and accordingly, 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. NRS 0.060(2).

2. CRIMINAL LAW.
   The constitutionality of a statute is a question of law that the supreme court reviews de novo.
3. CONSTITUTIONAL LAW.
   Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional; and in order to meet that burden, the challenger must make a clear showing of invalidity.
4. CRIMINAL LAW.
   A statute is deemed to be unconstitutionally vague if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.
5. CRIMINAL LAW.
   The first prong of the vagueness test is designed to provide notice of conduct that is prohibited under the statute so that ordinary citizens can conform their conduct to comport with the law; however, notice is insufficient if the statute is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence cannot understand what conduct is prohibited.
6. CRIMINAL LAW.
   When drafting statutes, the Legislature is not required to exercise absolute precision, but, at a minimum, it must draft statutes that delineate the boundaries of prohibited conduct.
7. CRIMINAL LAW.
   In instances where the Legislature does not define each term it uses in a statute, the statute will not be deemed unconstitutional if the term has a well-settled and ordinarily understood meaning.
8. CRIMINAL LAW.
   A statute is unconstitutionally vague if it lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.

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

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we address whether NRS 0.060(2)'s definition of substantial bodily harm as ''prolonged physical pain'' is unconstitutionally vague. In light of the well-settled and ordinarily understood meaning of the phrase ''prolonged physical pain,'' we conclude that NRS 0.060(2) is not unconstitutionally vague.

FACTS AND PROCEDURAL HISTORY

After being asked to leave the victim's convenience store, appellant Maurice Collins struck Ahmad Peyghambarav in the face,

knocking him unconscious. While Ahmad was unconscious, Collins rifled through Ahmad's pockets and took his cellular phone.

A short time later, with Ahmad's cell phone in his possession, Collins was apprehended and transported to a detention center. During these events, Collins became extremely irate and threatened multiple public officers with physical violence.

In the meantime, after regaining consciousness, Ahmad experienced an extreme amount of pain in his head and drove to a local hospital for medical attention. Based on a CT scan image, the examining neurosurgeon concluded that Ahmad had suffered a right temple fracture as a result of trauma. Although he seemed alert and coherent, Ahmad was prescribed a one-week course of anticonvulsant medication due to the risk of seizures associated with his closed head injury.

For the next few weeks, Ahmad experienced dizziness and could not bend over without almost losing consciousness. Moreover, for a month and a half following the incident, Ahmad experienced intermittent headaches. However, despite these symptoms, and doctor instructions for ongoing checkups, Ahmad never sought further medical attention regarding his injuries.

Collins was charged with one count of battery with substantial bodily harm, one count of robbery, and three counts of intimidating public officers. Following a two-day trial, Collins was found guilty on all but two counts of intimidating a public officer. After being adjudicated a habitual criminal, Collins was sentenced to two concurrent prison terms of 240 months with parole eligibility after 96 months on the robbery and battery counts to run concurrent with a 12-month jail term on the intimidating a public officer count. This appeal followed.

DISCUSSION

[Headnote 1]

On appeal, Collins contends that NRS 0.060(2), which defines substantial bodily harm as ''prolonged physical pain,'' is unconstitutionally vague. We disagree and conclude that the phrase ''prolonged physical pain'' has a well-settled and ordinarily understood meaning and, as a result, is not unconstitutionally vague.

[Headnotes 2, 3]

''The constitutionality of a statute is a question of law that we review de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity.'' *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

[Headnote 4]

A statute is deemed to be unconstitutionally vague if it ''(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.'' *Id.* at 293, 129 P.3d at 685.

Notice of prohibited conduct

[Headnotes 5-7]

The first prong of the vagueness test is designed to provide notice of conduct that is prohibited under the statute so that ordinary citizens can conform their conduct to comport with the law. *Gallegos v. State*, 123 Nev. 289, 293, 163 P.3d 456, 459 (2007). Notice is insufficient, however, if the ''statute is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence cannot understand what conduct is prohibited.'' *Id.* (internal quotations omitted). When drafting statutes, the Legislature is not required to exercise absolute precision but, at a minimum, it must draft statutes that delineate the boundaries of prohibited conduct. *Id.* In instances where the Legislature does not define each term it uses in a statute, the statute will not be deemed unconstitutional if the term has a well-settled and ordinarily understood meaning. *Id.*

In this case, Collins argues that NRS 0.060(2)'s definition of ''prolonged physical pain'' fails to provide notice because it does not delineate any temporal period of how long the pain must last, the severity of the pain, or the frequency with which it occurs, and is so imprecise that an ordinary person has to guess at its meaning. For support, he cites statutes from other jurisdictions that, in his opinion, use more precise language to define serious or substantial bodily harm or injury.[1]

Problematically, in making this argument, Collins ignores the fact that NRS 0.060 provides two alternate definitions of the term

[1]*See, e.g.*, Ariz. Rev. Stat. Ann. § 13-105 (2008) (defining ''serious physical injury'' as ''physical injury that creates a risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb''); Minn. Stat. § 609.02 (2004) (defining ''substantial bodily harm'' as ''bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member''); Model Penal Code § 210.0 (defining ''serious bodily injury'' as bodily injury that (1) ''creates a substantial risk of death,'' (2) ''causes serious permanent disfigurement,'' or (3) causes ''protracted loss or impairment of the functions of any bodily member or organ'').

''substantial bodily harm.''[2] The first definition is set forth in NRS 0.060(1) and uses language substantially similar to the language utilized by the Arizona and Minnesota Legislatures, as well as the Model Penal Code, to define ''substantial bodily harm.'' Specifically, NRS 0.060(1) defines ''substantial bodily harm'' as ''[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.'' It is the second definition of ''substantial bodily harm'' as ''prolonged physical pain'' that Collins challenges as unconstitutional. As a result, Collins' state-by-state comparison does not assist us in resolving his claim that the term ''prolonged physical pain,'' as set forth in NRS 0.060(2), is unconstitutionally vague.

In contrast, the State argues that the phrase ''prolonged physical pain'' has a well-settled and ordinarily understood meaning. Although it acknowledges that pain may very well be subjective, the State argues that there must be something more than mere pain under the statute—it must also be of a physical nature and of sufficient duration. Conceding that there is no precise way to determine the temporal standard for prolonged pain, the State alleges that the plain meaning of ''prolonged,'' at a minimum, rules out any pain or suffering that is of an immediate or short duration. For the reasons set forth below, we agree with the State.

The term ''pain'' has multiple meanings, ''rang[ing] from mild discomfort or dull distress to acute often unbearable agony.'' *Webster's Third New International Dictionary* 1621 (4th ed. 1976). Therefore, by its very nature, the term ''pain'' is necessarily subjective and cannot be defined further. *Cf. Matter of Phillip A.*, 400 N.E.2d 358, 359 (N.Y. Ct. App. 1980) (''Pain is, of course, a subjective matter. Thus, touching the skin of a person who has suffered third degree burns will cause exquisite pain, while the forceful striking of a gymnast in the solar plexus may cause him no discomfort at all.''). The term ''prolonged'' means ''to lengthen in time[;]'' ''to extend in duration'' or ''to lengthen in extent, scope, or range.'' *Webster's*, *supra*, at 1815. In NRS 0.060(2), the term ''prolonged,'' a temporal term, modifies ''physical pain.'' Consequently, 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.[3] As a result, ''prolonged physical

[2]The jury was instructed under both definitions of substantial bodily harm, and the prosecutor argued for the battery with substantial bodily harm conviction under both definitions. However, on appeal, Collins only challenges the definition of substantial bodily harm under the second definition, NRS 0.060(2).

[3]In a battery, for example, the wrongdoer would not be liable for ''prolonged physical pain'' for the touching itself. However, the wrongdoer would be liable for any lasting physical pain resulting from the touching.

pain'' under NRS 0.060(2) has a well-settled and ordinarily understood meaning. Accordingly, we conclude that NRS 0.060(2) provides sufficient notice of prohibited conduct.

Existence of specific standards

[Headnote 8]

Under the second prong of the test, a statute is unconstitutionally vague if it ''lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.'' *Gallegos*, 123 Nev. at 296, 163 P.3d at 460-61 (internal quotations omitted). This prong is designed to prevent ''standardless sweep[s], which would allow the police, prosecutors, and juries to pursue their personal predilections.'' *Id.* (internal quotations omitted). Because the phrase ''prolonged physical pain'' has a well-settled and ordinarily understandable meaning—*i.e.*, there must be at least some physical suffering that lasts longer than the pain immediately resulting from the wrongful act—it is not so lacking in specific standards as to allow arbitrary or discriminatory enforcement. Accordingly, we conclude that NRS 0.060(2) is not unconstitutionally vague.[4]

CONCLUSION

In this appeal, we conclude that NRS 0.060(2), which defines ''substantial bodily harm'' as ''prolonged physical pain,'' is not unconstitutionally vague. Accordingly, we affirm the judgment of conviction.

HARDESTY, C.J., and DOUGLAS, J., concur.

[4]In addition to the constitutional question addressed in this opinion, Collins also alleges that (1) juror bias prevented him from receiving a fair trial, (2) insufficient evidence supported his robbery and battery with substantial bodily harm convictions, (3) his charge of intimidating a public officer should have been severed from his robbery and battery charges, (4) the district court improperly provided the jury with an instruction on flight, (5) his sentence amounted to cruel and unusual punishment, (6) the district court violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in adjudicating him a habitual offender, and (7) the presentence investigation report contained inaccurate and prejudicial information. Having carefully reviewed these contentions, we conclude that none warrant reversal.

TERRACON CONSULTANTS WESTERN, INC.; TERRACON, INC.; LOCHSA, LLC; AND KLAI-JUBA ARCHITECTS, LTD., APPELLANTS, *v.* MANDALAY RESORT GROUP, FKA CIRCUS CIRCUS ENTERPRISES, INC.; MANDALAY DEVELOPMENT, FKA CIRCUS CIRCUS DEVELOPMENT CORP.; AND MANDALAY CORPORATION, RESPONDENTS.

No. 47844

March 26, 2009 206 P.3d 81

Certified questions, pursuant to NRAP 5, regarding the scope of Nevada's economic loss doctrine. United States District Court for the District of Nevada; Robert C. Jones, Judge.

The supreme court, GIBBONS, J., held that: (1) economic loss doctrine applies to preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the commercial property development or improvement process, when the plaintiffs seek to recover purely economic losses; and (2) because property owner suffered only economic loss without any attendant personal injury or property damage, the economic loss doctrine barred property owner from proceeding with its negligence-based claims against design professional.

Questions answered.

Holland & Hart, LLP, and *Gregory S. Gilbert* and *Sean D. Thueson*, Las Vegas; *McDowell, Rice, Smith & Buchanan* and *Thomas R. Buchanan*, Kansas City, Missouri, for Appellants Terracon Consultants Western, Inc., and Terracon, Inc.

Weil & Drage, APC, and *Jean A. Weil, Colin R. Harlow*, and *Anthony D. Platt*, Las Vegas, for Appellants Lochsa, LLC, and Klai-Juba Architects, Ltd.

Haney, Woloson & Mullins and *Wade B. Gochnour*, Las Vegas; *Santoro, Driggs, Walch, Kearney, Holley & Thompson* and *Dennis R. Haney* and *Shemilly A. Briscoe*, Las Vegas; *Niddrie, Fish & Buchanan* and *Martin N. Buchanan*, San Diego, California; *Girardi & Keese* and *David R. Lira* and *Shahram A. Shayesteh*, Los Angeles, California, for Respondents.

Beckley Singleton, Chtd., and *Daniel F. Polsenberg*, Las Vegas; *Morris Polich Purdy, LLP*, and *Nicholas M. Wieczorek*, Las Vegas, for Amici Curiae.

1. NEGLIGENCE.

The economic loss doctrine bars professional negligence claims against design professionals who provide services in the process of developing or improving commercial property when the plaintiffs' damages are purely financial.

2. FEDERAL COURTS.

Supreme court has discretion in determining whether to accept and answer a question certified by a federal court, and in deciding whether to exercise that discretion, supreme court looks to whether (1) the certified question's answer may be determinative of part of the federal case, (2) there is controlling Nevada precedent, and (3) the answer will help settle important questions of law. NRAP 5.

3. FEDERAL COURTS.

In exercising its discretion to answer certified questions from federal court, supreme court nevertheless must constrain itself to resolving legal issues presented in the parties' pleadings, and in that regard, supreme court avoids answering academic or abstract matters that a certifying court may have included in posing its questions to supreme court. NRAP 5.

4. FEDERAL COURTS.

When federal court certified two questions to supreme court, asking whether economic loss doctrine precluded tort claims brought against contractors who solely provide services and whether doctrine precluded tort claims against design professionals, supreme court reframed federal court's two questions as one in order to address precisely the particular negligence claim and factual scenario that led to certification order and to avoid any overly broad conclusions about claims against ''contractors,'' a term that federal court did not define in certification order, and thus, supreme court would answer following question: whether economic loss doctrine applied to preclude negligence-based claims against design professionals who provide services in commercial property development or improvement process when plaintiffs seek to recover purely economic losses. NRAP 5.

5. NEGLIGENCE.

The economic loss doctrine draws a legal line between contract and tort liability that forbids tort compensation for certain types of foreseeable, negligently caused, financial injury.

6. NEGLIGENCE; TORTS.

The economic loss doctrine expresses the policy that the need for useful commercial economic activity and the desire to make injured plaintiffs whole is best balanced by allowing tort recovery only to those plaintiffs who have suffered personal injury or property damage.

7. ACTION.

When economic loss occurs as a result of negligence in the context of commercial activity, contract law can be invoked to enforce the quality expectations derived from the parties' agreement.

8. NEGLIGENCE.

In addition to balancing economic activity incentives against providing compensation to negligence victims, the economic loss doctrine is driven by financial considerations, and in that regard, the doctrine works to reduce the cost of tort actions, but still provides tort victims with a remedy because less expensive alternative forms of compensation, such as insurance, generally are available to a financially injured party.

9. TORTS.

Exceptions to the economic loss doctrine exist in broad categories of cases in which the policy concerns about administrative costs and a disproportionate balance between liability and fault are insignificant, or other countervailing considerations weigh in favor of liability.

10. FRAUD.

Exception to the economic loss doctrine exists for negligent misrepresentation; negligent misrepresentation is a special financial harm claim for which tort recovery is permitted because without such liability the law would not exert significant financial pressures to avoid such negligence.

11. NEGLIGENCE.
    The economic loss doctrine applies to preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the commercial property development or improvement process, when the plaintiffs seek to recover purely economic losses.
12. ACTION.
    The work provided by construction contractors or the services rendered by design professionals in the commercial building process are both integral to the building process and impact the quality of building projects, and therefore, when the quality is deemed defective, resulting in economic loss, remedies are properly addressed through contract law.
13. ACTION.
    In the commercial property development and improvement process, design professionals' duties typically are prescribed by the parties' contract, and therefore, any duty breached arises from the contractual relationship only, which necessitates an analysis of the damages that were within the contemplation of the parties when framing their agreement.
14. NEGLIGENCE.
    The economic loss doctrine cuts off tort liability when no personal injury or property damage occurred, with traditionally recognized exceptions for certain classes of claims, and negligence claims against design professionals do not fall within those traditional exceptions.
15. NEGLIGENCE.
    Because commercial property owner suffered only economic loss without any attendant personal injury or property damage, the economic loss doctrine barred property owner from proceeding with its negligence-based claims against company that provided professional engineering advice.
16. NEGLIGENCE.
    In a commercial property construction defect action in which the plaintiffs seek to recover purely economic losses through negligence-based claims, the economic loss doctrine applies to bar such claims against design professionals who have provided professional services in the commercial property development or improvement process.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

The United States District Court for the District of Nevada has certified, under NRAP 5, the following questions to this court. Does the economic loss doctrine apply to contractors who solely provide services in construction defect cases? Does the economic loss doctrine apply in construction defect cases to design professionals, such as engineers and architects, who solely provide services, regardless of whether the services are rendered before or during construction? Although we accept the federal court's referral, we do so by reframing its two questions as one in order to address precisely the particular negligence claim and factual scenario that led to

the certification order and to avoid any overly broad conclusions about claims against ''contractors,'' a term that the federal district court did not define in its certification order. Thus, we answer the following question. Does the economic loss doctrine apply to preclude negligence-based claims against design professionals, such as engineers and architects, who provide services in the commercial property development or improvement process, when the plaintiffs seek to recover purely economic losses?

[Headnote 1]

The answer to the question is yes. ''Purely economic loss'' has been defined as '' 'the loss of the benefit of the user's bargain . . . including . . . pecuniary damage for inadequate value, the cost of repair and replacement of [a] defective product, or consequent loss of profits, without any claim of personal injury or damage to other property.' '' *Calloway v. City of Reno*, 116 Nev. 250, 257, 993 P.2d 1259, 1263 (2000) (first and second alterations in original) (quoting *American Law of Products Liability* (3d) § 60:36, at 66 (1991)), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004). After examining relevant authority and contemplating the policy considerations behind the economic loss doctrine, we have determined that the doctrine's purpose—to shield defendants from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable—would be furthered by applying it to preclude the professional negligence claims at issue here. Thus, we conclude that the economic loss doctrine bars professional negligence claims against design professionals who provided services in the process of developing or improving commercial property when the plaintiffs' damages are purely financial.

PROCEDURAL HISTORY AND FACTS

This matter arises from a removed diversity case in which a property owner brought a breach of contract and professional negligence action against certain design professionals (engineering and architectural firms). The property owner alleged that the design professionals provided negligent design advice upon which the property owner relied in making major improvements to its commercial real property, causing the property owner economic losses.

