to smoking, in exchange for the tobacco companies restricting the marketing of their products and making substantial annual payments to the settling states. With respect to each tobacco company's annual payment, under the MSA, the amount of each company's payment is determined on a nationwide basis by an independent auditor. To determine a tobacco company's annual payment, the independent auditor starts with a base payment amount set forth in the MSA, then makes adjustments to each company's annual payment as prescribed by the MSA. After the independent auditor determines each company's annual payment, it allocates the payments among the settling states, as the MSA sets forth.

The NPM adjustment

One MSA adjustment applied by the independent auditor that generally reduces a tobacco company's annual payment is the ''Non-Participating Manufacturer Adjustment'' (NPM adjustment), which essentially reduces a tobacco company's annual payment amount if that company, as a result of its participation in the MSA, loses its share of the tobacco market to a tobacco company

[3]The original suit was also brought against Brown & Williamson, which has since merged with R.J. Reynolds Tobacco Company.

that is not bound by the MSA. Specifically, section IX(d)(1) of the MSA provides that an NPM adjustment shall apply if: (a) the settling tobacco companies collectively lose market share to tobacco companies not subject to the MSA's payment obligations and marketing and other restrictions, and (b) an economic consulting firm determines that the MSA was a significant factor contributing to that loss. Nonetheless, under the MSA, a state can avoid an NPM adjustment by enacting, and diligently enforcing, a qualifying statute imposing certain payment obligations on tobacco companies doing business in that state that are not parties to the MSA. A qualifying statute is a statute that requires all tobacco manufacturers selling cigarettes in a state to either join the MSA or place funds into an escrow account for the benefit of the state's future tobacco-related liabilities. Under the MSA, an NPM adjustment may be made when it is determined that a state fails to diligently enforce its qualifying statute.

MSA's arbitration provision

Additionally with respect to the independent auditor, under the MSA's terms, disputes regarding the independent auditor's decision must be arbitrated. Under section XI(c) of the MSA, ''[a]ny dispute, controversy or claim arising out of or relating to'' the independent auditor's calculations and determinations[4] ''shall be submitted to binding arbitration'' before a nationwide panel of three former federal judges.

Dispute over the original participating manufacturers' April 2006 payment obligations

The present dispute concerns the independent auditor's determination that a settling tobacco company experienced a nationwide market share loss for the 2003 calendar year. In March 2006, the independent auditor concluded that the MSA was a significant contributing factor to the loss and calculated the 2003 NPM adjustment to be approximately $1.2 billion. The tobacco companies thus requested that the independent auditor apply the 2003 NPM adjustment to their 2006 payments to Nevada, asserting that Nevada failed to diligently enforce its qualifying statute in 2003. The independent auditor refused to apply an NPM adjustment to the tobacco companies' 2006 annual payments to Nevada because the independent auditor contended that it was not within the scope of his power under the MSA to make such a legal determination.

[4]Specifically the MSA provides that settling states arbitrate ''any dispute concerning the operation or application of any of the adjustments'' made by the independent auditor, including the ''diligent enforcement'' exemption. *See* MSA § XI(c).

Thereafter, the tobacco companies withheld millions of dollars from their 2006 settlement payment to Nevada because of the independent auditor's determination that the MSA was a significant contributing factor to the market share loss in 2003, the subsequent calculation of the NPM adjustment, and their belief that Nevada failed to diligently enforce its qualifying statute.

In response, on April 20, 2006, the State filed a complaint for an enforcement order or a declaratory order under the MSA. In its cause of action, the State sought a declaration or enforcement order that Nevada had diligently enforced its qualifying statute during the 2003 calendar year, precluding the tobacco companies from applying the independent auditor's NPM adjustment to their 2006 payment.

The tobacco companies answered the State's complaint and filed a motion to compel arbitration and to dismiss the State's complaint or stay the litigation.

The State opposed the tobacco companies' motion to compel arbitration, asserting among other arguments, that the MSA's arbitration clause did not extend to issues with regard to a state's enforcement of its qualifying statute. That is, the State argued that Nevada did not agree to arbitrate the diligent enforcement dispute.

The district court ultimately granted the motion to compel arbitration. In reaching its decision, the district court found that Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration. *See Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990). The district court also found that the relevant arbitration clause was quite expansive. Thus, the parties were ordered to pursue arbitration pursuant to section XI(c) of the MSA.

DISCUSSION

The State now petitions this court for a writ of mandamus directing the district court to vacate its order granting the tobacco companies' motion to compel arbitration. The tobacco companies have filed an answer to the petition, as directed.

[Headnotes 1, 2]

A writ of mandamus is available to compel the performance of an act that the law requires or to control a manifest abuse of discretion. *See* NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Mandamus, moreover, is an extraordinary remedy, and the decision to entertain such a petition is addressed solely to our discretion. *See Poulos v. District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). In general, a writ may issue only when petitioner has no plain, adequate, and speedy legal remedy, such as an appeal. NRS 34.170;

see Pan v. Dist. Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (noting that an appeal is generally an adequate legal remedy precluding writ relief). Importantly, then, as the order challenged here—a district court order compelling arbitration—is not an appealable order, and as we conclude that our consideration of this important issue is appropriate at this time, we exercise discretion to consider this writ petition. *Clark County v. Empire Electric, Inc.*, 96 Nev. 18, 19, 604 P.2d 352, 353 (1980); NRS 38.247.