Respondents Mandalay Resort Group, Mandalay Development, and Mandalay Corporation (collectively, Mandalay) managed the construction of the approximately $1 billion Mandalay Resort and Casino (the resort) in Las Vegas. To complete the resort, Mandalay hired various subcontractors, including appellants Terracon Con-

sultants Western, Inc., Terracon, Inc. (collectively, Terracon), Lochsa, LLC, and Klai-Juba Architects, Ltd. Mandalay entered into a written contract with Terracon, under which Terracon agreed to provide geotechnical engineering advice about the subsurface soil conditions and recommended a foundation design for the property. The parties do not dispute that Terracon's work was limited to providing professional engineering advice and that Terracon was not involved in physically constructing the property. Although Mandalay did not have written agreements with Klai-Juba or Lochsa, those firms, apparently acting in accordance with an oral arrangement with Mandalay, provided architectural and engineering services, respectively, by designing parts of the resort's structure. As with Terracon, Klai-Juba and Lochsa played no role in the resort's physical construction.

In accordance with the written contract's terms, Terracon prepared a geotechnical report with its foundation design recommendations, which Mandalay implemented as it began erecting the resort. Based upon Terracon's soil analysis and the anticipated weight of the building, Terracon predicted a certain amount of settling underneath the foundation. According to Mandalay's complaint, however, the ultimate amount of settling exceeded Terracon's projections. Because Clark County believed that the settling presented a potential danger to the resort's structural integrity, the county required Mandalay to repair and reinforce the foundation before proceeding with the construction. Consequently, Mandalay sued Terracon for damages in state court, alleging that the deficient engineering advice caused the resort's foundation problems.[1] Mandalay's theories of recovery included breach of contract, breach of the covenant of good faith and fair dealing, and professional negligence.

Terracon removed the matter to the United States District Court for the District of Nevada and, thereafter, moved for partial summary judgment on Mandalay's professional negligence claim, arguing that the claim was barred under the economic loss doctrine. Mandalay opposed the motion, arguing, among other things, that as a matter of law the economic loss doctrine did not apply to negligence claims against design professionals or contractors who solely provide services.

Terracon also filed a third-party complaint against, among others, Lochsa and Klai-Juba for negligence, contribution, and equitable indemnity. Terracon argued that if the economic loss doctrine did not bar Mandalay's negligence claim, then the doctrine likewise would not bar its claims against Lochsa and Klai-Juba. In response, Lochsa

[1]Although, according to Mandalay's complaint, Terracon's negligence also caused property damage to the resort structure itself, we do not address that aspect of Mandalay's claim because the U.S. District Court asked this court only whether tort recovery is permitted *assuming the losses are purely economic*.

and Klai-Juba argued that the economic loss doctrine applied and moved the federal court to dismiss Terracon's third-party complaint on that basis.

The U.S. District Court denied without prejudice the motion for partial summary judgment and the motion to dismiss the third-party complaint, after determining that Nevada law was unclear on whether the economic loss doctrine applied to bar a claim grounded on allegations that design professionals negligently rendered services when the plaintiffs sought to recover purely economic losses.[2] The federal court thus asked this court to address the scope of Nevada's economic loss doctrine and, in particular, whether it applies to preclude negligence-based claims against engineers, architects, or other design professionals in construction defect cases, when the plaintiff seeks to recover purely economic losses.

Acknowledging that our caselaw addressing this doctrine contains nuanced ambiguities, we accept the federal court's referral. We reframe the questions presented therein, however, to answer directly whether the economic loss doctrine bars professional negligence claims against design professionals who provide only their services in the commercial property development or improvement process, when the plaintiffs are seeking to recover purely economic losses. In doing so, we point out that this opinion has no bearing on NRS Chapter 40's provisions governing actions brought based on construction defects in newly constructed residential property.[3] Appellants and respondents have briefed the issue, as directed, and we permitted certain professional organizations to file a brief as amici curiae.[4]

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[2]The U.S. District Court, in presenting the certified questions, pointed out that this court's jurisprudence suggests that the economic loss doctrine might not extend to preclude tort-based claims against design professionals even when the plaintiffs are seeking to recover only financial losses. *See Calloway v. City of Reno*, 116 Nev. 250, 273 n.3, 993 P.2d 1259, 1274 n.3 (2000) (MAUPIN, J., concurring in part and dissenting in part) (pointing out, in dictum, that ''economic losses without property damage or personal injury have been deemed recoverable in tort in connection with various types of professional malpractice/negligence claims''), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004).

[3]In *Olson*, 120 Nev. 240, 89 P.3d 31, this court determined that the economic loss doctrine does not apply to preclude tort-based claims in which the plaintiffs seek to recover purely economic losses resulting from alleged construction defects in newly constructed residential properties. That decision was based, in part, on this court's reasoning that NRS Chapter 40 preserved the discrete right of a purchaser of a newly constructed residence to sue in tort to recover purely economic losses.

[4]The amici curiae brief was submitted on behalf of the American Institute of Architects (AIA), AIA Nevada; AIA Las Vegas; the American Council of Engineering Companies; the American Council of Engineering Companies of Nevada; the Design Professionals Coalition of the American Council of Engineering Companies; the National Society of Professional Engineers; the

DISCUSSION

NRAP 5

[Headnote 2]

This court has discretion in determining whether to accept and answer a question certified by a federal court. NRAP 5; *Volvo Cars of North America v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006). In deciding whether to exercise that discretion, this court looks to whether (1) the certified question's answer may be determinative of part of the federal case, (2) there is controlling Nevada precedent, and (3) the answer will help settle important questions of law. *See Volvo Cars*, 122 Nev. at 749, 137 P.3d at 1163.

[Headnotes 3, 4]

As noted, the federal district court certified two questions. The first question asked whether the economic loss doctrine precluded tort claims brought against contractors who solely provide services. As the defendants here were design professionals, namely engineers and architects, any issue concerning contractors would not fit within the scope of the unresolved legal issue raised in the parties' pleadings. The second question asked whether the economic loss doctrine precluded tort claims against design professionals. That question, however, did not address the commercial aspect of the project, and thus, it was too broad. Consequently, we have reframed the federal court's two questions as one question. In so doing, we point out that, in exercising our discretion to answer certified questions, we nevertheless must constrain ourselves to resolving legal issues presented in the parties' pleadings. In that regard, we avoid answering academic or abstract matters that a certifying court may have included in posing its questions to this court. In restating the federal court's questions into one more precise question, it now fits within the three criteria outlined in *Volvo Cars*. *Id.* Accordingly, we answer it.

The economic loss doctrine

The economic loss doctrine is a judicially created rule that primarily emanates from products liability jurisprudence. *Calloway v. City of Reno*, 116 Nev. 250, 257, 993 P.2d 1259, 1263 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004). This court has explained that '' '[t]he economic loss doctrine marks the fundamental boundary between con-

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Nevada Society of Professional Engineers; ASFE/The Best People on Earth; the American Society of Civil Engineers; and the Nevada Section of the American Society of Civil Engineers.

tract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others.' '' *Id*. at 256, 993 P.2d at 1263 (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C. L. Rev. 891, 894-95 (1989)). Applying the economic loss doctrine to accomplish its general purpose, this court has concluded that the doctrine bars unintentional tort actions when the plaintiff seeks to recover ''purely economic losses.'' *See Local Joint Exec. Bd. v. Stern*, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982). Nevertheless, as set forth below, exceptions to the doctrine apply in certain categories of cases when strong countervailing considerations weigh in favor of imposing liability. *See generally Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985).

As indicated, for purposes of the certified question, the U.S. District Court has determined that any losses that Mandalay suffered were purely economic.[5] Thus, while we typically begin analyzing economic loss doctrine matters by ascertaining whether the damages are purely economic in nature, *Arco Prods. Co. v. May*, 113 Nev. 1295, 1297, 948 P.2d 263, 265 (1997), we need not undertake that analysis here. Accordingly, we proceed to consider whether the particular professional negligence claims at issue here are within the economic loss doctrine's scope.

Our answer begins with a discussion of the economic loss doctrine's purpose, and then we discuss the policy behind the doctrine. Next, we discuss the recognized exceptions to the economic loss doctrine. Finally, we apply our interpretation of the doctrine to the current case.

The economic loss doctrine's purpose

The seminal Nevada decision concerning the economic loss doctrine is *Stern*, 98 Nev. 409, 651 P.2d 637. In *Stern*, we considered an action brought by MGM Grand Hotel employees against those involved in the hotel's design and construction to recover lost wages and employment benefits after a fire damaged the hotel. The plaintiffs in *Stern* sued under negligent interference with contractual relations and prospective economic advantage theories, among others. In *Stern*, we began our analysis by pointing out that purely economic losses are recoverable in actions for tortious interference with contractual relations or prospective economic advantage when the alleged interference is *intentional*. *Id*. at 411, 651 P.2d at 638. In that regard, we rejected the minority view that permitted recovery for

[5]This opinion is not intended to address any property damage-based claims Mandalay may have raised in the district court, as such claims are beyond the scope of the question addressed here.

negligent interference with economic expectancies under limited circumstances, stating that:

> [W]e believe the tests that have been developed to determine who should recover for negligent interference with contract or prospective economic advantage are presently inadequate to guide trial courts to consistent, predictable, and fair results. The foreseeability of economic loss, even when modified by other factors, is a standard that sweeps too broadly in a professional or commercial context, portending liability that is socially harmful in its potential scope and uncertainty. We therefore decline to adopt the minority view allowing such recovery.

Id. Thus, we focused on crafting a predictable, fair articulation of the economic loss doctrine.

With that focus in mind, we reasoned that allowing the plaintiffs to sue under a negligence theory for purely economic losses, without accompanying personal injury or property damage, would have defeated the primary purpose of the economic loss doctrine: ''to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable.'' *Id*. at 411, 651 P.2d at 638. We expressed our conclusion about the economic loss doctrine's application to negligence claims, stating that unless there is personal injury or property damage, a plaintiff may not recover in negligence for economic losses.[6] *Id*. at 410-11, 651 P.2d at 638. Applying the rule to the facts presented in *Stern*, we determined that, although the plaintiffs suffered financial injury, namely, lost wages, benefits, and union dues, they had no possessory or proprietary interest in the hotel property and they suffered no accompanying personal injuries as a result of the fire that would permit them to recover in tort. *Id*.; *see also Robins Dry Dock & Repair Co*. *v. Flint*, 275 U.S. 303, 309 (1927) (explaining the general rule that a party cannot recover in tort for its economic losses unless that party suffers an accompanying physical injury or damage to its property). Accordingly, we concluded that the eco-

[6]The full statement of the economic loss doctrine's scope in *Stern* provided that ''absent privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss.'' 98 Nev. at 410-11, 651 P.2d at 638. Although that statement suggested that recovery was permitted for purely economic losses if the parties had a contractual arrangement, the doctrine has never been applied in that way and the law, including the cases to which *Stern* cites, does not support such a broad conclusion. In pointing out this misstatement in *Stern*, we also point out that, while privity of contract is not a proper legal criterion for allowing tort recovery for purely economic losses in and of itself, that does not mean that the presence of contractual privity between litigants universally prevents such recoveries.

nomic loss doctrine barred the employees from recovering under a negligence theory.[7] *Stern*, 98 Nev. at 411, 651 P.2d at 638.

While the doctrine generally provides that purely economic losses are not recoverable in tort absent personal injury or property damage, courts have made exceptions to allow such recovery in certain categories of cases, such as negligent misrepresentation and professional negligence actions against attorneys, accountants, real estate professionals, and insurance brokers. *See, e.g.*, *Goodrich & Pennington v. J.R. Woolard*, 120 Nev. 777, 101 P.3d 792 (2004); *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002); *Choi v. Chase Manhattan Mortg. Co.*, 63 F. Supp. 2d 874, 883-85 (N.D. Ill. 1999); *2314 Lincoln Park West Condo. v. Mann*, 555 N.E.2d 346, 353 (Ill. 1990). In determining whether an exception to the economic loss doctrine should be made to allow negligence-based claims against professionals who provide design-related services in the commercial property development or improvement process, we first examine the policy considerations underlying the doctrine and then any countervailing policy reasons that weigh against applying it.

Policy considerations underlying the economic loss doctrine

[Headnotes 5-7]

The economic loss doctrine draws a legal line between contract and tort liability that forbids tort compensation for ''certain types of foreseeable, negligently caused, financial injury.'' *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir. 1985). The doctrine expresses the policy that the need for useful commercial economic activity and the desire to make injured plaintiffs whole is best balanced by allowing tort recovery only to those plaintiffs who have suffered personal injury or property damage. *Public Service Ent. Group v. Philadelphia Elec.*, 722 F. Supp. 184, 211 (D.N.J. 1989). And it has been reasoned that such useful commercial activity could be deterred if those involved in it were subject to tort liability. *Id.* Instead, when economic loss occurs as a result of negligence in the context of commercial activity, contract law can be invoked to enforce the quality expectations derived from the parties' agreement. *See Calloway v. City of Reno*, 116 Nev. 250, 260-61, 993 P.2d 1259, 1265-66 (2000) (determining, in the context of a residential property construction defect action, initiated before the pertinent portions of NRS Chapter 40 were enacted, that when a plaintiff seeks to recover its purely economic losses related to a construction

[7]*Stern* also addressed the plaintiffs' strict products liability theory of recovery, explaining that it had been widely held that recovery under such a theory was unavailable for purely economic losses. 98 Nev. at 411-12, 651 P.2d at 638. Strict products liability is not within the scope of the certified question we are answering here, and regardless, controlling precedent is clear on that point, so we do not further address it.

defect, such harm is properly addressed by the policies underlying contract, not tort, law).[8]

[Headnote 8]

In addition to balancing economic activity incentives against providing compensation to negligence victims, the economic loss doctrine is driven by financial considerations. In that regard, the doctrine works to reduce the cost of tort actions, but still provides tort victims with a remedy because less expensive alternative forms of compensation, such as insurance, generally are available to a financially injured party. *See Barber Lines A/S*, 764 F.2d at 54-55 (pointing out that typically, a ''financial'' plaintiff is a business firm that usually will buy insurance that may compensate it for its ''first party loss,'' while other victims may sue under tort principles if they suffered some physical harm to their person or property, or under contract principles if an agreement exists). Thus, when applied to foreclose tort liability at a certain point, the economic loss doctrine dispels the fear of creating victim compensation costs that are unnecessarily high, at least from an administrative standpoint. *Id*. at 55.

Another consideration behind the economic loss doctrine is balancing the disproportion between liability and fault. *Id*. To that end, cutting off tort liability at the point where only economic loss is at stake without accompanying physical injury or property damage ''provides . . . incentives and disincentives to engage in economic activity or to make it safer.'' *Id*. On the other hand, imposing unbounded tort liability for pure financial harm could result in ''incentives that are perverse,'' such as insurance premiums that are too expensive for the average economic actor to afford. *Id*. For those reasons, courts have been reluctant to impose tort liability for purely financial harm. *Id*.

Exceptions to the economic loss doctrine

[Headnotes 9, 10]

Nevertheless, as pointed out above, exceptions to the economic loss doctrine exist in broad categories of cases in which the policy concerns about administrative costs and a disproportionate balance between liability and fault are insignificant, or other countervailing considerations weigh in favor of liability. For example, negligent misrepresentation is a special financial harm claim for which tort recovery is permitted because without such liability the law would not

[8]Subsequently, we addressed whether a residential property owner could assert a negligence claim in a construction defect action brought under NRS Chapter 40 when purely economic losses were at stake and determined that, notwithstanding our decision in *Calloway*, such a claim could be maintained if initiated under NRS 40.640. *See Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004) (creating a statutory right to sue for losses related to construction defects in residential properties).

exert significant financial pressures to avoid such negligence. *Id*. at 56. An exception also has been created for commercial fishermen, who generally are permitted to sue for economic losses as ''favorites of admiralty'' law. *Id*.

With regard to the particular type of claim at issue here, those jurisdictions that have made exceptions to the economic loss doctrine to permit tort-based claims against design professionals when only economic loss is at issue, reason that the economic loss doctrine does not apply to bar tort claims grounded on negligently rendered services. *See, e.g.*, *McCarthy Well Co. v. St. Peter Creamery*, 410 N.W.2d 312 (Minn. 1987) (concluding that under Minnesota law, the economic loss doctrine barred tort actions only in cases governed by the Uniform Commercial Code and was thus not applicable in cases where the alleged negligence involved the performance of services rather than the sale of goods). Other courts have reasoned that tort claims against design professionals where only economic losses occurred are permissible when design professionals owe duties beyond the terms of the contract. *See Griffin Plumbing & Heating v. Jordan*, 463 S.E.2d 85 (S.C. 1995) (holding that the economic loss doctrine did not apply to the particular negligence claim against the engineer defendant, after concluding that an engineer owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties or with third parties); *Eastern Steel v. City of Salem*, 549 S.E.2d 266 (W. Va. 2001) (concluding that a contractor may recover purely economic damages in an action alleging professional negligence on the part of a design professional because such a professional owes a duty of care to a contractor due to the special relationship that exists between the two). Still other courts allow recovery on the basis that such claims are foreseeable. *See Ins. Co. of North America v. Town of Manchester*, 17 F. Supp. 2d 81, 84 (D. Conn. 1998).

The economic loss doctrine applies to preclude Mandalay's professional negligence claim

[Headnote 11]

Guided by the doctrine's purpose—''to shield [defendants] from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable,'' *Local Joint. Exec. Bd. v. Stern*, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982)—and, after contemplating the competing policy reasons set forth above, we conclude that the economic loss doctrine should apply to bar the professional negligence claim at issue here.

In the context of engineers and architects, the bar created by the economic loss doctrine applies to commercial activity for which contract law is better suited to resolve professional negligence claims. This legal line between contract and tort liability promotes

useful commercial economic activity, while still allowing tort recovery when personal injury or property damage are present. Further, as in this case, contracting parties often address the issue of economic losses in contract provisions.

Based on the same policy considerations that guide our decision here, other jurisdictions have reached the same conclusion. *See, e.g.*, *Holden Farms, Inc. v. Hog Slat Inc.*, 347 F.3d 1055 (8th Cir. 2003) (determining that when a financial injury reflects disappointed expectations, negligent design claims are barred by the economic loss doctrine because contract law is better suited to the nature of the loss); *Maine Rubber Intern. v. Environ. Management Group*, 298 F. Supp. 2d 133 (D. Me. 2004) (concluding that negligent design claims present a breach of express or implied warranty issue, properly addressed by contract law); *BRW, Inc. v. Duffy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004) (holding that the economic loss doctrine barred the plaintiff's tort claim against an engineering firm because the parties' contracts defined the engineering firm's duties, and pointing out that policy considerations weighed against permitting tort and contract remedies to overlap, particularly in the construction industry, where it is important to maintain a precise allocation of risk secured by contract); *City Exp., Inc. v. Express Partners*, 959 P.2d 836 (Haw. 1998) (applying the economic loss doctrine to preclude negligence claims against design professionals based in part on the policy of promoting certainty and predictability in allocating risk so that future business activity is not impeded); *see also, e.g.*, *Fireman's Fund Ins. v. SEC Donohue, Inc.*, 679 N.E.2d 1197 (Ill. 1997); *Prendiville v. Contemporary Homes, Inc.*, 83 P.3d 1257 (Kan. Ct. App. 2004); *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988); *Floor Craft v. Parma Com. Gen. Hosp.*, 560 N.E.2d 206 (Ohio 1990); *Goose Creek Sch. Dist. v. Jarrar's Plumbing*, 74 S.W.3d 486 (Tex. App. 2002); *American Towers Owners v. CCI Mechanical*, 930 P.2d 1182 (Utah 1996); *Carlson v. Sharp*, 994 P.2d 851 (Wash. Ct. App. 1999); *1325 North Van Buren v. T-3 Group*, 716 N.W.2d 822 (Wis. 2006) (all forbidding negligence claims against design professionals when only economic loss was at stake).

[Headnotes 12, 13]

We perceive no significant policy distinction that would drive us to permit tort-based claims to recover economic losses against design professionals, such as architects and engineers, who provided their professional services in the commercial property development and improvement process, when we have concluded that such claims are barred under the economic loss doctrine if brought against contractors and subcontractors involved in physically constructing improvements to real property. *See Calloway v. City of Reno*, 116 Nev.

250, 993 P.2d 1259 (2000).[9] The work provided by construction contractors or the services rendered by design professionals in the commercial building process are both integral to the building process and impact the quality of building projects. Therefore, when the quality is deemed defective, resulting in economic loss, remedies are properly addressed through contract law. *See id.*[10] In that regard, we point out that economic losses for which no tort action will lie generally involve a buyer's ''disappointed economic expectations.'' *Sensenbrenner v. Rust, Orling & Neale*, 374 S.E.2d 55, 56-58 (Va. 1988). In the commercial property development and improvement process, design professionals' duties typically are prescribed by the parties' contract, and therefore, any duty breached arises from the contractual relationship only, which ''necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement.'' *Id.* at 58.

[Headnote 14]

While the loss alleged here arguably was foreseeable, we do not read the rule as necessarily being dependent on foreseeability notions. *See Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 52 (1st Cir. 1985). Instead, the economic loss doctrine cuts off tort liability when no personal injury or property damage occurred, with traditionally recognized exceptions for certain classes of claims. *Id.* at 55-56. Negligence claims against design professionals do not fall within those traditional exceptions, and we decline to make an exception here.

[Headnote 15]

In this case, for purposes of the certified question, Mandalay suffered only economic loss without any attendant personal injury or property damage, and therefore, the economic loss doctrine bars Mandalay from proceeding with their negligence-based claims against Terracon. Thus, adhering to our general policy of applying

[9]We again point out that *Calloway* was not decided in the context of NRS Chapter 40, as the underlying action was initiated before the effective date of the pertinent portions of that chapter, and, at any rate, the discrepancies between *Calloway* and NRS Chapter 40 were resolved in *Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004). Regardless, our decision today in no way implicates NRS Chapter 40, as the property at issue here is not residential.

[10]In *Calloway*, we cited with approval *Casa Clara v. Charley Toppino and Sons*, 620 So. 2d 1244 (Fla. 1993), in which the Florida Supreme Court determined that the economic loss doctrine applied to foreclose tort-based claims in construction defect cases brought against construction contractors. 116 Nev. at 261, 993 P.2d at 1266. Notwithstanding *Casa Clara*, the Florida Supreme Court later refused to apply the economic loss doctrine to a negligence claim in a construction defect action brought against a design professional, after reasoning that Florida law allowed recovery of pure economic losses in the context of

the economic loss doctrine in a predictable and fair way, we answer the federal court's question affirmatively.

CONCLUSION

[Headnote 16]

We conclude that, in a commercial property construction defect action in which the plaintiffs seek to recover purely economic losses through negligence-based claims, the economic loss doctrine applies to bar such claims against design professionals who have provided professional services in the commercial property development or improvement process. Accordingly, we answer the U.S. District Court's certified question in the affirmative.

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

DARREN ROY MACK, APPELLANT, *v.*
ESTATE OF CHARLA MACK, RESPONDENT.

No. 49754

March 26, 2009 206 P.3d 98

Appeal from a district court's nunc pro tunc order regarding the division of marital assets. Second Judicial District Court, Washoe County; David A. Huff, Judge.

Husband who shot and killed wife during pending divorce proceedings sought review of nunc pro tunc order of the district court memorializing an oral order entered by the former presiding judge who was also shot by husband. The supreme court, CHERRY, J., held that: (1) supreme court could take judicial notice of events that occurred in husband's criminal proceedings; (2) trial court acted appropriately in issuing order nunc pro tunc as to render the record truthful as to the acts done or intended to be done by the prior court; (3) substantial evidence existed to establish a meeting of the minds between the parties, such that trial court could enter nunc pro tunc order acknowledging settlement; (4) third-party waivers as to various claims against marital estate were not an unmet condition precedent to divorce settlement agreement between parties; (5) trial court is-

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professional negligence claims of all kinds, including claims brought by those who were not a party to the original professional services contract. *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999). Given the policy considerations that support restricting liability for certain types of foreseeable, negligently caused financial injury, we cannot agree with the Florida court's holding in *Moransais*, especially since the claims against the design professional in *Moransais* involved statutory negligence and negligent misrepresentation, issues that are not present here.

sued a valid qualified domestic relations order (QDRO) during wife's lifetime, such that husband's pension plan was subject to distribution under ERISA; and (6) state's slayer statute prohibiting convicted murderers from benefiting from their wrongful acts was not preempted by ERISA as to prohibit distribution of husband's pension plan.

Affirmed.

[Rehearing denied May 19, 2009]

Law Offices of Mark Wray and *Julia Vohl Islas* and *Mark Wray*, Reno, for Appellant.

Kreitlein & Walker, Ltd., and *Egan K. Walker*, Reno, for Respondent.

1. EVIDENCE.
   In divorce action in which husband shot wife and presiding judge during pending proceedings, killing wife and injuring judge, the supreme court took judicial notice of events that occurred in husband's criminal proceedings, namely his conviction; deceased wife's estate acted as substitute party, and absent facts of criminal trial, husband stood to gain financially from his own wrongdoing in taking the life of another. NRS 47.130(2)(b), 47.150(1).
2. APPEAL AND ERROR.
   On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom.
3. APPEAL AND ERROR.
   Supreme court will generally not consider on appeal statements made by counsel portraying what purportedly occurred below.
4. EVIDENCE.
   Supreme court may take judicial notice of facts generally known or capable of verification from a reliable source, whether requested to or not; further, the court may take judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute. NRS 47.130(2)(b), 47.150(1).
5. EVIDENCE.
   As a general rule, the supreme court will not take judicial notice of records in another and different case, even though the cases are connected; however, this rule is flexible in its application and, under some circumstances, the court will invoke judicial notice to take cognizance of the record in another case. NRS 47.130(2)(b), 47.150(1).
6. EVIDENCE.
   To determine if a particular circumstance falls within the exception allowing supreme court to invoke judicial notice to take cognizance of the record in another case, the court examines the closeness of the relationship between the two cases.
7. EVIDENCE.
   Supreme court will take judicial notice of other state court and administrative proceedings when a valid reason presents itself.
8. DIVORCE.
   Trial court assigned to dissolution action after husband shot wife and presiding judge during pending proceedings, killing wife and injuring judge,

acted appropriately in issuing order nunc pro tunc as to render the record truthful as to the acts done or intended to be done by the prior court, without changing the actual judgment rendered; trial court did not change the divorce decree, but instead used the nunc pro tunc order to relate back to the hearings in which the divorce decree was adjudicated and entered orally on the record by the presiding judge, prior to the shooting incident.

9. APPEAL AND ERROR; MOTIONS.
   The grant or denial of an order nunc pro tunc is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion.

10. MOTIONS.
    Purpose of an order nunc pro tunc is to make a record speak the truth concerning acts done.

11. DIVORCE.
    Based on husband's clear assent to the terms of the divorce settlement agreement, as evinced in the transcript of two hearings, substantial evidence existed to establish a meeting of the minds between the parties, such that trial court could enter nunc pro tunc order acknowledging the settlement, in divorce action in which husband shot wife and presiding judge during pending proceedings, killing wife and injuring judge.

12. APPEAL AND ERROR.
    Contract interpretation is subject to a de novo standard of review.

13. APPEAL AND ERROR.
    The question of whether a contract exists is one of fact, requiring supreme court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.

14. HUSBAND AND WIFE.
    A settlement agreement in a divorce action is governed by principles of contract law; as such, a settlement agreement will not be an enforceable contract unless there is an offer and acceptance, meeting of the minds, and consideration.

15. DIVORCE; HUSBAND AND WIFE.
    Third-party waivers as to various claims against marital estate were not an unmet condition precedent to enforcement of divorce settlement agreement between parties, and thus, fact that third parties had failed to sign waivers prior to shooting incident in which husband shot wife and presiding judge, killing wife and injuring judge, did not preclude subsequent entry of nunc pro tunc order memorializing presiding judge's oral judgment adopting agreement; husband acquiesced to terms of settlement on record at two hearings prior to shooting incident, meaning trial court did not alter terms of settlement agreement but merely accepted terms that had already been approved of by both parties.

16. DIVORCE.
    Trial court issued a valid qualified domestic relations order (QDRO) during wife's lifetime, prior to shooting incident in which husband shot wife and presiding judge during pending divorce proceedings, killing wife and injuring judge, such that husband's pension plan was subject to equitable distribution, by wife's estate, upon entry of judgment nunc pro tunc, in accordance with Employee Retirement Income Security Act (ERISA); presiding judge had issued an oral order prior to shooting incident, creating a recognized existence in wife and the right to receive a portion of husband's pension plan. Employee Retirement Income Security Act of 1974, § 206(d)(3)(B)(i)(I), 29 U.S.C. § 1056(d)(3)(B)(i)(I).

17. DIVORCE.

Whether an order constitutes a valid qualified domestic relations order (QDRO) under Employee Retirement Income Security Act (ERISA) is a question of law that is reviewed de novo.

18. LABOR AND EMPLOYMENT; STATES.

Nevada's slayer statute prohibiting convicted murderers from benefiting from their wrongful acts was not preempted by Employee Retirement Income Security Act (ERISA), and thus, husband who shot wife and presiding judge during pending divorce proceedings, killing wife and injuring judge, could not use ERISA rules and regulations as a way of avoiding payment to wife's estate of lump-sum payment from his ERISA pension plan, as reflected in trial court's oral judgment, prior to shooting incident, and memorialized in subsequent nunc pro tunc order; application of slayer statute could not affect determination of eligibility for benefits or affect method of calculating benefits due. NRS 41B.200.

19. STATES.

Whether a state law is preempted by a federal statute is a question of Congressional intent.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

In this appeal we address four issues. First, we will examine whether we may take judicial notice of the outcome of proceedings in which one spouse was adjudged to have murdered the other. Next, we will discuss whether a nunc pro tunc order[2] was appropriate in this case when one spouse died before the oral record was memorialized in an order, and we examine whether the procedure of entering the oral order nunc pro tunc was appropriate and the merits of the underlying order. We next address whether the district court issued a Qualified Domestic Relations Order (QDRO) during Charla's lifetime. Last, we will discuss the effect of the Employee Retirement Income Security Act of 1974 (ERISA) on the district court order being appealed, namely, whether the order is a QRDO under ERISA and whether ERISA preempts application of Nevada's slayer statute.

We conclude that: (1) we may take judicial notice of appellant Darren Mack (Darren) being adjudged his wife Charla Mack's (Charla) killer, (2) the nunc pro tunc order was proper to memorialize Judge Weller's oral orders, (3) the district court properly issued the QDRO during Charla's lifetime, and (4) Nevada's slayer statute

[1]THE HONORABLE JAMES HARDESTY, Chief Justice, voluntarily recused himself from participation in the decision of this matter. THE HONORABLE KRISTINA PICKERING, Justice, did not participate in the decision of this matter.

[2]A nunc pro tunc order is an order that is entered retroactive to a certain date.

is not preempted by ERISA. As such, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

This is an appeal of a district court's nunc pro tunc order memorializing an oral order entered by the former presiding judge, Judge Weller, in the divorce of Charla and Darren. Charla and Darren were married on May 13, 1995, in Lake Tahoe, California. Their union produced one child, Erika Nicole Mack, born on December 22, 1997. Charla filed the initial divorce complaint on February 8, 2005. Darren filed an answer and counterclaim on March 23, 2005. One of the main areas of contention between Charla and Darren was the distribution of property upon their divorce.

On January 9, 2006, the district court held a hearing on the issue of property settlement. During the hearing, the district court recited several oral orders. In part, the district court mandated that within 48 hours of the agreement being reduced to writing, Darren must pay Charla $480,000; of that amount, $50,000 was made available to be used for whatever purpose Charla desired, with the balance going towards the purchase of a vehicle and a home for herself. The district court also mandated that a QDRO was to be executed, which would result in Charla receiving spousal support from Darren's pension fund in the amount of $10,000 per month for a period of five years.

The court also entered several orders regarding certain other issues. The only issue worthy of note is as follows: releases would be signed between and among Charla, Darren's mother Joan Mack (Joan), and the entities owned by Darren and Joan—Palace, Mack & Mack I, and Mack & Mack II—waiving their respective rights to sue.

At the conclusion of the court's oral orders, Darren stated that he needed to take the agreement ''to the people I'm borrowing it from and I can get it within forty-eight hours. I don't have any money.'' The court approved and asked that Charla's attorney, Shawn Meador, write up the agreement by January 20, 2006, so that the parties could sign it. Thereafter, the court paused the proceedings to ensure that each spouse had the opportunity to discuss the terms of the agreement with their counsel.

Finally, the court canvassed the parties as to their understanding of the court's order. Because the issue of understanding is at the heart of this appeal, we include the entire colloquy:

> THE COURT: All right.
>
> Mr. Mack, have you had an opportunity to discuss this property agreement that we've been talking about here on the record with your attorney to the full extent that you would like?

MR. MACK: Yes.

THE COURT: Do you have any remaining questions?

MR. MACK: I don't, your Honor.

THE COURT: Is there anything you wish to add?

MR. MACK: Huh-uh. No, sir.

THE COURT: Is there anything you wish to subtract?

MR. MACK: No.

THE COURT: Do you agree to be bound by this agreement?

MR. MACK: I do.

THE COURT: Ma'am?

MRS. MACK: Yes.

THE COURT: Mrs. Mack, have you heard the entire agreement spoken on the record?

MRS. MACK: I have.

THE COURT: Do you understand it?

MRS. MACK: Yes, I do.

THE COURT: Have you had an opportunity to discuss it with your attorney to the full extent that you would like?

MRS. MACK: Yes, I have.

THE COURT: Do you have any remaining questions?

MRS. MACK: Let me just check. Let me just check, look at this. (Reading.)

No.

THE COURT: Is there anything you would like to add?

MRS. MACK: No.

THE COURT: Is there anything you would like to take away?

MRS. MACK: No.

THE COURT: Do you agree to be bound?

MRS. MACK: Yes.

THE COURT: Okay.

Next the court ensured that counsel had a clear understanding of the agreement and adequately informed their clients about the agreement.

THE COURT: . . .

Counsel for Mr. Mack, have you heard the agreement?

MR. SHAW: I have, your Honor.

THE COURT: Okay.

Do you think it is in your client's best interests to enter into this agreement?

MR. SHAW: Yes.

THE COURT: Okay.

Counsel for Mrs. Mack, have you heard the entire agreement?

MR. MEADOR: I have, your Honor.

THE COURT: Do you think it's in your client's best interests to enter into this agreement?

MR. MEADOR: Yes, I do.

THE COURT: Then this agreement is accepted by the Court and shall be the order of the Court and shall be binding on the parties.

Following the hearing, each party submitted a proposed order, and the proposed orders were inconsistent with each other. Charla filed a formal objection on the record in order to preserve her objections to Darren's proposed order. Among other issues, Charla objected to Darren's post-hearing contention that he did not have authority to bind Palace or Joan to a release agreement; Charla contended that if Darren did not have the authority to make such an agreement at the time, he should not have indicated he did.

In turn, Darren's attorney, Jan Shaw, filed an affidavit in response to Charla's formal objection. In his affidavit, Shaw conceded that the parties submitted different versions of a written form of the agreement to the court and asserted that the problem was whether Joan, Palace, and the Mack & Mack entities would or would not sign waivers and releases of all claims against Charla, with Charla waiving the same. Moreover, Shaw attested that, ''[t]he parties have done all that they are required to do, and your Affiant believes both assume this case is settled. Certainly it is the belief of [Darren] that this case is settled; that there is a binding agreement between the parties that he is to honor.'' Finally, Shaw contended that, ''all the Plaintiff [Charla] had to do was get appropriate releases and waivers to counsel for the non-parties, do so promptly, and determine whether or not they were going to be executed . . . [Charla's contentions have] nothing to do with the Defendant [Darren] who wanted this case settled, who believes it is settled, and who is prepared to comply with the settlement.''