Whether the MSA compels arbitration by its plain language

[Headnotes 3-6]

Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law that we review de novo. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990); *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990). In interpreting a contract, we construe a contract that is clear on its face from the written language, and it should be enforced as written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005). A contract is ambiguous only when it is subject to more than one reasonable interpretation. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007). As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration. *Phillips*, 106 Nev. at 417, 794 P.2d at 718.

With regard to the arbitrability of disputes concerning the independent auditor's decisions, section XI(c) of the MSA provides the following:

> Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge.

Furthermore, subsection IX(j), referenced in that provision, details the order in which allocations, offsets, reductions, and adjustments, including the NPM adjustment and corresponding exception for a state's diligent enforcement of its qualifying statute, will apply. Subsection XI(i) details the remedy for miscalculated or disputed payments, including that failure to dispute the independent auditor's calculation is tantamount to agreement with the calculations.

[Headnote 7]

In its petition, the State argues that the issue of whether Nevada diligently enforced its qualifying statute as required to avoid an NPM adjustment under the MSA is not within the scope of the MSA's arbitration clause, and thus, the district court erred in granting the tobacco companies' motion to compel arbitration. According to the State, the MSA's arbitration clause is limited to review of calculations of the independent auditor, and the clause does not extend to the auditor's resolution of mixed questions of law and fact, such as the question of whether Nevada diligently enforced its qualifying statute.

The tobacco companies contend that the MSA's plain language does not limit arbitrable issues only to those of specific calculations made by the independent auditor because subsection IX(j), referenced in the arbitration clause, specifically includes the NPM adjustment and the diligent enforcement exemption. Moreover, the tobacco companies argue that the State has not overcome the well-settled presumption in favor of arbitration.

Here, section XI(c)'s language is plain with regard to whether it requires that a dispute over an independent auditor's decision concerning a state's enforcement of its qualifying statute be arbitrated. Indeed, the MSA's arbitration clause broadly provides that all disputes ''arising out of or relating to'' the independent auditor's determinations ''shall be'' submitted to arbitration.[5] Certainly, as the arbitration clause's reference to section IX(j) suggests, an independent auditor's decision regarding a state's enforcement of its qualifying statute relates to the independent auditor's determination whether to make an NPM adjustment to a tobacco company's annual payment amount and, if so, how much of an adjustment to make, as such a determination is fundamental to any NPM adjustment. And no language within the MSA's arbitration clause supports the State's contention that arbitration is limited to calculations by the independent auditor. Thus, under the arbitration clause's clear language, disputes regarding diligent enforcement are subject to arbitration because of the clause's broad language.

Moreover, this conclusion is supported by the vast majority of jurisdictions that have addressed this issue, and in so doing concluded that the ''plain and unambiguous language of the MSA's arbitration provision requires arbitration of the parties' dispute concerning the NPM Adjustment, including the State's diligent enforcement defense.'' *People v. Lorillard Tobacco Co.*, 865

[5]We are persuaded by the United States Court of Appeals for the Eighth Circuit's decision in *Fleet Tire Serv. v. Oliver Rubber*, 118 F.3d 619, 621 (8th Cir. 1997), in which the court held that an arbitration clause containing the phrase ''relating to'' ''constitute[d] the broadest language the parties could reasonably use to subject their disputes to [arbitration].''

N.E.2d 546, 554 (Ill. App. Ct. 2007), *appeal denied*, 875 N.E.2d 1119 (Ill. 2007); *see also State v. Lorillard Tobacco*, 1 So. 3d 1, 5 (Ala. 2008); *State v. Philip Morris, Inc.*, 905 A.2d 42, 51 (Conn. 2006); *State, ex rel. Carter v. Philip Morris*, 879 N.E.2d 1212, 1216 (Ind. Ct. App. 2008); *Ieyoub v. Philip Morris, USA, Inc.*, 982 So. 2d 296, 300 (La. Ct. App. 2008), *appeal denied*, 992 So. 2d 942 (La. 2008); *State v. Philip Morris*, 944 A.2d 1167, 1182 (Md. Ct. Spec. App. 2008), *cert. denied*, 949 A.2d 653 (Md. 2008); *State ex rel., Bruning v. R.J. Reynolds*, 746 N.W.2d 672, 680 (Neb. 2008); *State v. Philip Morris USA, Inc.*, 927 A.2d 503, 509 (N.H. 2007); *State ex rel. N.M. Attorney General*, 194 P.3d 749, 754 (N.M. Ct. App. 2008); *State v. Philip Morris Inc.*, 813 N.Y.S.2d 71, 76 (App. Div. 2006), *aff'd*, 869 N.E.2d 636, 640 (N.Y. 2007); *State v. Philip Morris USA, Inc.*, 666 S.E.2d 783, 792-93 (N.C. Ct. App. 2008); *State v. Philip Morris, Inc.*, No. 06AP-1012, 2008 WL 2854536, at *10 (Ohio Ct. App., July 24, 2008); *State v. Philip Morris USA Inc.*, 945 A.2d 887, 892 (Vt. 2008).