Thereafter, Charla filed an emergency motion for order to show cause or, in the alternative, to enforce the settlement agreement, motion for order shortening time to respond, and a motion for an award of attorney fees and costs. In her motion, Charla argued that Darren was carrying out the exact threat he previously posed to her, which was to create delay and problems post-settlement and to force Charla to spend as much as possible out of the settlement awards on attorney fees and costs. Further, Charla argued that there was no support in the record that the responsibility for procuring waivers from Joan, Palace, and the Mack & Mack entities was Charla's obligation, although she diligently pursued obtaining the waivers.

Darren responded via another affidavit filed by Shaw on February 15, 2006. Darren contended that the proposed written orders of both parties clearly stated that the waivers are an issue between Charla and the third parties of Joan, Palace, and the Mack entities, without Darren's involvement.

Thereafter, several motions were filed by both parties. Charla filed a notice of acceptance of settlement and request for entry of order. In her motion, Charla asked that the court finalize the settlement, with Charla agreeing to waive the requirement that Joan and Palace dismiss their lawsuits[3] and, in turn, Charla would reserve any claims or defenses she may have against Joan and Palace because they seemed unwilling to enter into mutual waivers and releases. However, Charla also offered that if Joan and Palace were willing to sign the releases, she would honor that part of the agreement and in turn execute waivers. Darren filed an objection to Charla's request for entry of order on the basis that: (1) the offer of settlement was an earlier version of a settlement offer that was no longer in Darren's best interest; (2) the motion did not comply with the Nevada Rules of Civil Procedure, the District Court Rules, or the Local Rules of Practice for the Second Judicial District Court as to motion pleading; and (3) the court was without jurisdiction to issue the requested relief based on caselaw. Charla thereafter replied, refuting Darren's claims.

The district court held a hearing regarding the issues hindering settlement on May 24, 2006. At this hearing, Judge Weller reaffirmed his oral order of January 9, 2006. As to the issue regarding settlement of claims between Charla and Joan, Palace, and the Mack & Mack entities, the court stated that it read the settlement to be as follows:

> That there's a requirement that Mrs. Mack, the mother, the grandmother, drop [the] pending lawsuit, she's testified twice today under oath her willingness to do that.
>
> I also read that language to say that Mr. and Mrs. Mack are granting each other as part [of] the settlement a full and final settlement of all their financial rights and obligations arising out of their relationship, marital or otherwise.
>
> I also read that language as saying that Mrs. Mack, the litigant, Charla Mack, will not initiate any lawsuit against Mr. Mack's mother or the business, which I understand to be Palace.
>
> And I'm willing to consider that more broadly if the parties agree that that includes Mack & Mack I, I don't think I knew at the time [of] the settlement of the existence of Mack &

[3]The record does not include any documents regarding lawsuits filed by Joan or Palace against Charla. However, based on this motion, it appears that Charla had entered into some agreement whereby Joan and Palace agreed to drop the lawsuits that they had filed against Charla.

Mack I, I don't recall it specifically, or Mack & Mack II, or the mother alluded to the southern properties that might be in another entity. But what I understand that language on Page 13 to say is that Mrs. Mack, Charla Mack, is not going to initiate a lawsuit against anyone involved in Palace or Mr. Mack or anyone.

I don't read it as saying that she can't respond to a lawsuit or counter-claim if she is sued, but I do read it as saying that she is not going to initiate a lawsuit.

In relation to Mr. Mack's obligation, I very specifically remember Mr. Mack leaving this courtroom in the negotiation, probably before we were on the record, we were talking about the deal that we had reached and put on the record, and he went outside to find out if it was okay to enter into the agreement, and he came back and he entered into the agreement.

I read the language on Page 13 of the transcript to say that Mr. Mack will use his best effort to ensure that the business and his mother will not sue Charla Mack. They were the only parties here, and I read that language to talk about the agreement between the only parties who were here.

And I think that that also, best efforts is one way of expressing it, another way of expressing it is in every contract in Nevada is an implied covenant of good faith and fair dealing. And I read that language to require Mr. Mack to in good faith and in fair dealing to do everything he could to keep the business and his mother from initiating a lawsuit against Charla Mack.

I also read that page—the language on that page as saying that by saying that it resolves all claims among the business, the mother, Mr. Mack and Mrs. Mack, I read that as meaning to the extent of the parties who were in the courtroom and made that agreement on the record have within their control, that it didn't obligate them to do anything that was impossible, and it didn't obligate anybody who wasn't part of the agreement to do anything at all.

Although, I took what Mr. Mack said in the courtroom to be his representation on behalf of those other parties, they weren't party to the agreement, and the only parties who were bound were Mr. and Mrs. Mack, and it obligated them to the extent that—specifically Mr. Mack to the extent that he was able to obtain the cooperation to his mother and the business.

I also find that the language for the release was for her benefit, and I guess this is redundant because this is part of your argument to Mr. Meador that I told you I'd adopt.

I think the best thing I can do for you is to set a hearing date on the custody issues and get them over with as quickly as possible. As I stated to you earlier, if you don't like what I do on custody it's easy to turn that around.

The court also resolved another issue at Darren's request—to know Charla's physical address on the basis that he should know where Erika was living. Charla argued in part that she should not have to reveal her address to Darren because ''[Darren] gets so angry and so worked up that I just don't feel comfortable right now of him knowing personally where I live.'' The court offered Charla the options of either obtaining a temporary restraining order or petitioning the secretary of state's office to obtain a fictitious address for all court proceedings. At the end of the hearing, Charla disclosed her address to Darren on the record and the court ordered that neither party, nor an agent of either party, was to be within 100 yards of the other except during custody exchanges, nor would there be any interference with the other party electronically via telephone or e-mail.

On June 12, 2006, Charla was killed, and Judge Weller was shot.[4] Darren was later convicted of both Charla's murder and the attempted murder of Judge Weller. On September 19, 2006, the district court issued an order allowing the Estate of Charla Mack (the Estate) to substitute for Charla in the remainder of the divorce proceedings. Thereafter, on December 5, 2006, the Estate filed a motion for entry of an order nunc pro tunc, seeking to have the oral orders entered by Judge Weller at the hearings on January 9, 2006, and May 24, 2006, codified in a written order.

The Estate made three main arguments in support of its motion. First, the Estate argued that Charla had a property interest in Darren's retirement benefits and business holdings because they were community assets, therefore, belonging in half to her per statutory authority. Second, the Estate argued that it had a valid claim to her property because an action for divorce survives the death of a party insofar as property distribution issues remain following the death. Finally, the Estate argued that the settlement agreement agreed upon on January 9, 2006, was valid and enforceable as ruled by Judge Weller, and therefore a nunc pro tunc order must be memorialized.

Darren filed an opposition to the motion for entry of an order nunc pro tunc along with a motion to dismiss. Darren argued that a nunc pro tunc order was not appropriate because: (1) the district court did not have jurisdiction to force a settlement on terms to which Darren never agreed; (2) there was no agreement because there was no meeting of the minds on a material term (specifically, the release agreements); (3) even if there was an enforceable settlement agreement, one of the terms of the agreement included settlement with third parties, and that specific condition precedent never occurred; (4) the district court lacked the authority to alter the settlement by eliminating the condition regarding resolution of third-

[4]We note that Judge Huff assumed responsibility for this case after these events.

party claims; (5) the district court had no jurisdiction to issue an order affecting Darren's ERISA-qualified pension plan; and (6) Darren objected to the admissibility of evidence concerning alleged community property interests. As to his motion to dismiss, Darren argued that the divorce action must be dismissed upon the death of one of the parties, inclusive of all property rights as they are incidental to a final decree.

The Estate filed a reply to Darren's opposition along with an opposition to Darren's motion to dismiss. In its opposition to the motion to dismiss, the Estate argued that Nevada has long recognized that although the divorce decree becomes a nullity upon a party's death, property issues do not abate at death, contrary to Darren's contentions. Additionally, the Estate noted that there was a decision on the merits of this case, and the decision was deemed enforceable, and therefore a nunc pro tunc is appropriate. The Estate made the following reply arguments as to the pending motion for an order nunc pro tunc: (1) an order nunc pro tunc must be entered in this case to reflect the decision rendered by the court; (2) the enforceability of the settlement agreement had already been adjudicated at the May 24, 2006, hearing and need not be addressed; and (3) the district court had jurisdiction to issue orders affecting ERISA-qualified pension plans.

Thereafter the district court entered an order nunc pro tunc. In its order, the district court relied on our opinion in *Finley v. Finley*, 65 Nev. 113, 118, 189 P.2d 334, 336 (1948), *overruled on other grounds by Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964), for authority to enter an order nunc pro tunc to render the record truthful as to the acts done or intended to be done by the district court without changing the actual judgment rendered. Further, the district court found that, based on the January 9, and May 24, 2006, hearings, the facts were clear that Judge Weller made a decision on the facts of the case concerning the property settlement and would have signed an order immediately had a written order been available.

Some of the facts that the district court found persuasive in its finding that a factual basis for a nunc pro tunc order existed are: (1) Judge Weller's canvass of the parties and the parties' subsequent agreement to the settlement, (2) Judge Weller's statement on the record that the settlement ''shall be the order of the court,'' (3) Judge Weller's assignment to Charla's attorney at both hearings to draft the order for his signature and filing, and (4) Judge Weller's statement on the record that if the parties were unhappy with his ruling they were free to appeal to the Nevada Supreme Court. Based on these factual findings and pursuant to *Finley*, the district court found that an actual order was entered by the court, and therefore it granted the Estate's motion and entered an order nunc pro tunc. Darren has timely appealed.

DISCUSSION

Darren raises several issues on appeal. Because of the applicability to the other issues raised by Darren, we begin by considering whether we may take judicial notice of the fact that Darren was adjudged Charla's killer. We will then address whether the entry of a nunc pro tunc order was proper in this case and whether the merits of that order were valid. Next, we will address whether the district court properly issued a valid QDRO. Last, we will address the applicability of Nevada's slayer statute to ERISA.

Judicial notice

[Headnote 1]

Darren argues that events that occurred in his criminal proceedings and events that occurred after the filing of this appeal are not matters of the record in this appeal. As such, he contends that this court may not consider these matters.

[Headnotes 2, 3]

On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom. *Toigo v. Toigo*, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) (citing *Lindauer v. Allen*, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969)). We will generally not consider on appeal statements made by counsel portraying what purportedly occurred below. *Wichinsky v. Mosa*, 109 Nev. 84, 87, 847 P.2d 727, 729 (1993) (citing *Lindauer*, 85 Nev. at 433, 456 P.2d at 852-53).

[Headnote 4]

However, we may take judicial notice of facts generally known or capable of verification from a reliable source, whether we are requested to or not. NRS 47.150(1). Further, we may take judicial notice of facts that are ''[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.'' *See* NRS 47.130(2)(b).

[Headnote 5]

As a general rule, we will not take judicial notice of records in another and different case, even though the cases are connected. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (citing *Giannopulos v. Chachas*, 50 Nev. 269, 270, 257 P. 618, 618 (1927)). However, this rule is flexible in its application and, under some circumstances, we will invoke judicial notice to take cognizance of the record in another case. *Id*.

[Headnotes 6, 7]

To determine if a particular circumstance falls within the exception, we examine the closeness of the relationship between the two

cases. *Id*. We have taken judicial notice of other state court and administrative proceedings when a valid reason presented itself. *See, e.g.*, *id.*; *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314-15 (1972); *State Farm Mut. v. Comm'r of Ins.*, 114 Nev. 535, 539, 958 P.2d 733, 735 (1998).

Because Darren's murder trial occurred after the nunc pro tunc order was issued, the record on appeal is silent regarding the person responsible for Charla's death. As such, Darren contends that we cannot take judicial notice of the outcome of his murder trial for Charla's death and its application to this appeal as it relates to the ERISA pension plan.

We hold that judicial notice may be taken of the outcome of a murder trial in which the deceased stood to gain financially from the killer because of the close relationship between the murder trial and the benefits to which the deceased's estate is entitled. This relationship is close and serious enough that the legislature of almost every state has addressed it in state slayer statutes, which prohibit a person's financial gain from their own wrongdoing in taking the life of another.[5] Based on this close relationship, we conclude that these particular circumstances fall within the exception and that we may take judicial notice of the outcome of Darren's murder trial for Charla's death because it falls within the exception to the general rule of judicial notice, as Charla stood to gain financially from Darren's ERISA pension plan.

The nunc pro tunc order

[Headnote 8]

Darren argues that the district court's nunc pro tunc order should not be upheld because the entering of such an order was not appropriate and that the district court's underlying decision was invalid. We disagree.

[Headnote 9]

The grant or denial of an order nunc pro tunc is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *Allen v. Allen*, 70 Nev. 412, 415, 270 P.2d 671, 672 (1954).

Entering the nunc pro tunc order was appropriate

Darren argues that the nunc pro tunc order entered by the district court does not meet the standard for issuance of such an order because the Estate did not allege a clerical error, nor did it seek to amend a prior judgment. Rather, the Estate sought to create a written order where none existed before and to modify that order from that which was previously part of the record. Specifically, Darren

[5]Nevada's slayer statute will be discussed later in this opinion.

contends that because Judge Weller did not enter a written order from the January 9, 2006, hearing, there was no order for the district court to amend nunc pro tunc.

[Headnote 10]

The purpose of an order nunc pro tunc is to ''make a record speak the truth concerning acts done.'' *Finley v. Finley*, 65 Nev. 113, 118, 189 P.2d 334, 336 (1948) (citing *Talbot v. Mack*, 41 Nev. 245, 255, 169 P. 25, 27 (1917)), *overruled on other grounds by Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964). Further, we have held that

> an order nunc pro tunc cannot be made use of nor resorted to, to supply omitted action. Power to order the entry of judgment nunc pro tunc cannot be used for the purpose of correcting judicial errors or omissions of the court. Nor can this procedure be employed to change the judgment actually rendered to one which the court neither rendered nor intended to render.

Finley, 65 Nev. at 118, 189 P.2d at 336 (citing *Wright v. Curry*, 187 S.W.2d 880, 881 (Ark. 1945); *Schroeder v. Superior Court*, 239 P. 65, 66 (Cal. Ct. App. 1925)).

The nunc pro tunc order entered by the district court was used to memorialize the oral records from the hearings held on January 9, 2006, and May 24, 2006. As such, and because the nunc pro tunc order was not used for any of the purposes we previously disapproved of in *Finley*, we conclude that the nunc pro tunc order meets the standard for issuing such an order. We further conclude that the district court did not abuse its discretion in entering this order because it was not used to supply omitted action, nor to correct judicial errors or an omission of the court or to change the judgment actually rendered. As noted, the nunc pro tunc order here was used to memorialize the oral orders made on the record by Judge Weller.

Darren also contends that the case relied upon by the district court, *Koester v. Estate of Koester*, 101 Nev. 68, 693 P.2d 569 (1985), is distinguishable from this case. Instead, Darren contends that this case should be adjudicated in the same manner as *McClintock v. McClintock*, 122 Nev. 842, 138 P.3d 513 (2006).

In *Koester*, 101 Nev. at 70-71, 693 P.2d at 571, the district court entered a nunc pro tunc order memorializing a decree of divorce, which was not filed before Mrs. Koester's death. We held that, because Mrs. Koester had died after the district court entered its decision, the district court had the power to enter the judgment nunc pro tunc after Mrs. Koester's death. *Id.* at 71-72, 693 P.2d at 572. Further, we also adopted the general principle regarding relating back a final divorce decree following the death of one party. *Id.* at 73-74, 693 P.2d at 572. Specifically, we stated that a district court could properly relate back a divorce decree to a point in time before

the death of one of the parties ''[i]f the facts justifying the entry of a decree were adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately, but for some reason was not entered as such on the judgment record . . . .'' *Id.* at 73, 693 P.2d at 572.

In *McClintock*, 122 Nev. at 843, 138 P.3d at 514, we held that a district court could not enter a nunc pro tunc order to change the date of a divorce to a date prior to the date the district court entered its decision. We thus concluded that ''[t]he district court abused its discretion by moving the date of the . . . divorce decree, nunc pro tunc, to a date before the district court's adjudication of the matter.'' *Id.* at 846, 138 P.3d at 516.

Darren argues that *Koester* is distinguishable because the nunc pro tunc order involved in that case served to validate a decree of divorce that was voidable based solely on the date entered on the original order following Mrs. Koester's death. Darren argues that the district court abused its discretion and violated our holding in *McClintock*, 122 Nev. at 843, 138 P.3d at 514, by backdating the nunc pro tunc order. Based on our reading of these two cases, we disagree with Darren's contentions because the district court did not change the divorce decree.

It was not the case here, as it was in *McClintock*, that the district court changed the date the divorce decree was entered. As such, we conclude that, as in *Koester*, the district court did not abuse its discretion because the district court used the nunc pro tunc order to relate back to the hearings held on January 9, 2006, and May 24, 2006, where the divorce decree was adjudicated and entered orally on the record by Judge Weller.

The merits of the order were valid

[Headnote 11]

Darren contends that even if the nunc pro tunc procedure was proper, the order constituted an abuse of discretion because the district court did not apply the law to the facts shown by the record in the divorce case. Darren specifically argues that the merits of the order entered by the district court were invalid because there was no meeting of the minds to support the settlement agreement and the condition precedent of obtaining waivers was not met.

First, Darren argues that the underlying decision of the district court to grant the nunc pro tunc order was an abuse of discretion because the settlement agreement memorialized in the order was invalid and not enforceable. Darren specifically contends that the settlement agreement was invalid because there was no meeting of the minds as to a material term of the agreement. That is, the execution of release agreements between and amongst Charla, Joan, Palace,

and the Mack & Mack entities did not lead to a meeting of the minds.

[Headnotes 12, 13]

''Contract interpretation is subject to a de novo standard of review.'' *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (citing *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004); *Grand Hotel Gift Shop v. Granite St. Ins.*, 108 Nev. 811, 815, 839 P.2d 599, 602 (1992)). ''However, the question of whether a contract exists is one of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.'' *May*, 121 Nev. at 672-73, 119 P.3d at 1257 (citing *James Hardie Gypsum, Inc. v. Inquipco*, 112 Nev. 1397, 1401, 929 P.2d 903, 906 (1996), *overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates*, 117 Nev. 948, 955 n.6, 35 P.3d 964, 968-69 n.6 (2001)).

[Headnote 14]

A settlement agreement, which is a contract, is governed by principles of contract law. *May*, 121 Nev. at 672, 119 P.3d at 1257. As such, a settlement agreement will not be an enforceable contract unless there is ''an offer and acceptance, meeting of the minds, and consideration.'' *Id*. (citing *Keddie v. Beneficial Insurance, Inc.*, 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (BATJER, C.J., concurring)).

We conclude that, based on Darren's clear assent to the terms of the settlement agreement at the hearings held by Judge Weller on January 9, 2006, and May 24, 2006, substantial evidence exists that shows a meeting of the minds between the parties. As such, we affirm the order of the district court with respect to the settlement agreement because the record indicates an understood settlement between the parties.

[Headnote 15]

Second, Darren argues that Joan, Palace, and the Mack & Mack entities' signatures on the waivers were a condition precedent to the valid execution of the settlement agreement, and because the condition was never met, the settlement agreement cannot be enforced. Darren further argues that the district court was without any legal authority to alter the terms of the settlement agreement because a settlement is a matter of a private contract between two parties. *See Travis v. Nelson*, 102 Nev. 433, 434, 725 P.2d 570, 571 (1986). Likening the instant case to *Travis*, Darren argues that the district court should have determined there was no settlement between the parties rather than allow the court's own frustration with the parties to take over and improperly substitute the court's judgment. Accordingly, Darren argues that the district court's elimination of the settlement provision, which called for waivers to be signed between

and among Charla, Joan, Palace, and the Mack & Mack entities, effectively subjected Darren to paying approximately $1 million to Charla without Darren receiving the important benefit of the bargain for which he entered.

In *Travis*, 102 Nev. at 434, 725 P.2d at 571, we held that a district court did not have the authority to alter the terms of an agreement. Further, we stated that a district court did have the authority to approve terms of an agreement, which were beneficial to an estate, but could not order the parties to agree to a settlement that included terms which were not agreed upon. *Id*.

Because Darren acquiesced to the terms of the settlement agreement on the record at the hearings on January 9, 2006, and May 24, 2006, and because the determination by the district court that the waiver terms were not a condition precedent was not clearly erroneous, we conclude that the waivers were not an unmet condition precedent and the agreement should be enforced. As such, the district court did not alter the terms of the settlement agreement but merely accepted the terms that were already approved of by both parties.

The district court issued a valid QDRO

[Headnote 16]

Darren contends that the district court erred in issuing a QDRO to Charla's estate because the QDRO was issued in violation of ERISA. Darren points out that under ERISA, in order for Charla to collect from his pension plan, she was required to obtain a valid QDRO. However, Darren contends that ERISA precludes Charla from receiving payments from his retirement account because she does not qualify as an alternate payee. Darren further argues that in order for there to be a QDRO, the court must issue a domestic relations order (DRO) and the plan administrator must then determine if it is qualified. Because the district court never signed a DRO, Darren argues that the administrator had nothing to qualify.

[Headnote 17]

Whether an order ''constitutes a valid QDRO under ERISA is a question of law.'' *Branco v. UFCW-Northern California Employers*, 279 F.3d 1154, 1158 (9th Cir. 2002) (citing *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1150 n.5 (9th Cir. 2000)). We review questions of law de novo. *Sheriff v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008).

ERISA provides protection for beneficiaries of employee pension and welfare benefit plans offered in the private workplace. ERISA includes a ''spendthrift'' provision, restricting a plan participant's ability to assign his or her benefits under a pension plan covered by this act. 29 U.S.C. § 1056(d)(1) (2006). ERISA expressly preempts state law and makes the regulation of pension plans a matter of exclusive federal interest. *Id*. § 1144(a).

Because concerns that ERISA's spendthrift and preemption provisions affected the validity of state court DROs, Congress enacted the Retirement Equity Act of 1984 to exempt QDROs from those provisions. *Id.* § 1056(d)(3)(A). Congress provided that the spendthrift provision ''shall not apply if the order is determined to be a qualified domestic relations order [QDRO].'' *Id.* Consistent with this language, Congress added an exception to the express ERISA preemption provision, stating that the preemption provision ''shall not apply to [QDROs].'' *Id.* § 1144(b)(7). Under a QDRO, an alternative payee is treated as a plan beneficiary. *Id.* § 1056(d)(3)(J).

A DRO is ''qualified'' if it ''creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.'' *Id.* § 1056(d)(3)(B)(i)(I). The QDRO provisions define ''alternate payee'' to mean ''any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.'' *Id.* § 1056(d)(3)(K).

The district court issued a valid QDRO during Charla's lifetime. In the January 9 hearing, Judge Weller stated that within 48 hours, ''a QDRO will be executed which will transfer to Mrs. Mack the sum of five hundred thousand dollars with any appreciation that is distributed to that five hundred thousand dollars and more or less equal installments over a period of five years.'' Here, the court issued a QDRO, because Judge Weller's oral order created a recognized existence in Charla, the right to receive a portion of Darren's ERISA pension plan. *See id.* § 1056(d)(3)(B)(i)(I). Because the district court issued a DRO, which was qualified, and it recognized Charla as an alternate payee with the right to receive a $500,000 payment from Darren's ERISA pension plan, we conclude that the QDRO was valid and affirm the order of the district court.

Slayer-beneficiaries cannot benefit from their wrongdoing in the ERISA context

[Headnote 18]

As we have determined that we may take judicial notice of the fact that Darren has been adjudged to have murdered Charla, the issue now becomes whether Darren may benefit from his murderous act and not have to pay Charla's estate the lump-sum payment from his ERISA pension plan. We have decided to address this issue because of the grave importance it presents to the functioning of Nevada's slayer statute. Because we conclude that Nevada's slayer statute does not fall within the category of laws that have been recognized as preempted by ERISA, we hold that Darren cannot benefit from his wrongdoing and stop Charla's estate from obtaining payments from his ERISA-qualified pension plan.

Darren argues that the district court created a fiction by backdating the ''settlement agreement'' by a year and a half. Darren claims that the district court had to do so because, otherwise, his order would violate ERISA law and the federal preemption doctrine.

[Headnote 19]

Whether a state law is preempted by a federal statute is a question of Congressional intent. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987). While it is an issue of first impression in Nevada, several federal district courts have determined that Congress did not intend ERISA to preempt state laws that prohibit murderers from reaping financial benefits because of their crimes. *See, e.g.*, *Mendez-Bellido v. Bd. of Tr. of Div. 1181, A.T.U.*, 709 F. Supp. 329, 331 (E.D.N.Y. 1989); *Atwater v. Nortel Networks, Inc.*, 388 F. Supp. 2d 610, 614 (M.D.N.C. 2005); *Connecticut Gen. Life Ins. Co. v. Riner*, 351 F. Supp. 2d 492, 497 (W.D. Va. 2005); *UNUM Ins. Co. of America v. Locke*, No. 2:06 CV 0861, 2006 WL 2457106 (W.D. La. Aug. 22, 2006); *Administrative Committee for the H.E.B. v. Harris*, 217 F. Supp. 2d 759, 761 (E.D. Tex. 2002); *New Orleans Elec. Pension Fund v. Newman*, 784 F. Supp. 1233, 1236 (E.D. La. 1992). Today, we approve of the holdings of these courts and adopt the framework set out in *Mendez-Bellido*. 709 F. Supp. at 331.

State laws that '' 'relate to any employee benefit plan' '' are preempted by ERISA. *Mendez-Bellido*, 709 F. Supp. at 331 (quoting 29 U.S.C. § 1144(a)). In the context of ERISA, ''[t]he words 'relate to' must be interpreted broadly to effectuate Congress' purpose of 'establish[ing] pension plan regulation as exclusively a federal concern.' '' *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). While there is no concrete rule to determine whether a state law is preempted by ERISA, the United States Court of Appeals for the Second Circuit provided some guidance in *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 146 (2d Cir. 1989), when it stated that

> [W]e find that laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect on ERISA plans is incidental.

We conclude that the Nevada slayer statute is not preempted by ERISA, as the application of this statute will not affect the determination of an employee's eligibility for benefits, *compare Gilbert v. Burlington Industries Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), or the

impact on the method of calculating benefits due. *See Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 829-30 (1988).

At common law, convicted murderers were not stopped from benefiting from their wrongful acts and were able to inherit from the estate of the person whom they had killed. *Holliday v. McMullen*, 104 Nev. 294, 296, 756 P.2d 1179, 1179 (1988). However, we have noted that ''[s]tate legislatures, rightfully resolving that killers should not profit from their heinous deeds, began passing laws that have come to be known as slayer statutes.'' *Id*.

The Nevada slayer statute, NRS 41B.200, provides that a killer cannot profit or benefit from his wrong. NRS 41B.200(1) states that ''[n]otwithstanding any other provision of law, the provisions of this chapter apply to any appointment, nomination, power, right, property, interest or benefit that accrues or devolves to a killer of a decedent based upon the death of the decedent.''

Since we hold that the Nevada slayer statute is not preempted by ERISA, it follows that Darren should not be allowed to benefit from his wrongdoing in murdering Charla. As such, we affirm the order of the district court with respect to the settlement agreement that gave Charla a lump-sum payment from Darren's ERISA pension plan.

CONCLUSION

We conclude that we may take judicial notice of the outcome of a murder trial in which the deceased stood to gain financially from her killer because of the close relationship between the murder trial and the benefits to which the deceased's estate is entitled.

Futher, the district court did not abuse its discretion in entering the nunc pro tunc order to memorialize the oral records made at the hearings of January 9, 2006, and May 24, 2006, because the entering of the nunc pro tunc order was proper and the district court's underlying basis for issuing the order was valid.

Also, we conclude that the district court properly issued a QDRO during Charla's lifetime which gave Charla a recognized right to receive a portion of Darren's ERISA pension plan.

Finally, because we hold that Nevada's slayer statute is not preempted by ERISA, Darren may not benefit from his wrongful act of killing Charla. Thus, we affirm the order of the district court with respect to the lump-sum payment to Charla from Darren's ERISA pension plan.

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

IN THE MATTER OF THE APPLICATION OF SANG MAN SHIN FOR AN ORDER TO SEAL RECORDS.

SANG MAN SHIN, APPELLANT, *v.* THE STATE OF NEVADA, DEPARTMENT OF PUBLIC SAFETY, RESPONDENT.

No. 47995

March 26, 2009 206 P.3d 91

Appeal from a district court order setting aside as void an order sealing a criminal record. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The supreme court, SAITTA, J., held that movant enjoyed no right to have his criminal record sealed.

Affirmed.

Amesbury & Schutt and *John P. Parris* and *David C. Amesbury*, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, and *Robert G. Kilroy*, Deputy Attorney General, Carson City, for Respondent.

1. PARDON AND PAROLE.
   A Presidential pardon blots out the existence of the offender's guilt, and thus removes all existence of a prior criminal conviction.
2. CRIMINAL LAW.
   The supreme court reviews de novo a district court's legal conclusions, including matters of statutory constitutionality and statutory interpretation.
3. CONSTITUTIONAL LAW.
   Statutes are presumptively valid, and the burden is on those attacking them to show their unconstitutionality.
4. CRIMINAL LAW; PARDON AND PAROLE.
   Statute regulating criminal-record expunction of convicted sex offenders did not improperly impinge on executive pardoning power, and thus, although movant was granted a pardon on prior conviction for attempted lewdness with a minor, he enjoyed no right to have his criminal record sealed. Const. art. 5, § 14; NRS 179.245(5).

Before the Court EN BANC.[1]

OPINION

By the Court, SAITTA, J.:

We are asked to determine whether NRS 179.245(5), which prohibits Nevada courts from sealing records concerning sexually based offenses, improperly impinges upon the power of the State Board of

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

Pardons Commissioners to issue pardons. While the pardoning power's reach is expansive, it does not extend to removing the historical fact that a conviction occurred, and it cannot bequeath innocence. Instead, a pardon is an act of forgiveness that restores civil rights and removes most legal consequences of a criminal conviction. We find nothing in Article 5, Section 14 of the Nevada Constitution that creates a civil right to expunge a criminal record. Only the Legislature can remove the historical fact of a criminal conviction by authorizing the expunction of the criminal record. Therefore, we conclude that the district court did not abuse its discretion when it set aside a prior order sealing a criminal record, and accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

The record indicates that in 1987, law enforcement officers arrested appellant Sang Man Shin for attempted lewdness with a minor, to which he subsequently pleaded guilty. The district court sentenced him to two years imprisonment and then suspended the sentence, imposing probation. Shin successfully served his probation.

After maintaining a clean criminal record for approximately 15 years, Shin sought a pardon. Following his request, in 2002, the State Board of Pardons Commissioners (Pardons Board) granted him a pardon, restoring all of his civil rights except for the right to keep firearms. In 2006, Shin moved to have his criminal record sealed pursuant to NRS 179.245, to which the Clark County District Attorney stipulated. Thereafter, the district court granted the motion and ordered Shin's criminal record sealed.

Upon receiving notice of the district court's order, respondent State of Nevada, Department of Public Safety (DPS) moved to set it aside. During the district court proceedings, the DPS argued that Shin's record had been erroneously sealed because, as a convicted sex offender, NRS 179.245(5) expressly precluded the court from sealing his record since it ''relat[ed] to a conviction of a crime against a child or a sexual offense.'' The district court agreed and ordered Shin's record unsealed.

Contending that his pardon not only restored his civil rights but entitled him to his record's expunction, Shin appealed.

DISCUSSION

[Headnote 1]

On appeal, Shin principally contends that this court should follow the U.S. Supreme Court's decision in *Ex parte Garland*, which stated that a Presidential pardon blots out the existence of the offender's guilt, and thus removes all existence of a prior criminal conviction. 71 U.S. 333, 380 (1866). More specifically, Shin con-

tends that his pardon not only cleared the civil rights restrictions attendant with his conviction, but further included the right to seal his criminal records. Pursuant to this reasoning, Shin asserts that NRS 179.245(5) is unconstitutional because the Legislature does not have the power to prevent him from sealing his criminal record. We disagree.

Standard of review

[Headnotes 2, 3]

We review de novo a district court's legal conclusions, including matters of statutory constitutionality and statutory interpretation. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007); *Walker v. Dist. Ct.*, 120 Nev. 815, 819, 101 P.3d 787, 790 (2004). Statutes are presumptively valid, and '' 'the burden is on those attacking them to show their unconstitutionality.' '' *Sheriff v. Vlasak*, 111 Nev. 59, 61-62, 888 P.2d 441, 443 (1995) (quoting *Wilmeth v. State*, 96 Nev. 403, 405, 610 P.2d 735, 737 (1980)).

Nevada's constitutional and statutory scheme governing pardons and record expunction

In Nevada, the Pardons Board's constitutional power to grant pardons and commutations of sentences is exclusive. Nev. Const. art. 5, § 14. The Nevada Constitution provides that ''[t]he governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may . . . grant pardons, after convictions.'' *Id.* Article 5, Section 14 of the Nevada Constitution specifically requires the Governor to be involved in the pardoning process as part of the executive function but is silent as to many of a pardon's effects, including the availability of record expunction. In furtherance of this constitutional provision, NRS 213.090 states that ''[a] person who is granted a full, unconditional pardon by the Board is restored to all civil rights and is relieved of all disabilities incurred upon conviction.'' No other constitutional or statutory provision addresses the effects of a pardon.

The Nevada Constitution does not expressly address the expunction of criminal records. In the absence of a specific constitutional limitation to the contrary, the power to enact laws is vested in the Legislature. Nev. Const. art. 4, § 1; *see Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000). The Legislature has addressed the expunction of criminal records in NRS 179.245.[2] Although

[2]NRS 179.245 explicitly delineates those crimes that constitute a sexual offense (including attempted lewdness with a child, of which Shin was convicted). Effective July 1, 2008, NRS 179.245 was amended to adjust where ''crime against a child'' is defined (NRS 179.245(7)(a)). See 2007 Nev. Stat., ch. 485, § 8, at 2751-53. The language relevant to our analysis in this opinion was not altered.

NRS 179.245 generally grants the district court discretion to seal records of criminal conviction, it expressly prohibits the sealing of records pertaining to a sexual offense: ''A person may not petition the court to seal records relating to a conviction of a crime against a child or a sexual offense.'' NRS 179.245(5). NRS 179.245(5) is silent regarding whether a pardon may nevertheless require sealing a sex offender's record. Resolving this question requires us to determine the scope of the pardoning power—particularly, whether a pardon erases the offender's guilt and the historical fact of the crime, or merely relieves all conviction-imposed civil disabilities.

In addressing the scope of the pardoning power in Nevada, we begin by examining our precedent. Because our jurisprudence does not resolve the question of whether a pardon includes the attendant right to seal a criminal record, we consider the United States Supreme Court's precedent, caselaw from the United States Courts of Appeals, and finally, other states' jurisprudence.