Whether the MSA expressly excludes diligent enforcement disputes from the jurisdiction of state courts

Notwithstanding the arbitration clause's plain language, the State contends that a separate provision of the MSA requires that state courts resolve issues regarding a state's enforcement of its qualifying statute. Specifically, the State argues that section VII of the MSA broadly allows the parties to submit disputes arising under the MSA to state courts. The tobacco companies contend, however, that while section VII of the MSA allows the parties to submit certain disputes to state courts, it expressly excludes from state courts disputes concerning a state's enforcement of its qualifying statute.

MSA section VII(a) provides that:

> Each Participating Manufacturer and each Settling State acknowledge that the Court: (1) has jurisdiction over the subject matter of the action identified in Exhibit D in such Settling State and over each Participating Manufacturer; (2) shall retain exclusive jurisdiction for the purposes of implementing and enforcing this Agreement and the Consent Decree as to each Settling State; and (3) *except as provided in subsections IX(d), XI(c)* and XVII(d) and Exhibit O, shall be the only court to which disputes under this Agreement or the Consent Decree are presented as to such Settling State.

(Emphasis added.)

[Headnote 8]

Contrary to the State's argument, MSA section VII's plain language precludes parties from submitting diligent enforcement dis-

putes to state courts. Specifically, section VII broadly excludes the MSA's arbitration clause, section XI(c), from its scope. *See also People v. Lorillard Tobacco Co.*, 865 N.E.2d at 552 (concluding that section VII excludes the MSA's arbitration clause from its scope, thus precluding the argument that the parties agreed to submit diligent enforcement disputes to state court). Moreover, section VII also excludes section IX(d), which determines both the NPM adjustment and the subsidiary diligent enforcement determination from its scope. The MSA's requirement that diligent enforcement disputes be arbitrated makes sense, given the inherently national character of payment related disputes. *See id.* at 554. Diligent enforcement is not an issue solely affecting an individual state; diligent enforcement disputes affect all of the settling states, as the amounts each state receives are dependent on the diligent enforcement of other states. Therefore, the MSA compels arbitration of diligent enforcement disputes and ensures that such disputes are not subject to state court jurisdiction under the plain language of the MSA.

CONCLUSION

We conclude that the plain language of the MSA's arbitration provision specifically includes within its scope disputes concerning a state's diligent enforcement of its qualifying statute. The MSA's arbitration clause clearly pertains to disputes ''relat[ed] to'' the independent auditor's calculation of a tobacco company's annual payment under the settlement agreement. As the auditor's annual payment calculation takes into account whether a state has diligently enforced its qualifying statute, under the MSA's clear language, the determination whether a state has diligently enforced its qualifying statute is undoubtedly a determination ''relating to'' the auditor's calculation.

Further, the State's contention, that the MSA's provision outlining the issues that the parties agreed to submit to state courts includes disputes regarding a state's enforcement of its qualifying statute, is without merit. That provision clearly excludes from its scope the disputes covered by the MSA's arbitration clause and, as discussed, the MSA's arbitration clause plainly includes disputes pertaining to a state's diligent enforcement of its qualifying statute.

Accordingly, the district court's decision to compel the parties to arbitrate the dispute in this case is not a manifest abuse of its discretion, and thus, we deny the State's petition.

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

KATHY GARCIA, APPELLANT, *v.*
SCOLARI'S FOOD & DRUG, RESPONDENT.

No. 50046

January 29, 2009 200 P.3d 514

Proper person appeal from a district court order denying a petition for judicial review in an occupational disease matter. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Workers' compensation claimant sought judicial review of appeals officer's decision that denied claim for occupational disease benefits. The district court denied claimant's motion to present additional evidence and later denied petition for judicial review. Claimant appealed. The supreme court, HARDESTY, C.J., held that: (1) as a matter of first impression, for purposes of section of Administrative Procedure Act (APA) allowing district court to order that additional evidence be taken before an agency if good reasons exist for failing to present it during administrative proceeding, ''good reasons'' do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding and that party then seeks remand; (2) as a matter of first impression, failures of claimant's attorney to present functional capacity evaluation and doctor's letter to appeals officer did not constitute ''good reasons'' for remand; and (3) substantial evidence supported appeals officer's conclusion that claimant presented insufficient evidence to establish industrial causation of her medical condition.

Affirmed.

CHERRY, J., with whom SAITTA, J., agreed, dissented.

Kathy Garcia, Reno, in Proper Person.

McDonald Carano Wilson LLP and *Timothy E. Rowe*, Reno, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   For purposes of section of Administrative Procedure Act (APA) allowing district court to order that additional evidence be taken before an agency if good reasons exist for failing to present it during administrative proceeding, ''good reasons'' do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding and that party then seeks remand for reconsideration with that evidence after an adverse decision at the administrative level. NRS 233B.131(2).
2. WORKERS' COMPENSATION.
   For purposes of section of Administrative Procedure Act (APA) allowing district court to order that additional evidence be taken before an agency if good reasons exist for failing to present it during administrative proceeding, failures of attorney for workers' compensation claimant to

present functional capacity evaluation and doctor's letter to appeals officer did not constitute ''good reasons'' to remand to appeals officer for reconsideration with additional evidence, though claimant alleged that attorney's failures constituted negligence; withheld evidence was available at time of hearing but was not presented due to attorney's trial strategy. NRS 233B.131(2).