Nevada decisional law

In an 1880 decision, *State of Nevada v. Foley*, this court considered the scope of the pardoning power. 15 Nev. 64 (1880). In *Foley*, the State sought to introduce a witness who was a convicted and pardoned felon. *Id*. at 66. The defense objected on competency grounds. *Id*. The district court overruled the objection and allowed the witness to testify, finding that the pardon restored the witness's competency. *Id*. at 66-67. On appeal, this court agreed, concluding that ''the authorities are uniform to the effect that a full and unconditional pardon of an offense removes all disabilities resulting from conviction thereof.'' *Id*. at 67. In reaching this conclusion, this court relied on the similar authorities and language as utilized in *Garland* to explain that the purpose of a pardon was ''to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former, as to give him a new *credit and capacity*.'' *Id*. at 69 (quoting William Blackstone, 4 Commentaries *402); *see Ex parte Garland*, 71 U.S. at 380-81. While this explanation suggested that the pardoning power's reach was expansive, this court ultimately reversed the district court and remanded for a new trial, concluding that the witness's competency had not been legally established, as he had been convicted of an additional crime that was not expressly addressed by the pardon. *Foley*, 15 Nev. at 67, 74.

Following *Foley*, this court later indirectly considered the scope of the pardoning power in *Pinana v. State*, 76 Nev. 274, 352 P.2d 824 (1960). In *Pinana*, the appellant was found guilty of first-degree murder and sentenced to life imprisonment without the possibility of parole. *Id*. at 278, 352 P.2d at 827. Asserting a variety of errors on appeal, the appellant contended that the sentence was un-

constitutional in part because it permitted the jury to abridge her eligibility for parole. *Id.* at 281, 352 P.2d at 828. More specifically, the appellant contended that Article 5, Section 14 of the Nevada Constitution, empowering the Pardons Board to grant pardons and commute punishments, precluded the Legislature from granting the judiciary the power to parole. *Id.* This court explained that a parole and a pardon are different legal concepts and are derived and governed by different provisions of law. *Id.* at 281-83, 352 P.2d at 828-29. Thereafter, this court concluded that the Executive's constitutional power to grant pardons was not unconstitutionally abridged by a statute providing for an administrative system of parole or by statutes granting the judiciary the power over paroles. *Id.* at 282, 352 P.2d at 829. While *Pinana* did not involve a factual predicate of a pardoned criminal, this court nevertheless distinguished parole from a pardon, explaining in dicta the legal effects of a pardon. *Id.* at 282-83, 352 P.2d at 829. Quoting the Supreme Court of Pennsylvania, we tacitly adopted its holding that:

> ''[a] pardon is the exercise of the sovereign's prerogative of mercy. It completely frees the offender from the control of the state. It not only exempts him from further punishment but relieves him from all the legal disabilities resulting from his conviction. It blots out the very existence of his guilt, so that, in the eye of the law, he is thereafter as innocent as if he had never committed the offense.''

Id. at 282, 352 P.2d at 829 (quoting *Commonwealth v. Cain*, 28 A.2d 897, 899 (Pa. 1942)). Accordingly, we concluded that NRS 200.030 was not unconstitutional because the Legislature had the power to establish the appropriate punishment for a felony conviction, *see* Nev. Const. art. 4, § 1, and thus, acted within its powers when it delegated to the judiciary the power to eliminate the possibility of parole. *Pinana*, 76 Nev. at 283, 352 P.2d at 829.

These Nevada cases accord with early U.S. Supreme Court interpretations of the federal clemency power, which, as explained below, is no longer the prevailing view of the gubernatorial pardoning power in the majority of other courts around the nation.

United States Supreme Court decisions

The definition of a pardon, as first articulated by Chief Justice Marshall in *United States v. Wilson*, suggested that acceptance of a pardon might imply guilt. 32 U.S. 150 (1833). Justice Marshall stated that ''[a] pardon is an act of grace,'' *id.* at 160, ''the validity of which . . . is not complete without acceptance.'' *Id.* at 161. Furthermore, Justice Marshall indicated that it might be rejected by the person to whom it was offered and that the court could not force it upon him. *Id.*

Ex parte Garland, an 1866 decision, represents the U.S. Supreme Court's articulation of the presidential pardoning power in several reconstruction era cases, holding that a pardon obliterates both the conviction and guilt and thus places the offender in the same position as if she had never committed the offense. 71 U.S. 333; *see also Osborn v. United States*, 91 U.S. 474, 477 (1875); *Carlisle v. United States*, 83 U.S. 147, 153 (1873). Following the Court's resolution of the dispositive issue in the case, the Court went on to explain that a pardon

> reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Garland, 71 U.S. at 380-81. After undertaking this expansive articulation of the pardoning power, the Court thereafter acknowledged that the power did have some limitations, as it could ''not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.'' *Id.* at 381.

While the U.S. Supreme Court has never expressly overruled *Garland*, since that decision the Court has eroded its broad articulation of the power by narrowing its scope in *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U.S. 1 (1894), *Burdick v. United States*, 236 U.S. 79 (1915), and *Carlesi v. New York*, 233 U.S. 51 (1914). In *Angle*, the Court held that a third-party civil right of action to recover damages remains regardless of a pardon. *Angle*, 151 U.S. at 19. In *Burdick*, the Court implicitly acknowledged that the mere act of accepting a preconviction pardon carried an unremovable social stigma, an acknowledgment that is inconsistent with a position that a pardon blots out all existence of guilt. 236 U.S. at 90-91 (reversing a defendant's contempt conviction for the refusal to testify before a grand jury even after receiving a presidential pardon and explaining that ''the grace of a pardon, though good its intention, may be only in pretense or seeming, . . . involving consequences of even greater disgrace than those from which it purports to relieve''). In *Carlesi*, the Court held that a sentencing board may consider the pardoned offender's prior actions when determining the punishment for a new offense. 233 U.S. at 59. This holding impliedly indicates that the offender's pardon did not completely erase all the attendant consequences and considerations following the fact of conviction. *See id.*

The Supreme Court later backed away from the theory of a pardon as an admission of guilt or that a pardon could be rejected by the recipient in *Biddle v. Perovich*.[3] 274 U.S. 480 (1927). *Biddle* involved a certified question from a circuit appellate court regarding whether the President had the authority to commute a sentence from the death penalty to life in prison. Justice Holmes, writing for the Supreme Court, answered in the affirmative, holding that it was ''the public welfare, not his consent, [that] determines what shall be done'' and that Biddle could not refuse the pardon. *Id*. at 486. The Court emphasized the broad plenary power conferred to the President by Article II, Section 2, Clause 2 of the United States Constitution to allow the forgiveness of a convicted person, in part or entirely, or to reduce or alter the penalty. Signaling a clear departure from Justice Marshall's prior characterization of a pardon, Justice Holmes intimated that a pardon does not blot out all guilt associated with a conviction, stating that:

> [a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

Id. at 486; *see Cook v. Freeholders of Middlesex*, 26 N.J.L. 326, 333 (N.J. 1857) (''The power of pardoning is founded on considerations of the public good, and is to be exercised on [that] ground.'').

United States Courts of Appeals decisions

The United States Courts of Appeals for the Third Circuit, Seventh Circuit, and the District of Columbia Circuit have not followed *Garland*'s broad articulation of the presidential pardoning power. *U.S. v. Noonan*, 906 F.2d 952, 958, 960 (3d Cir. 1990) (concluding that a pardon can only remove the punishment for a crime, not the fact of the crime itself, and holding that the United States Supreme Court's decision in *Burdick* implicitly rejected its prior sweeping conception of the pardoning power in *Garland*); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975); *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (concluding that the United States Supreme Court's articulation of the pardoning power in *Garland* was uncontrolling dictum and further holding that the *Burdick* decision implicitly rejected the overly broad position). Rather, they have concluded that the explanation was mere dictum because the Court had already decided the dispositive issue of whether a particular oath was constitutional and was also implicitly overruled by *Burdick*.

[3]In *Biddle v. Perovich*, the Court did not overrule *Burdick*, but rather stated ''the reasoning . . . is not to be extended to the present case.'' 274 U.S. at 488.

Focusing on the scope of the Texas executive's pardoning power, in *Groseclose v. Plummer*, the Ninth Circuit Court of Appeals reached a similar conclusion. 106 F.2d 311 (9th Cir. 1939). In *Groseclose*, the Ninth Circuit rejected the defendant's contention that the Texas pardons wiped out his prior convictions as though they had never occurred, analogizing that ''[t]his is the same as saying that executive clemency clears the boards as thoroughly as the granting of a new trial and subsequent acquittal would do.'' *Id*. at 313. While recognizing that some authorities supported the proposition that a pardon obliterated the underlying conviction and guilt, the Ninth Circuit disagreed, concluding that

> the great weight of authority support[s] the more realistic view that a pardon, to the extent of its terms, does nothing more than to abolish all restrictions upon the liberty of the pardoned one, and upon his civil rights that follow a felony conviction and sentence.

Id. The court acknowledged that while a Texas pardon may have the effect of prohibiting the Texas courts from considering the act giving rise to the pardoned offense, the pardon could ''not turn back the hand of time[;] . . . the stubborn fact remains that the *habit* of crime was upon him.'' *Id*.

Other courts' authority

Lower courts have similarly taken the position that a pardon's power does not include the ability to abrogate a conviction's underlying guilt and have concluded that *Garland*'s interpretation of the power was mere dictum. For instance, the New York Court of Appeals, in *People v. Brophy*, held that a pardon could wipe out the legal consequences flowing from an adjudication of guilt, but concluded that *Garland*'s ''blotting out'' language was merely used as a ''metaphor'' to encourage support for a contentious decision in a tumultuous time in our nation's history, when ''passions roused by the rebellion still clouded the judgment of most citizens.'' 38 N.E.2d 468, 470 (N.Y. 1941). In the case of *In re Abrams*, the District of Columbia Court of Appeals agreed that the pardon discussion in *Garland* was dictum and concluded that a pardon did not ''blot out of existence the guilt'' associated with one who committed a crime. 689 A.2d 6, 18-19 (D.C. 1997) (citing *Brophy*, 38 N.E.2d at 470). To illustrate the implications of concluding that a pardon blots out the existence of guilt, the District of Columbia Court of Appeals offered the following analogy:

> Suppose that an alcoholic surgeon performs an operation while intoxicated. He botches the surgery. The patient dies. The surgeon is convicted of manslaughter and is sentenced to imprisonment. The President grants him a full and unconditional

> pardon. According to Abrams, the surgeon now has the right, as a result of the pardon, to continue to operate on other patients, without any interference from the medical licensing authorities.

Id. at 10-11. The District of Columbia Court of Appeals concluded that this result would be ''altogether unacceptable and even irrational.'' *Id.* at 11. Although the pardon did away with the consequences of the conviction, ''it could not and did not require the court to close its eyes to the fact that Abrams did what he did.'' *Id.* at 7.

In *Dixon v. McMullen*, the United States District Court for the Northern District of Texas addressed whether a police academy applicant who had initially pleaded guilty to a case that was subsequently dismissed, and then received a gubernatorial pardon, could be eligible to serve as a police officer. 527 F. Supp. 711 (N.D. Tex. 1981). Because the pardon was not issued on the basis of proof of innocence, the underlying guilt of the offense remained regardless of the pardon. *Id.* at 718. The *Dixon* court recognized that separation of powers was an issue and stated that

> [t]he undisputed legal effect of a pardon is to restore the civil rights to an ex-felon (suffrage, jury service, and the chance to seek public office). However, the Governor cannot overrule the judgment of a court of law. He has no ''appellate'' jurisdiction. . . . Regardless of the post-judgment procedural maneuvering, a final conviction does not disappear. A pardon implies guilt. Texas Courts may forgive, but they do not forget. The fact is not obliterated and there is no ''wash.'' . . . Moreover, the granting of a pardon does not in any way indicate a defect in the process. It may remove some disabilities, but does not change the common-law principle that a conviction of an infamous offense is evidence of bad character.

Id. at 717-18 (internal citations omitted).

Florida imposes conditions on the eligibility of an individual seeking to expunge or seal her criminal record. The Supreme Court of Florida, in *R.J.L. v. State*, 887 So. 2d 1268, 1270 (Fla. 2004), concluded that the issuance of a pardon did not remove the historical fact that the individual was convicted. *Id.* at 1281. Additionally, the court reaffirmed that statutory requirements governing record expunction were not a violation of the separation of powers doctrine, in part because the court's authority was derived from a statutory grant of power. *Id.* at 1271 (citing with approval *State v. D.H.W.*, 686 So. 2d 1331, 1335 (Fla. 1996)). Therefore, the court held that the legislature could require certain conditions be met before granting a petition for record expunction. *Id.*

Having examined several cases and numerous other legal authorities, the *R.J.L.* court concluded that the effect of a pardon generally fell into two categories. *Id.* at 1278. In the first category, three courts had expressly adopted the reasoning of *Garland* and concluded that a pardon ''remov[ed] an adjudication of guilt so that the person is treated as if he never committed the crime'' and, therefore, a pardon would carry with it the attendant right of records expunction. *Id.* at 1278-79 (citing *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind. Ct. App. 1990); *State v. Cope*, 676 N.E.2d 141, 143 (Ohio Ct. App. 1996); *Com. v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987)). The second category of decisions involved cases which had held that although a pardon may remove punishment or restore civil rights, it did not remove the adjudication of guilt. *Id.* (citing *People v. Thon*, 746 N.E.2d 1225 (Ill. App. Ct. 2001); *Storcella v. State, Dept. of Treasury*, 686 A.2d 789, 792 (N.J. Super. Ct. App. Div. 1997); *People v. Brophy*, 38 N.E.2d 468 (N.Y. 1941); *Prichard v. Battle*, 17 S.E.2d 393, 397 (Va. 1941)). The *R.J.L.* court determined that only nine jurisdictions had directly addressed the issue of whether a pardon entitles an individual to record expunction and that a majority of those courts agreed, based principally on the reasoning that ''a pardon does not 'blot out the existence of guilt,' '' *id.* at 1279 (quoting *State v. Skinner*, 632 A.2d 82, 87 (Del. 1993)), that ''a pardoned individual is not entitled to record expunction.'' *Id.* (citing *Skinner*, 632 A.2d at 87; *People v. Glisson*, 372 N.E.2d 669, 671 (Ill. 1978); *Com. v. Vickey*, 412 N.E.2d 877, 883 (Mass. 1980); *State v. Bachman*, 675 S.W.2d 41, 52 (Mo. Ct. App. 1984); *State v. Blanchard*, 100 S.W.3d 226, 228 (Tenn. Crim. App. 2002); *State v. Aguirre*, 871 P.2d 616, 620 (Wash. Ct. App. 1994)).

After considering the split of authorities that had confronted the issue, the Florida Supreme Court initially determined that, while a pardon removes punishment and disability and restores civil rights, expunction is not a civil right. *R.J.L.*, 887 So. 2d at 1280. The Florida Supreme Court then reasoned that a pardon's power to forgive the legal consequences of a criminal act did not confer innocence or remove the historical fact that the crime occurred. *Id.*

The pardon did not include expunction in this case

[Headnote 4]

Based upon the reasoning expressed in *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, *United States v. Wilson*, *Burdick v. United States*, and *Carlesi v. New York*, we conclude that the U.S. Supreme Court has *sub silentio* retreated from *Garland*'s sweeping articulation of the pardoning power. 151 U.S. 1, 19 (1894); 32 U.S. 150, 159-61 (1833); 236 U.S. 79, 90-91 (1915); 233 U.S. 51, 59 (1914). The United States Court of Appeals for the Seventh Circuit in *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975), the Third Circuit in *U.S. v. Noonan*, 906 F.2d 952,

958, 960 (3d Cir. 1990), the District of Columbia Circuit in *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994), and the Ninth Circuit in *Groseclose v. Plummer*, 106 F.2d 311, 313 (9th Cir. 1939), as well as the United States District Court for the Northern District of Texas in *Dixon v. McMullen*, 527 F. Supp. 711, 718 (N.D. Tex. 1981), have all reached a similar conclusion and held that *Garland*'s recitation of the power was noncontrolling dictum. The majority of the state courts that have addressed the issue, including the New York Court of Appeals in *People v. Brophy*, 38 N.E.2d 468, 470 (N.Y. 1941), the District of Columbia Court of Appeals in *In re Abrams*, 689 A.2d 6, 19 (D.C. 1997), and the Supreme Court of Florida in *R.J.L. v. State*, 887 So. 2d 1268, 1270 (Fla. 2004), have all concluded that the pardoning power does not bequeath innocence or erase the historical fact of the underlying criminal act and conviction.

We adopt the reasoning of these cases limiting the scope of a pardon because the rationale is consistent with Nevada's Constitution. As we have observed, there is nothing in Nevada's Constitution that creates a civil right to expunge a criminal record. The authorities cited are in accord: expunction is not a civil right. Based upon these well-reasoned authorities, we hereby retreat from our prior decisions in *State of Nevada v. Foley*, 15 Nev. 64, 69 (1880), and *Pinana v. State*, 76 Nev. 274, 282, 352 P.2d 824, 829 (1960), to the extent that they imply that a pardon blots out guilt and erases the historical fact of the underlying conviction. In doing so, we acknowledge that *Pinana*'s quotation of the Supreme Court of Pennsylvania, which concluded that a pardon ''blots out the very existence of his guilt,'' was merely dictum because *Pinana* did not involve a pardoned criminal. 76 Nev. at 282, 352 P.2d at 829 (citing *Commonwealth v. Cain*, 28 A.2d 897, 899 (Pa. 1942)).

Because we conclude that the effect of the pardon does not erase the historical fact of the conviction, we hold that there is nothing in the Nevada Constitution that creates a civil right to an expunction of the record of a criminal conviction. Additionally, we hold that the Legislature's enactment of NRS 213.090, addressing those circumstances in which the historical fact of a criminal conviction may be expunged from public view, does not abridge the pardoning power in Article 5, Section 14 of the Nevada Constitution.