3. ADMINISTRATIVE LAW AND PROCEDURE.

The two principal inquiries under section of Administrative Procedure Act (APA) allowing district court to order that additional evidence be taken before an agency are whether the evidence sought to be added is material and whether ''good reasons'' exist for the failure to present the evidence to the administrative agency. NRS 233B.131(2).

4. ADMINISTRATIVE LAW AND PROCEDURE.

Because section of Administrative Procedure Act (APA) allowing district court to order that additional evidence be taken before an agency provides that the district court ''*may* order that the additional evidence and any rebuttal evidence be taken before the agency,'' the decision to grant or deny a request to remand a matter for the consideration of additional evidence is reviewed for an abuse of discretion. NRS 233B.131(2).

5. ADMINISTRATIVE LAW AND PROCEDURE.

Under section of Administrative Procedure Act (APA) allowing district court to order that additional evidence be taken before an agency, that a party's attorney makes what could be characterized as a poor decision with regard to what evidence to present at an administrative proceeding will not suffice to justify remand to the appeals officer for consideration of additional evidence, especially after an adverse decision is issued by the appeals officer and when the evidence sought to be presented was available at the time of the administrative hearing. NRS 233B.131(2).

6. WORKERS' COMPENSATION.

Substantial evidence supported appeals officer's conclusion that workers' compensation claimant, who suffered pain in arm and shoulders, presented insufficient evidence to establish industrial causation of her medical condition, and thus, claimant was not entitled to occupational disease benefits; evidence indicated that reports from claimant's initial medical examinations did not connect her condition to her employment, and doctor's independent medical evaluation stated that claimant's current symptomatology was nonindustrial condition attributable to aging process rather than her employment. NRS 617.358(1), 617.440.

7. ADMINISTRATIVE LAW AND PROCEDURE.

Supreme court reviews an administrative decision in the same manner as the district court.

8. ADMINISTRATIVE LAW AND PROCEDURE.

When reviewing an agency's decision, supreme court, like the district court, decides purely legal questions de novo.

9. ADMINISTRATIVE LAW AND PROCEDURE.

In reviewing questions of fact when reviewing an agency's decision, both the supreme court and the district court are prohibited from substituting their judgment for that of the agency.

10. ADMINISTRATIVE LAW AND PROCEDURE.

On factual issues, the supreme court is limited to determining whether there is substantial evidence in the record to support the agency's decision.

11. ADMINISTRATIVE LAW AND PROCEDURE.

For purposes of reviewing whether substantial evidence supports an appeals officer's conclusion on a factual issue, ''substantial evidence'' is

evidence that a reasonable mind might accept as adequate to support the appeals officer's conclusion.

12. ADMINISTRATIVE LAW AND PROCEDURE.

In reviewing an agency's decision, the reviewing court is confined to the record before the agency.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, C.J.:

This appeal seeks our review of a district court order denying a petition for judicial review of an administrative decision that denied occupational disease benefits. During the district court proceedings, appellant sought to have the matter remanded to the appeals officer pursuant to NRS 233B.131(2), which provides that the district court may order additional evidence to be taken before an administrative agency if the evidence is material and good reasons exist for failing to present it during the administrative proceeding. Appellant argued that her attorney negligently failed to introduce material evidence during the administrative proceedings. The district court denied appellant's request, however, after determining that appellant had failed to establish good reasons.

We take this opportunity to provide guidance on the good reasons standard set forth in NRS 233B.131(2). We conclude that good reasons do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding and that party then seeks remand for reconsideration with that evidence after an adverse decision by the administrative agency. Here, appellant did not establish good reasons for her failure to present the additional evidence to the appeals officer, and therefore, the district court did not abuse its discretion in denying appellant's motion to remand the matter for consideration of additional evidence. Moreover, having reviewed the record, we conclude that the appeals officer did not commit clear error or an abuse of discretion in determining that appellant had failed to show that her condition was work-related. We therefore affirm the district court order denying appellant's petition for judicial review.

FACTS

In April 2005, proper person appellant Kathy Garcia submitted an occupational disease claim for pain in her arms and shoulders to her employer, respondent Scolari's Food & Drug. After reporting her claim, Garcia's condition was evaluated on several occa-

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

sions. None of the physicians or nurse practitioners who evaluated Garcia during these initial visits connected the pain in her arms and shoulders to her employment at Scolari's. Garcia subsequently was referred for an independent medical evaluation by Donald S. Huene, M.D. Dr. Huene offered nonindustrial diagnoses of lateral epicondylitis, myofascitis, possible fibromyalgia, and possible radial tunnel syndrome. Dr. Huene attributed the cause of Garcia's condition to the aging process, concluded that the condition was not work-related, and stated that ''work has aggravated [Garcia's] symptoms but is not the primary cause.'' Based on this evaluation by Dr. Huene, Garcia's claim for occupational disease benefits was denied.

Garcia, through counsel, administratively appealed, and a hearing was held before an appeals officer. The only evidence Garcia presented at the hearing was her own testimony. Apparently relying on the medical evidence provided by Scolari's—in particular, the portion of Dr. Huene's report describing Garcia's symptoms as having been aggravated by her work—Garcia's attorney argued that the work-related aggravation of a nonindustrial condition is compensable. Scolari's argued, however, that Dr. Huene's report did not establish a compensable claim because the doctor concluded that Garcia did not have an occupational disease.

At the conclusion of the hearing, the appeals officer indicated that the parties would be allowed additional time to submit further information before a decision was made. Although not specifically reflected in the record, both parties acknowledge that the appeals officer delayed issuing a decision in this matter to allow Garcia's attorney to submit two additional documents: a functional capacity evaluation confirming that Garcia had ''cervical/shoulder/scapular issues'' and a letter from Dr. Glenn Miller that purportedly connected Garcia's condition to her employment, both of which were available at the time of the hearing. When no further evidence was submitted, however, the appeals officer concluded that Garcia had failed to meet her statutory burden of establishing industrial causation and denied Garcia's claim for benefits. In explaining the decision, the appeals officer noted that, based on the submitted evidence, none of the physicians who had seen or treated Garcia suggested that Garcia's condition was caused by her employment. The appeals officer also noted that while Dr. Huene had indicated in his report that Garcia's employment had aggravated her nonindustrial condition, under NRS 617.366, such an aggravation is not compensable unless an occupational disease is also independently established.

Garcia subsequently filed, in proper person, a petition for judicial review in the district court, contending that the appeals officer's decision was improper and rendered without the benefit of all the relevant evidence. Garcia then moved the district court for leave

to present additional evidence under NRS 233B.131(2). The district court denied Garcia's motion to present additional evidence, concluding that she had failed to establish good reasons for failing to submit the evidence during the administrative proceeding. The district court subsequently denied Garcia's petition for judicial review, and this proper person appeal followed. As directed, respondent has filed a response.

DISCUSSION

On appeal, Garcia asserts that the attorney who represented her during the administrative proceedings was neglectful of her claim and negligently failed to present any medical evidence to support her claim. Specifically, Garcia points to the functional capacity evaluation confirming that she had ''cervical/shoulder/scapular issues'' and Dr. Miller's letter, which she claims connected her arm and shoulder condition to her employment. Garcia argues that she relied on her attorney to provide this medical evidence, especially after the appeals officer allowed additional time to do so, and she asserts that she was unaware of her attorney's failure to provide this evidence until she received the appeals officer's decision denying her claim.

In its response, Scolari's argues that the above evidence is not material and that Garcia failed to demonstrate good reasons for her failure to present the evidence to the appeals officer in the first instance. Scolari's notes that the evidence was available at the time of the hearing and asserts that attorney negligence should not excuse Garcia's failure to present the evidence. Scolari's also contends that substantial evidence supports the appeals officer's decision to deny Garcia's claim.

[Headnote 1]

We conclude that good reasons do not exist when a party's attorney deliberately decides not to present available evidence during the course of an administrative proceeding and that party then seeks remand for reconsideration with that evidence after an adverse decision at the administrative level. Accordingly, the district court did not abuse its discretion in determining that good reasons did not exist under NRS 233B.131(2) to remand this matter to the appeals officer for consideration of additional evidence. Further, based upon the evidence presented in the record, substantial evidence supports the appeals officer's decision denying Garcia's occupational disease claim.

Denial of Garcia's request to supplement the record

[Headnotes 2-4]

Under NRS 233B.131(2), when a party to an administrative proceeding seeks to present additional evidence that was not pre-

sented to the agency during the administrative hearing, the district court may order that such evidence be taken by the agency:

> [i]f, before submission to the court, an application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency.

Thus, the two principal inquiries under NRS 233B.131(2) are whether the evidence sought to be added is material and whether ''good reasons'' exist for the failure to present the evidence to the administrative agency. Because NRS 233B.131(2) provides that the district court ''*may* order that the additional evidence and any rebuttal evidence be taken before the agency'' (emphasis added), the decision to grant or deny a request to remand a matter for the consideration of additional evidence is reviewed for an abuse of discretion. *See Minton v. Board of Medical Examiners*, 110 Nev. 1060, 1081, 881 P.2d 1339, 1354 (1994) (explaining that the use of the word ''may'' in a statute usually gives the district court discretion to act).

Here, we are concerned with the second prong of the analysis—whether the district court properly found that no ''good reasons'' existed for Garcia's failure to present the functional capacity evaluation and Dr. Miller's letter to the appeals officer. Although this court has not yet considered what constitutes a good reason for failing to present evidence at an administrative hearing under this statute, this issue has been addressed in a number of other states with similar statutes. *See, e.g.*, *Salmon v. Department of Public Health*, 788 A.2d 1199, 1220-21 (Conn. 2002) (granting relief, under a good reason standard, for ineffective representation by counsel); *Northern Illinois Gas v. Industrial Com'n*, 498 N.E.2d 327, 332 (Ill. App. Ct. 1986) (finding, under a good cause standard, it was proper for lower court to refuse to supplement the record to include additional evidence in a workers' compensation matter); *Pannoni v. Board of Trustees*, 90 P.3d 438, 449-50 (Mont. 2004) (concluding, under a good reasons standard, that good reasons had not been established when the failure to present the evidence was due to a tactical decision); *Breedon v. Maryland State Dept. of Ed.*, 411 A.2d 1073, 1080 (Md. Ct. Spec. App. 1980) (finding, under a good reasons standard, that a request to present additional evidence to an administrative agency was sufficient); *McDowell v. Citibank*, 734 N.W.2d 1, 11 (S.D. 2007) (declining, under a good reasons standard, to provide relief in a workers' compensation matter). We find two such cases, *McDowell* and *Northern Illinois Gas*, particularly applicable to our resolution of this matter.