CONCLUSION

As NRS 179.245(5) regulates the expunction of a criminal record of convicted sex offenders, and as expunction is not a civil right contemplated within the scope of the constitutional pardoning power, we conclude that NRS 179.245(5) does not improperly impinge on the Pardons Board's power. Accordingly, we hold that Shin is unable to demonstrate that the statute unconstitutionally abridges the Executive's pardoning power pursuant to Article 5, Section 14 of the

Nevada Constitution. As a result, we conclude that the district court did not abuse its discretion when it unsealed Shin's criminal record, and accordingly, we affirm the court's decision.

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

KARCHER FIRESTOPPING, A DIVISION OF KARCHER INSULATION, INC., A CALIFORNIA CORPORATION, APPELLANT, *v.* MEADOW VALLEY CONTRACTORS, INC., A NEVADA CORPORATION; TECHNICOAT WATERPROOFING SPECIALISTS, A LIMITED PARTNERSHIP; ROBERT COFFMAN, INDIVIDUALLY; AND UNITED STATES GUARANTY COMPANY, RESPONDENTS.

No. 49291

April 16, 2009 204 P.3d 1262

Appeal from a district court order granting a motion to vacate an arbitration award, referring the matter back to arbitration for further proceedings, and denying a motion to confirm the award. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

The supreme court, PARRAGUIRRE, J., held that order of trial court that vacated arbitration award while directing a rehearing was not appealable, notwithstanding that order also denied confirmation of award, which, on its own, would be appealable.

Dismissed.

McDonald Carano Wilson, LLP, and *Timothy E. Rowe*, Reno; *Lax & Stevens* and *Donna E. Kirkner*, Los Angeles, California, for Appellant.

Kevin B. Christensen, Chtd., and *Evan L. James*, Las Vegas, for Respondents Meadow Valley Contractors and United States Guaranty Company.

Lewis & Roca, LLP, and *Dan R. Waite* and *Daniel F. Polsenberg*, Las Vegas, for Respondent Technicoat Waterproofing Specialists.

1. APPEAL AND ERROR.
   The supreme court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule.
2. APPEAL AND ERROR.
   Questions of statutory construction are reviewed de novo.

3. STATUTES.
   The goal of statutory interpretation is to effectuate the Legislature's intent.
4. STATUTES.
   If a statute's language is clear and unambiguous, the supreme court will apply its plain language.
5. STATUTES.
   Plain meaning of a statute may be ascertained by examining the context and language of the statute as a whole.
6. STATUTES.
   The supreme court generally avoids statutory interpretation that renders language meaningless or superfluous.
7. ALTERNATIVE DISPUTE RESOLUTION.
   Order of trial court that vacates arbitration award while directing a rehearing is not appealable, notwithstanding that order also denies confirmation of award, which, on its own, would be appealable; appeals are only permitted from orders that bring element of finality to arbitration process. NRS 38.247(1).

Before the Court EN BANC.[1]

OPINION

By the Court, PARRAGUIRRE, J.:

This appeal seeks our review of a district court order that granted a motion to vacate an arbitration award, referred the matter back to arbitration for further proceedings, and denied a motion to confirm the award. The Legislature has authorized appeals from certain arbitration-related orders as set forth in NRS 38.247(1). Under this statutory scheme, if the order challenged on appeal had only denied appellant's motion to confirm the arbitration award, it would be appealable under NRS 38.247(1)(c). Similarly, if the challenged order had vacated the award without directing a rehearing, the order would be appealable under NRS 38.247(1)(e). In this case, however, the district court order denied the motion to confirm the award, vacated the award, and directed a rehearing. Thus, we must determine whether such an order is appealable under NRS 38.247(1). We conclude that, under the plain language of NRS 38.247(1)(e), we lack jurisdiction to consider appeals challenging such orders. Accordingly, we dismiss this appeal.

FACTS AND PROCEDURAL HISTORY

Appellant Karcher Firestopping was the prevailing party at arbitration. Thereafter, respondent Technicoat Waterproofing Specialists

[1]THE HONORABLE MICHAEL CHERRY, Justice, and THE HONORABLE NANCY SAITTA, Justice, did not participate in the decision of this matter.

filed a motion, joined by respondents Meadow Valley Contractors and United States Guaranty Company, to vacate and modify the arbitration award, and Karcher filed a countermotion to confirm the arbitrator's award. The district court denied Karcher's countermotion to confirm the award, granted Technicoat's motion to vacate the arbitration award, and referred the matter back to arbitration for supplemental proceedings. Karcher then appealed from the district court's order. This court's preliminary review of the case, however, raised concerns regarding the order's appealability under NRS 38.247(1). Accordingly, we directed Karcher to show cause as to whether the district court order was substantively appealable. Karcher has filed a response to the show cause order, and respondents have filed a reply.

DISCUSSION

[Headnotes 1-6]

This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984). In Nevada, appeals from arbitration orders are governed by statute, specifically NRS 38.247(1); therefore, determining whether this court has jurisdiction to consider this appeal involves interpretation of that statute. Questions of statutory construction are reviewed de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). The goal of statutory interpretation is to effectuate the Legislature's intent. *Savage v. Dist. Ct.*, 125 Nev. 9, 16, 200 P.3d 77, 82 (2009). If a statute's language is clear and unambiguous, this court will apply its plain language. *Leven*, 123 Nev. at 403, 168 P.3d at 715. Plain meaning may be ascertained by examining the context and language of the statute as a whole. *Redl v. Secretary of State*, 120 Nev. 75, 78, 85 P.3d 797, 799 (2004); *see also McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986). This court generally avoids statutory interpretation that renders language meaningless or superfluous. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005); *see also Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). Additionally, as Nevada has adopted the Uniform Arbitration Act (UAA),[2] in construing the UAA, ''consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.'' NRS 38.248.

NRS 38.247(1)(c) provides that an appeal may be taken from ''[a]n order confirming or denying confirmation of an [arbitration]

[2]In 2001, Nevada adopted the Uniform Arbitration Act of 2000. *See* NRS 38.206.

award.'' NRS 38.247(1)(e) provides that an appeal may be taken from ''[a]n order vacating an [arbitration] award without directing a rehearing.''[3] While this court has never addressed whether an order that both denies confirmation of an arbitration award and vacates the award, while directing a rehearing, is substantively appealable under NRS 38.247(1), a number of other courts have addressed this issue under similar provisions of the UAA.[4] Because consideration must be given to the need to promote uniformity of the law when construing the UAA, NRS 38.248, we look to these decisions for guidance regarding the appealability of such orders. First, we examine decisions from courts holding that such orders are not appealable, and then we address decisions from those courts that have concluded that such orders can be appealed.

Decisions concluding that no jurisdiction exists

The majority of courts that have considered this jurisdictional issue regarding orders that deny confirmation of an arbitration award and also vacate the award while directing rehearing have determined that such orders are not appealable. *See Connerton, Ray & Simon v. Simon*, 791 A.2d 86 (D.C. 2002); *Kowler Associates v. Ross*, 544 N.W.2d 800 (Minn. Ct. App. 1996); *Thrivent Financial for Lutherans v. Brock*, 251 S.W.3d 621 (Tex. App. 2007); *Prudential Securities, Inc. v. Vondergoltz*, 14 S.W.3d 329 (Tex. App. 2000). The primary approach taken by courts concluding that such orders are not appealable is to focus on the plain language of their statute providing that orders vacating an arbitration award without directing a rehearing are appealable. *See, e.g.*, *Simon*, 791 A.2d at 87-88 (interpreting a statute that provides for appeals from orders ''confirming or denying confirmation of an arbitration award'' and orders ''vacating an award without directing a rehearing''); *Ross*, 544 N.W.2d at 801-02 (same); *Vondergoltz*, 14 S.W.3d at 330-31 (same). Because these statutes provide for appeals only from orders vacating arbitration awards that do not also direct a rehearing, these courts concluded that the plain language of the statutes provide that orders vacating an award and directing a rehearing cannot be appealed. *See Simon*, 791 A.2d at 87-88; *Ross*, 544 N.W.2d at 801; *Vondergoltz*, 14 S.W.3d at 331.

[3]NRS 38.247(1) also provides for appeals from arbitration-related orders denying motions to compel arbitration, granting motions to stay arbitration, modifying or correcting an arbitration award, and arbitration-related orders that constitute a final judgment.

[4]*See Connerton, Ray & Simon v. Simon*, 791 A.2d 86 (D.C. 2002); *Kowler Associates v. Ross*, 544 N.W.2d 800 (Minn. Ct. App. 1996); *National Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334 (Mo. Ct. App. 1995); *Thrivent Financial for Lutherans v. Brock*, 251 S.W.3d 621 (Tex. App. 2007); *Werline v. East Texas Salt Water Disp. Co.*, 209 S.W.3d 888 (Tex. App. 2006); *Prudential Securities, Inc. v. Vondergoltz*, 14 S.W.3d 329 (Tex. App. 2000).

Relying on this conclusion, these courts have held that the addition of a ruling denying a motion to confirm the award to an order vacating the award and directing a rehearing does not render that order appealable even though the denial of a motion to confirm an arbitration award is independently appealable under their applicable statutes. *Simon*, 791 A.2d at 88; *Ross*, 544 N.W.2d at 801-02; *Vondergoltz*, 14 S.W.3d at 331. The rationale behind this conclusion is that allowing such orders to be appealed simply because a portion of the order denies confirmation of an arbitration award renders the ''without directing a rehearing'' language of these states' versions of NRS 38.247(1)(e) superfluous. *See Simon*, 791 A.2d at 87-88; *Ross*, 544 N.W.2d at 801; *Vondergoltz*, 14 S.W.3d at 331. Thus, in order to give full effect to each of the statutory provisions governing appeals from arbitration-related orders, these courts concluded that orders vacating an arbitration award while directing rehearing, and that also deny confirmation of the award, may not be appealed.

Several courts have further concluded that the uniform language set forth in their version of NRS 38.247(1), when read as a whole, implicitly contains a policy choice of permitting appellate review only when there is a sufficient degree of finality to the arbitration proceedings. *See Simon*, 791 A.2d at 88; *Ross*, 544 N.W.2d at 802; *Thrivent Financial for Lutherans v. Brock*, 251 S.W.3d 621, 622, 627 (Tex. App. 2007) (interpreting a statute that provides for appeals from orders ''confirming or denying confirmation of an award'' and orders ''vacating an award without directing a rehearing''); *see also Dept. of Transp. v. State Employ. Ass'n*, 581 A.2d 813, 814-15 (Me. 1990) (same, and determining that the court lacked jurisdiction to consider an order that vacated an arbitration award and directed rehearing but discussing in dicta an approach to an order similar to the one at issue here); *Nebraska Dept. of Health v. Struss*, 623 N.W.2d 308, 313-14 (Neb. 2001) (interpreting a statute that provides for appeals from orders ''confirming or denying confirmation of an award'' and orders ''vacating an award without directing a rehearing,'' and concluding that the court lacked jurisdiction over an appeal that challenged an order vacating an award and directing rehearing). Indeed, the Nebraska Supreme Court commented in *Struss* that the purpose of Nebraska's version of NRS 38.247(1) is to distinguish between orders that conclude the arbitration process, and are thus suitable for appellate review, and those that do not conclude the arbitration process, rendering appellate review premature. 623 N.W.2d at 314-15.

Decisions concluding that jurisdiction exists

Only two courts have interpreted language similar to that of NRS 38.247(1) as permitting appellate jurisdiction over orders that both deny confirmation of an arbitration award and vacate the award

while directing rehearing. *National Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 337-41 (Mo. Ct. App. 1995) (interpreting a statute that provides for appeals from orders ''confirming or denying confirmation of an award'' and orders ''vacating an award without directing a rehearing''); *Werline v. East Texas Salt Water Disp. Co.*, 209 S.W.3d 888, 893-96 (Tex. App. 2006) (same). In reaching this result, these courts emphasize the fact that their version of NRS 38.247(1)(c) expressly permits appeals from orders denying confirmation of an arbitration award. *Stewart*, 910 S.W.2d at 340-41; *Werline*, 209 S.W.3d at 895-96. Additionally, the *Stewart* court also noted that no subsection of the applicable statutes explicitly acts to bar the appealability of an order made appealable under another subsection when that order also contains a ruling that would not otherwise be independently appealable. 910 S.W.2d at 341. In *Stewart*, the court further noted that if their state's legislature had intended an order, such as the one at issue here, not to be appealable, it would have added the qualifier ''without directing a rehearing'' to their statute providing for appeals from orders denying confirmation of an award. *Id.* at 341. Emphasis is also placed on the conclusion that interpreting the language of their versions of NRS 38.247(1) as not allowing appeals from orders that deny confirmation and vacate the award while directing rehearing could allow the arbitration process to continue indefinitely. *Stewart*, 910 S.W.2d at 340; *Werline*, 209 S.W.3d at 896. Further, the *Werline* court asserted that not reading Texas's version of NRS 38.247(1)(c) as allowing an appeal from an order that both denies confirmation and vacates the award while directing rehearing renders the second half of subsection (c), which authorizes appeals from orders denying confirmation, almost meaningless. 209 S.W.3d at 895. The *Werline* court based this conclusion on its belief that if such orders could not be appealed, appellate jurisdiction would only exist ''in the rare situation when the trial court denies a motion to confirm, but fails to vacate the award.''[5] *Id.*

This court lacks jurisdiction to consider this appeal

[Headnote 7]

Having reviewed these alternative interpretations of analogous versions of NRS 38.247(1), we find the decisions concluding that appellate courts lack jurisdiction to review orders denying confirmation of an arbitration award and vacating the award while directing a rehearing better reasoned and more persuasive. In particular, we agree with the various courts that have concluded that the plain language of their version of NRS 38.247(1)(e), which provides for an appeal from orders vacating an arbitration award without direct-

[5]It appears that the *Werline* court believed that an order vacating the arbitration award would necessarily also involve referring the matter back to arbitration. 209 S.W.3d at 895.

ing a rehearing, bars appellate review of orders vacating an award while directing a rehearing, even if the order also denies confirmation of the award, which, on its own, would be appealable under a statute analogous to NRS 38.247(1)(c). *See, e.g.*, *Connerton, Ray & Simon v. Simon*, 791 A.2d 86, 87-88 (D.C. 2002); *Kowler Associates v. Ross*, 544 N.W.2d 800, 801-02 (Minn. Ct. App. 1996); *Prudential Securities, Inc. v. Vondergoltz*, 14 S.W.3d 329, 331 (Tex. App. 2000). As noted in these decisions, because in this matter the district court directed a rehearing, permitting appellate review at this point would render NRS 38.247(1)(e)'s ''without directing a rehearing'' language superfluous.

Further, we agree with the conclusion reached by several courts that the statutory structure providing for appeals from arbitration-related orders, when read as a whole, is designed to permit appeals only from orders that bring an element of finality to the arbitration process. *See Simon*, 791 A.2d at 88; *Dept. of Transp. v. State Employ. Ass'n*, 581 A.2d 813, 814-15 (Me. 1990); *Nebraska Dept. of Health v. Struss*, 623 N.W.2d 308, 314 (Neb. 2001); *Thrivent Financial for Lutherans v. Brock*, 251 S.W.3d 621, 627 (Tex. App. 2007). Here, the district court's order vacating the arbitration award and remanding for supplemental proceedings extended, rather than concluded, the arbitration process, and has not been identified by NRS 38.247(1) as sufficiently final to be suitable for appellate review. Accordingly, finding no statutory basis for an appeal from the district court order, we conclude that this court lacks jurisdiction over this appeal.

CONCLUSION

After reviewing the plain text of NRS 38.247(1)(e), as well as the implicit policy contained in NRS 38.247(1) favoring finality of the arbitration proceedings prior to appellate review, we conclude that this court lacks jurisdiction to review a district court order that vacates an arbitration award, directs rehearing, and denies a motion to confirm the award. Accordingly, we dismiss this appeal.

HARDESTY, C.J., DOUGLAS, GIBBONS, and PICKERING, JJ., concur.

CHRISTOPHER JOHN SCARBO, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JACKIE GLASS, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 51151

SCOTT DAVID ROEBKE, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JACKIE GLASS, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 51152

April 30, 2009 206 P.3d 975

Consolidated original petitions for writs of mandamus challenging district court orders denying petitioners' requests for competency reports.

The supreme court, DOUGLAS, J., held that prior to a hearing on a defendant's competency to stand trial, full and complete copies of competency examination reports must be delivered to defense counsel.

Petitions granted.

Philip J. Kohn, Public Defender, and *Howard S. Brooks*, Deputy Public Defender, Clark County, for Petitioners.

Catherine Cortez Masto, Attorney General, and *Jill Carol Davis*, Senior Deputy Attorney General, Carson City, for Respondents.

David J. Roger, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *James R. Sweetin*, Deputy District Attorney, Clark County, for Real Party in Interest.

1. MANDAMUS.

   The decision to entertain a mandamus petition lies within the discretion of the supreme court. NRS 34.160.

2. MANDAMUS.

   The supreme court may entertain mandamus petitions when judicial economy and sound judicial administration militate in favor of writ review; additionally, the court may exercise its discretion and entertain a writ petition when an important issue of law requires clarification.