In *McDowell*, the South Dakota Supreme Court considered, in a workers' compensation matter, whether the good reasons standard had been satisfied. 734 N.W.2d 1. The appellant sought to add evidence that allegedly bolstered the testimony of a witness, arguing that the evidence was not admitted at the administrative hearing because the evidence became significant only when the opposing counsel, to the surprise of the appellant, challenged the witness's truthfulness on cross-examination. *Id.* at 11. The court concluded that there was ''no question'' that this particular witness's testimony was ''the central point'' of the appellant's claim to reopen her workers' compensation settlement, and that, therefore, the appellant could not reasonably argue surprise that the witness's credibility would be attacked as a good reason for the failure to produce the evidence before the administrative body. *Id.* As the court explained, ''a party may not wait to submit evidence at an administrative hearing until after the party learns how the hearing examiner will rule.'' *Id.*

Additionally, in *Northern Illinois Gas*, the Appellate Court of Illinois considered, under a ''good cause'' standard, a request to supplement the record to include additional evidence in a workers' compensation matter. 498 N.E.2d 327. The *Northern Illinois Gas* court noted that the omitted evidence was available at the time of the administrative hearing but apparently was not presented because counsel believed that the opposing party had presented insufficient proof to prevail. *Id.* at 332. After considering this situation, the court decided that ''[a] party cannot choose one trial strategy and then, faced with an adverse decision, supply additional evidence on review, absent, for example, the need to prevent injustice by correcting the arbitrator's misunderstanding of the evidence, or other good cause.'' *Id.* Finding that good cause had not been established, the court held that the lower tribunal did not abuse its discretion when it declined the request to present the additional evidence. *Id.*

Here, the district court found that Garcia's attorney failed to present any medical evidence during the proceedings before the appeals officer, even though the functional capacity evaluation and the letter from Dr. Miller were available prior to the hearing. Even after the appeals officer gave Garcia's attorney additional time to present further evidence, the attorney failed to submit that evidence. A review of the administrative hearing transcript reveals that Garcia's attorney decided to rely solely on the medical evidence introduced by Scolari's, Dr. Huene's independent medical evaluation.[2] Scolari's introduced this report, presumably, because

[2]We note that while Garcia claims that her attorney misled her by indicating that he was prepared to present her case before the appeals officer and that he had obtained all of the necessary relevant medical records to do so, these

Dr. Huene expressly concluded that Garcia's condition was not work-related. The transcript from the hearing, however, suggests that Garcia's attorney thought either that the burdens of proof and persuasion were on the employer or that Dr. Huene's independent medical evaluation established a compensable claim, since Dr. Huene concluded that Garcia's employment aggravated her symptoms. The appeals officer disagreed with this interpretation, however, determining that NRS 617.366(1)'s aggravation provision was not applicable when an occupational disease has not been established.[3]

Regardless of the attorney's reasons for failing to submit the evidence, it is clear that Garcia's attorney pursued a deliberate, though unsuccessful, trial strategy. As the *McDowell* and *Northern Illinois Gas* cases explain, the type of relief sought here is generally inappropriate when a party waits to submit evidence until learning how a hearing examiner will rule or pursues one strategy at trial and then, after an adverse result, seeks to pursue another strategy with additional evidence. *See McDowell*, 734 N.W.2d at 11; *Northern Illinois Gas*, 498 N.E.2d at 332. Although Garcia argues that her attorney's failure to present the additional medical evidence constitutes negligence or neglectfulness that should entitle her to relief, we conclude that these actions do not constitute good reasons to remand the matter to the appeals officer under NRS 233B.131(2) because they were undertaken as part of a deliberate trial strategy by Garcia's attorney.

[Headnote 5]

The fact that a party's attorney makes what could be characterized as a poor decision with regard to what evidence to present at an administrative proceeding will not suffice to justify remand for consideration of additional evidence, especially after an adverse decision is issued by the appeals officer and when the evidence sought to be presented was available at the time of the administrative hearing. *See McDowell*, 734 N.W.2d at 11; *Northern Illinois Gas*, 498 N.E.2d at 332. Thus, even if we were to accept Garcia's argument that her attorney's actions constituted negligence or ne-

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allegations appear to represent a disagreement between Garcia and her attorney over what should have been presented to the appeals officer and what medical records were relevant, as opposed to a misrepresentation about the status of Garcia's claim or which evidence was going to be presented.

[3]NRS 617.366(1) provides that a resulting condition of an employee who (a) has a preexisting condition that did not arise out of and in the course of employment; and (b) thereafter contracts an occupational disease that aggravates, precipitates or accelerates the preexisting condition, shall be deemed to be a compensable occupational disease unless the insurer can establish, by a preponderance of the evidence, ''that the occupational disease is not a substantial contributing cause of the resulting condition.''

glectfulness, her attorney's actions nonetheless do not constitute good reasons for not presenting the evidence during the administrative proceeding. We agree, therefore, with the district court that good reasons to have this matter remanded to the appeals officer for reconsideration with the additional evidence were not established, since the withheld evidence was available at the time of the hearing but was not presented due to counsel's trial strategy. *See McDowell*, 734 N.W.2d at 11; *Northern Illinois Gas*, 498 N.E.2d at 332. Accordingly, we conclude that the district court did not abuse its discretion in denying Garcia's motion for leave to present additional evidence under NRS 233B.131(2).[4]

The appeals officer's denial of Garcia's claim

[Headnotes 6-12]

This court reviews an administrative decision in the same manner as the district court. *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997). We, like the district court, decide purely legal questions de novo. *Id.* In reviewing questions of fact, however, both this court and the district court are prohibited from substituting their judgment for that of the agency. *Id.* Therefore, on factual issues, this court is limited to determining whether there is substantial evidence in the record to support the agency's decision. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). Substantial evidence is evidence that a reasonable mind might accept as adequate to support the appeals officer's conclusion. *Id.* The reviewing court is confined to the record before the agency. *Id.* at 284, 112 P.3d at 1097.

Having reviewed the administrative record, we conclude that substantial evidence supports the appeals officer's conclusion that Garcia presented insufficient evidence to establish industrial causation of her medical condition. *See* NRS 617.358(1) (providing that, to receive occupational disease benefits, an employee must show by a preponderance of the evidence that her disease arose out of and in the course of her employment); NRS 617.440 (setting forth the requirements for an occupational disease to be deemed to arise out of and in the course of employment). The reports from Garcia's initial medical examinations do not connect her condition to her employment, and Dr. Huene's independent medical evaluation states that ''[Garcia's] current symptomatology is a nonindustrial condition'' attributable to the aging process rather than her

[4]Because we conclude that Garcia has not established good reasons under NRS 233B.131(2), we need not address NRS 233B.131(2)'s materiality requirement.

employment.[5] Accordingly, we conclude that the appeals officer's decision is supported by substantial evidence.[6]

CONCLUSION

We conclude that good reasons do not exist to remand an administrative matter to the appeals officer for reconsideration with additional evidence when a party's attorney deliberately or negligently decides not to present available evidence during the course of the administrative proceeding and that party then seeks to have that evidence considered after an adverse decision has issued at the administrative level. Thus, we further conclude that the district court did not abuse its discretion in determining that good reasons did not exist under NRS 233B.131(2) to remand this matter to the appeals officer. Further, based upon the evidence presented in the record, substantial evidence supports the appeals officer's decision denying Garcia's occupational disease claim. Accordingly, we affirm the district court's order denying Garcia's petition for judicial review.[7]

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

CHERRY, J., with whom SAITTA, J., agrees, dissenting:

The majority concludes that NRS 233B.131(2)'s ''good reasons'' standard is not satisfied when an attorney either deliberately or negligently fails to present available evidence at an administrative hearing. Because I believe that this approach to

[5]We have also considered Garcia's alternative argument that relief should be granted because of general broad supervisory powers the district courts hold over administrative agencies and conclude it is without merit.

[6]While Garcia's attorney argued at the hearing before the appeals officer that Dr. Huene's evaluation shifted the burden in this matter to Scolari's under NRS 617.366, Garcia does not challenge the appeals officer's conclusion that an aggravation under NRS 617.366(1)(b) is compensable only when it is aggravated by a subsequent occupational disease. Because the appeals officer's interpretation of the statute appears reasonable, we need not further address this issue. *See SIIS v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996) (setting forth the rule that the interpretation of a statute by an agency charged with the duty of administering the statute is entitled to deference).

[7]Our dissenting colleagues argue that negligent representation of a workers' compensation claimant at the administrative level warrants remand under NRS 233B.131(2) to the administrative tribunal by a district court exercising judicial review. We reject such a rule as overbroad and believe their reliance on *Salmon v. Department of Public Health* to support this conclusion is misplaced. 788 A.2d 1199 (Conn. 2002). First, we find no support in *Salmon* for the proposition that the right to an ineffective-assistance-of-counsel argument exists in civil cases. Second, although the *Salmon* court concluded that attorney incompetence can support a finding that good reasons exist for the failure

NRS 233B.131(2) fails to sufficiently account for the more flexible and informal nature of administrative proceedings, I respectfully dissent.

Administrative forums in Nevada permit greater flexibility than proceedings taking place in courts of law. *See Minton v. Board of Medical Examiners*, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994). We have recently noted, for instance, that there is not a state or federal constitutional right to prehearing discovery in administrative hearings and that the Nevada Rules of Civil Procedure do not apply to administrative proceedings. *Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. 701, 713, 191 P.3d 1159, 1167 (2008). Nevada is hardly alone in this approach to administrative proceedings. *See, e.g.*, *Arkansas Dept. of Human Services v. A.B.*, 286 S.W.3d 712, 717 (Ark. 2008) (explaining that specialization, experience, and more informal procedures allow agencies to better resolve certain disputes than courts of law); *Foley v. Metropolitan Sanitary Dist.*, 572 N.E.2d 978, 984 (Ill. App. Ct. 1991) (noting that ''[a]dministrative procedure is simpler, less formal and less technical than judicial procedure''); *Highland Town Sch. v. Review Bd. IN Dept.*, 892 N.E.2d 652, 656 (Ind. Ct. App. 2008) (explaining that proceedings before an administrative law judge are more informal than proceedings in a court of law and noting that proper person litigants are given greater leeway in administrative proceedings); *Stone v. Errecart*, 675 A.2d 1322, 1325-26 (Vt. 1996) (noting the more informal nature of administrative agencies); *Nelson County Schools v. Woodson*, 613 S.E.2d 480, 483 (Va. Ct. App. 2005) (stating that ''rigid[,] technical rules of pleading'' are unnecessary in the administrative context so long as substantial rights are protected (quotation and citation omitted)). Important reasons exist for not gradually layering administrative agencies with the formalities that accompany courts of law. For example, the adversarial nature of administrative proceedings is often less pronounced than in courts of law and parties are not always represented by counsel. *See* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. Kan. L. Rev. 473 (2003); Phyllis E. Bernard, *The Administrative Law Judge as a Bridge Between Law and Culture*, 23 J. Nat'l Ass'n Admin. L. Judges 1 (2003). Moreover, administrative agencies generally strive to provide a quicker, less expensive, and more accessible form of adjudication. Levy & Shapiro, *supra*, at 494-502; Bernard, *supra*, at 5-7, 18-19, 34. Thus, a more informal approach

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to present evidence at an administrative hearing, justifying a remand to the agency for reconsideration with the additional evidence, unlike the present case, in *Salmon* a remand was warranted because the evidence was not available at the time of the hearing. *Id.* at 1219.

may make better use of an agency's particular expertise. Levy & Shapiro, *supra*, at 494-502; Bernard, *supra*, at 5-7, 18-19, 34.

Because of the more flexible nature of proceedings before administrative agencies, I believe that an equally flexible approach should be used to determine when ''good reasons'' exist for failure to present evidence at an administrative hearing. Here, it appears from the transcript of the November 8, 2005, administrative hearing that Garcia's attorney failed to present any medical evidence even though such evidence was available prior to the hearing. Even after the appeals officer gave Garcia's attorney additional time to present that evidence, the attorney failed to submit the evidence for consideration by the appeals officer. Therefore, Garcia's attorney's neglectful or negligent handling of this case has effectively denied Garcia her full day in court with a truly informed adjudication of her claim. The majority's interpretation of NRS 233B.131(2)'s broadly worded ''good reasons'' standard unnecessarily limits the statute's use as a potential remedy. All Garcia seeks is a determination of her claim based on medical evidence, which would have been presented at the administrative hearing but for the negligence of the attorney she relied on to represent her.

The use of a more flexible approach in such cases is supported by the Connecticut Supreme Court's decision in *Salmon v. Department of Public Health*, 788 A.2d 1199 (Conn. 2002). The *Salmon* court considered whether a party should have been allowed to introduce impeachment evidence not presented during an administrative proceeding due to the asserted incompetence of the appellant's attorney. *Id*. at 1219-21. In making this determination, the *Salmon* court addressed whether the failure to introduce such evidence, due to an attorney's alleged incompetence, constituted a good reason for failing to introduce the evidence at the administrative proceeding under Connecticut's version of NRS 233B.131(2).[1] The *Salmon* court noted that hearings before an administrative agency are unlike those before a court of law and are more flexible and informal. 788 A.2d at 1220. Relying in part on the more flexible nature of administrative proceedings, the *Salmon* court concluded that the incompetence of one's attorney can rep-

[1]The relevant Connecticut statute, Conn. Gen. Stat. § 4-183(h) (2007), provides:

> [i]f, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court.

resent a good reason for failing to present evidence during an administrative proceeding. *Id.* at 1220-21.

In light of the more informal nature of administrative proceedings, I would adopt a rule, similar to the one set forth in *Salmon*, providing that the negligence or neglectfulness of one's attorney can constitute a good reason for failing to present evidence at an administrative hearing under NRS 233B.131(2). I would therefore conclude that the district court abused its discretion in determining that the negligence or neglectfulness of Garcia's attorney in representing her before the appeals officer did not constitute a good reason to remand this matter to the appeals officer for consideration of additional evidence. As a result, I would reverse the district court's decision with instructions to remand the matter to the appeals officer for reconsideration with the additional evidence Garcia seeks to present.

MAURICE COLLINS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 50104

March 5, 2009 203 P.3d 90

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery, intimidating a public officer, and battery with substantial bodily harm. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The supreme court, PARRAGUIRRE, J., held that statute that defined substantial bodily harm as ''prolonged physical pain'' provided sufficient notice of prohibited conduct and was not so lacking in specific standards as to allow arbitrary or discriminatory enforcement and, thus, was not unconstitutionally vague.

Affirmed.

Philip J. Kohn, Public Defender, and *Audrey Mary Conway*, Deputy Public Defender, Clark County, for Appellant.

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

1. ASSAULT AND BATTERY; CONSTITUTIONAL LAW.

The phrase ''prolonged physical pain'' must necessarily encompass some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act, and as a result, phrase ''prolonged physical pain'' had a well-settled and ordinarily understood meaning,