3. CONSTITUTIONAL LAW; MENTAL HEALTH.
   The right not to be tried while incompetent is grounded in fundamental principles such as the right to a fair trial and the right to due process under the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. 14; NRS 178.400 *et seq*.
4. CRIMINAL LAW.
   Accuracy in the competency process is best served when the district court and any appointed experts consider a wide scope of relevant evidence at every stage of the competency proceeding, including initial doubts as to the defendant's competency, the experts' evaluation, and the hearing after the evaluation. NRS 178.400 *et seq*.
5. CONSTITUTIONAL LAW.
   Prior to a hearing on a defendant's competency to stand trial, fundamental notions of due process under the United States and Nevada Constitutions demand that full and complete copies of the competency examination reports must be forwarded to the court that ordered the examination, and the court must cause copies of the report to be delivered forthwith to the office of the district attorney and to defense counsel, or to the defendant personally if not represented by counsel. Const. art. 1, § 8(5); U.S. CONST. amend. 14; NRS 178.415.
6. CONSTITUTIONAL LAW.
   The Due Process Clause requires notice and an opportunity to be heard before the government deprives a person of his or her liberty. Const. art. 1, § 8(5); U.S. CONST. amend. 14.
7. CONSTITUTIONAL LAW.
   Commitment to a psychiatric facility constitutes a deprivation of liberty, regardless of whether the commitment occurs as a result of a court order or referral, or an involuntary commitment proceeding; consequently, statutory competency proceedings must afford the defendant with proper notice and a meaningful opportunity to be heard for purposes of affording due process under the United States and Nevada Constitutions. Const. art. 1, § 8(5); U.S. CONST. amend. 14.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

In this first of two related cases involving competency proceedings in the Eighth Judicial District Court, we must determine whether defense counsel is entitled to full and complete copies of the court-appointed examiners' competency reports prior to a competency hearing held pursuant to NRS 178.415.[2]

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

[2]Today, we also decide the related case of *Sims v. Dist. Ct.*, 125 Nev. 126, 206 P.3d 980 (2009).

We conclude that prior to a competency hearing held pursuant to NRS 178.415, full and complete copies of the competency examination reports shall be delivered to the office of the district attorney and to defense counsel, or to the defendant personally if not represented by counsel. Accordingly, we grant these petitions for extraordinary relief.

FACTS

In January 2008, the State filed criminal charges against petitioners Christopher John Scarbo and Scott David Roebke. Scarbo was charged with felony possession of a stolen vehicle, a violation of NRS 205.273. Roebke was charged with felony first-degree arson, a violation of NRS 205.010. Shortly thereafter, defense counsel expressed doubt about the petitioners' competency to stand trial. The proceedings were suspended, and pursuant to the competency procedures adopted by the Eighth Judicial District Court, the cases were assigned to respondent Eighth Judicial District Court Judge Jackie Glass (Department 5) for resolution of the competency issues.

Thereafter, Department 5 appointed three psychologists to evaluate and prepare reports regarding the petitioners' competency. Subsequently, defense counsel submitted requests to receive full and complete copies of the competency examination reports prior to the competency hearing, which was being held pursuant to NRS 178.415. Department 5 denied defense counsel's requests to receive copies of the competency examination reports and indicated that defense counsel would only receive a summary of the reports.

Following the competency examinations, at a hearing in open court, Department 5 received and reviewed the competency examination reports and found the petitioners competent to stand trial. According to the reports, two of the three psychologists that examined the petitioners found that they were competent to stand trial.

Shortly thereafter, defense counsel renewed their requests for full and complete copies of the competency examination reports. Once again, Department 5 denied defense counsel's requests. Defense counsel then moved for a stay of proceedings in order to challenge Department 5's refusal to provide full and complete copies of the competency examination reports. These motions were also denied. At this point, defense counsel filed these original petitions for writs of mandamus and moved to stay the proceedings in the district court pending resolution of the instant petitions. On February 27, 2008, we entered temporary stays.

DISCUSSION

In recent years, this court has been called upon to consider an increasing number of issues regarding Nevada's competency procedure. In these consolidated writ petitions, we must determine

whether a criminal defendant in a competency proceeding is entitled to a full and complete copy of his or her competency examination report.

Standard for writ relief

[Headnote 1]

''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* NRS 34.160. The writ will not issue, however, when ''the petitioner has a plain, speedy and adequate remedy . . . in the ordinary course of law.'' *Hickey v. District Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989); NRS 34.170. The decision to entertain a mandamus petition lies within the discretion of this court. *Hickey*, 105 Nev. at 731, 782 P.2d at 1338.

[Headnote 2]

When exercising its discretion, this court may entertain mandamus petitions when judicial economy and sound judicial administration militate in favor of writ review. *See State v. Babayan*, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990). Additionally, this court may exercise its discretion and entertain a writ petition when ''an important issue of law requires clarification.'' *State v. Dist. Ct. (Epperson)*, 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004) (quotation marks omitted). These consolidated writ petitions present such an issue, and therefore, we begin by clarifying in this opinion Nevada's competency procedure.

Competency proceedings

[Headnote 3]

Among the myriad of rights enjoyed by criminal defendants is the right not to be tried while incompetent. This right is grounded in fundamental principles such as the right to a fair trial and the right to due process under the Fourteenth Amendment of the United States Constitution. *Olivares v. State*, 124 Nev. 1142, 1147, 195 P.3d 864, 868 (2008); *see* NRS 178.400; *see also* U.S. Const. amend. XIV. In Nevada, the Legislature has devised a procedure for determining competency to stand trial, thereby preventing the prosecution of mentally incompetent defendants. NRS 178.400 *et seq*.

Under Nevada's competency procedure, if any ''doubt arises as to the competence of the defendant, the court shall suspend the proceedings, the trial or the pronouncing of the judgment, as the case may be, until the question of competence is determined.'' NRS 178.405(1). The court shall then ''hold a hearing to fully consider

those doubts and to determine whether further competency proceedings under NRS 178.415 are warranted.''[3] *Olivares*, 124 Nev. at 1149, 195 P.3d at 869. In *Olivares*, we recognized that further competency proceedings under NRS 178.415 are warranted ''when there is reasonable doubt regarding a defendant's competency.'' *Id.* at 1148, 195 P.3d at 868. Competence shall be measured by the defendant's ability to understand the nature of the criminal charges and the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding. *Calvin v. State*, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100 (2006); *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see* NRS 178.400(2)(a)-(c).

[Headnote 4]

If the court finds that further competency proceedings are warranted, it shall ''appoint two [certified] psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant.'' NRS 178.415(1). During the competency examination, defense counsel may meet with the court-appointed competency examiners and discuss the defendant's ability to assist them up to that time.[4] *Calvin*, 122 Nev. at 1183-84, 147 P.3d at 1100. This is be-

[3]Under the competency procedures adopted by the Eighth Judicial District Court, all competency matters are assigned to a particular district court judge. In *Fergusen v. State*, this court reviewed the Eighth Judicial District's competency procedures and concluded that the district court may assign initial competency determinations to a particular district court judge. 124 Nev. 795, 797, 192 P.3d 712, 714 (2008). However, any ongoing competency issue must vest with the trial judge who has been assigned to hear the matter. *Id.* Finally, the determination of all competency matters that arise during trial must vest with the trial judge who has been assigned to hear the matter. *Id.*

[4]Petitioners contend that Department 5 violated this court's directive in *Calvin* by limiting defense counsel's ability to communicate with court-appointed competency examiners. In *Calvin*, we concluded that accuracy in the competency process is better served by allowing defense counsel the opportunity to meet with competency examiners and to discuss the defendant's competency. 122 Nev. at 1183-84, 147 P.3d at 1100. Nevertheless, we upheld the court's finding as to competency in that case because Calvin failed to provide us with ''any statements from his counsel [that] would have led the appointed experts or the district court to determine that he was not competent.'' *Id.* at 1184, 147 P.3d at 1100.

Here, the petitioners have again failed to provide us with any statements from their counsel that would have led the appointed experts or Department 5 to determine that they were not competent. Additionally, the petitioners failed to demonstrate that Department 5 limited the communication between defense counsel and competency examiners. This court clearly indicated in *Calvin* that defense counsel's ability to communicate with court-appointed competency examiners is vital to ensuring accuracy within the competency proceedings. Therefore, Department 5 lacked authority to deny the petitioners the opportunity to communicate with the competency examiners.

cause accuracy in the competency process ''is best served when the district court and any appointed experts consider a wide scope of relevant evidence at every stage of the competency proceeding, including initial doubts as to the defendant's competency, the experts' evaluation, and the hearing after the evaluation.'' *Id.* at 1183, 147 P.3d at 1100.

After the examination is completed, ''at a hearing in open court, the court that orders the examination must receive the report of the examination.'' NRS 178.415(2). After receiving the report of the examination, the court shall ''permit counsel for both sides to examine the person or persons appointed to examine the defendant.'' NRS 178.415(3). The court shall also permit counsel to introduce other evidence and cross-examine one another's witnesses.[5] *Id.* At the conclusion of the hearing, the court shall enter its findings as to competence. NRS 178.415(4).

Following the hearing, ''[i]f the court finds that the defendant is competent, the trial must proceed, or judgment may be pronounced, as the case may be.'' NRS 178.420. If the court finds that the defendant is incompetent, the court shall order psychiatric treatment, consistent with NRS 178.425, which may include the involuntary administration of medication. NRS 178.425(1).

After a defendant is found incompetent, ''[u]pon the completion of the evaluation and treatment of the defendant, the Administrator [of the Division of Mental Health and Developmental Services of the Department of Health and Human Services] or his designee shall report to the court in writing his specific findings and opinion'' as to whether the defendant is now competent to stand trial. NRS 178.455(1). Additionally, the Administrator or his designee shall maintain a copy of the report and send a copy of the report to counsel for both sides after the competency treatment is completed. NRS 178.455(3). After counsel receives a copy of the Administrator's report, the court shall hold a hearing, if such hearing is requested within ten days of receiving the report. NRS 178.460; *see Fergusen v. State*, 124 Nev. 795, 797, 192 P.3d 712, 714 (2008).

Competency examination reports

Having addressed our competency procedure, we turn now to the merits of these writ petitions—namely, whether defense counsel is entitled to full and complete copies of the competency examination

[5]The requirement that ''[t]he court that receives the report of the examination shall permit counsel for both sides to examine the person or persons appointed to examine the defendant'' does not compel the participation of the court-appointed competency examiners at the competency hearing. *See* NRS 178.415(3). Nevertheless, the court-appointed competency examiners must appear at the competency hearing upon receiving a subpoena.

reports prior to the competency hearing held pursuant to NRS 178.415.

[Headnote 5]

Initially, we note that after a defendant has been found incompetent and received treatment, pursuant to NRS 178.455(3), full and complete copies of the competency examination reports must be sent to the district attorney and to the defense counsel prior to any further competency hearings. *See* NRS 178.455(3). Unfortunately, however, the statutory competency procedure set forth in NRS 178.415, which governs the district court's initial inquiry into a defendant's competence, is silent with respect to whether full and complete copies of the competency examination reports must be sent to counsel prior to the competency hearing. Nevertheless, we conclude that fundamental notions of due process demand that prior to a competency hearing held pursuant to NRS 178.415, the competency examination report must be forwarded to the court that ordered the examination, and the court must cause copies of the report to be delivered forthwith to the office of the district attorney and to defense counsel, or to the defendant personally if not represented by counsel. *See Vitek v. Jones*, 445 U.S. 480, 494-96 (1980) (concluding that notice of the competency hearing was essential to afford the defendant ''an opportunity to challenge the contemplated action and to understand the nature of what is happening to him''); *see also Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (concluding that the function of the notice requirement is to afford the defendant an opportunity to marshal the facts and to prepare a response).

[Headnotes 6, 7]

The United States and Nevada Constitutions provide that no person shall be deprived of liberty without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5). ''The Due Process Clause requires notice and an opportunity to be heard before the government deprives a person of his or her [liberty].'' *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004). Commitment to a psychiatric facility constitutes a deprivation of liberty, regardless of whether the commitment occurs as a result of a court order or referral, or an involuntary commitment proceeding. *See Maniccia v. State*, 931 So. 2d 1027, 1029-30 (Fla. Dist. Ct. App. 2006). Consequently, our statutory competency proceedings must afford the defendant with proper notice and a meaningful opportunity to be heard.

In this case, defense counsel for the petitioners submitted a request to receive full and complete copies of the competency examination reports prior to a competency hearing held pursuant to NRS 178.415. Department 5 denied defense counsel's request for full and

complete copies of the competency examination reports prior to the competency hearing. By denying defense counsel's request for full and complete copies of the competency examination reports prior to the competency hearing, Department 5 denied the petitioners a meaningful opportunity to be heard. Accordingly, we conclude that prior to a competency hearing held pursuant to NRS 178.415, the court that ordered the examination shall cause full and complete copies of the competency examination reports to be delivered forthwith to the office of the district attorney and to defense counsel, or the defendant personally if not represented by counsel. By providing counsel for both sides with full and complete copies of the competency examination reports, the prosecuting attorney and the defense counsel will be afforded a meaningful opportunity to be heard during the competency hearing.

CONCLUSION

NRS 178.415 is silent with respect to whether defense counsel is entitled to complete copies of the competency examination reports. Nevertheless, we conclude that full and complete copies of the competency examination reports must be sent to the district attorney and to defense counsel prior to a competency hearing pursuant to NRS 178.415 to comport with fundamental notions of due process.

For the reasons stated above, we grant these consolidated writ petitions. The clerk of this court shall issue writs of mandamus directing the district court to vacate its prior competency findings and conduct new competency hearings pursuant to NRS 178.415. The writ shall further direct the district court to provide the district attorney and the defense counsel with full and complete copies of the competency examination reports in a manner that is consistent with this opinion.

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

CAROLINE MARIE SIMS, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JACKIE GLASS, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 51188

KANOHEA SAMUEL HEAUKULANI, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JACKIE GLASS, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 51189

April 30, 2009 206 P.3d 980

Consolidated original petitions for writs of mandamus challenging district court orders denying petitioners' requests to present evidence during competency hearings.

The supreme court, DOUGLAS, J., held that independent competency evaluations submitted by relators were admissible at competency hearings.

Petitions granted.

Philip J. Kohn, Public Defender, and *Christy L. Craig* and *Howard S. Brooks*, Deputy Public Defenders, Clark County, for Petitioners.

Catherine Cortez Masto, Attorney General, and *Jill Carol Davis*, Senior Deputy Attorney General, Carson City, for Respondent.

David J. Roger, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *James R. Sweetin*, Deputy District Attorney, Clark County, for Real Party in Interest.

1. CRIMINAL LAW.

   The determination of all competency matters that arise during trial must vest with the trial judge who has been assigned to hear the matter.

2. MANDAMUS.

   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion or an arbitrary or capricious exercise of discretion; a writ of mandamus will not issue, however, if the petitioners have a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.160, 34.170.

3. MANDAMUS.
   Mandamus is an extraordinary remedy, and it is within the discretion of the supreme court to determine whether mandamus petitions will be considered. NRS 34.160, 34.170.
4. APPEAL AND ERROR.
   Statutory interpretation is a question of law, and a trial court's interpretation of a statute is therefore reviewed de novo.
5. STATUTES.
   In examining a statute, supreme court will look first to the statute's plain language; if the plain language of the statute is ambiguous, or if the plain meaning of the statute was clearly not intended by the Legislature, the court will then turn to legislative intent for guidance.
6. CRIMINAL LAW.
   Both sides in a criminal prosecution may introduce other evidence during a competency hearing, including independent competency evaluations. NRS 178.415(3).
7. CRIMINAL LAW.
   While the district court has the discretionary authority to admit or exclude evidence during a competency hearing, the competency process will be much better served when the district court and any appointed experts consider a wide scope of relevant evidence at every stage of the competency proceeding; this does not compel the district court to consider every record and hear testimony from every witness the State or defense may wish to present, as all evidence must still be relevant to the ultimate issues of whether the defendant understands the nature of the proceedings against him and can assist his counsel in his defense.
8. CRIMINAL LAW.
   Probative value of independent competency evaluations was not substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, and evaluations were thus admissible at competency hearings in criminal prosecutions; the independent competency evaluations were relevant to petitioners' competency to stand trial, and independent competency evaluations could not be said to be a waste of time or a needless presentation of cumulative evidence when the independent competency evaluations came to different conclusions than those submitted by court-appointed competency examiners. NRS 48.035(2), 178.415(3).

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

In this second of two related cases involving competency procedures in the Eighth Judicial District Court, the petitioners challenge the district court's refusal to allow defense counsel the opportunity to present independent competency evaluations during the compe-

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

tency hearing.[2] We conclude that defense counsel may introduce these independent evaluations if they are relevant to the issue of the defendant's competency and their probative value is not substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Because the petitioners' independent competency evaluations are relevant to the issue of competency, and their probative value is not substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, we grant these consolidated petitions.

FACTS

In early 2007, petitioner Caroline Marie Sims was charged with one count each of home invasion while in possession of a deadly weapon, carrying a concealed weapon, and burglary while in possession of a deadly weapon. In March 2007, petitioner Kanohea Samuel Heaukulani was charged with one count of open or gross lewdness. Shortly after these charges were filed, concerns were raised at the justice court level regarding the petitioners' competency to stand trial.

The justice court, acting under the competency procedures adopted by the Eighth Judicial District Court, bound the petitioners over to respondent Eighth Judicial District Court Judge Jackie Glass (Department 5) for resolution of the competency issues. Thereafter, the court appointed two psychologists to evaluate the petitioners. Following the evaluations, Department 5 received and reviewed the competency reports. According to the reports, the petitioners were competent to stand trial. Consequently, Department 5 entered formal findings of competence, and the cases proceeded to trial.

Despite Department 5's findings of competence, defense counsel for the petitioners remained concerned about the petitioners' competency to stand trial. As a result, defense counsel ordered independent competency evaluations for both petitioners. Each of the independent competency examiners were properly certified to evaluate competency by the Division of Mental Health and Developmental Services of the Department of Health and Human Services. *See* NRS 178.417. The results from the independent competency evaluations were unanimous in their conclusion that the petitioners were not competent to stand trial.

[Headnote 1]

Shortly after receiving the results from the independent competency evaluations, defense counsel for the petitioners again raised the issue of competency to stand trial. The trial judges suspended the

[2]Today, we also decide the related case of *Scarbo v. Dist. Ct.*, 125 Nev. 118, 206 P.3d 975 (2009).

proceedings and transferred the ongoing competency matters back to Department 5.[3] The petitioners were again evaluated by court-appointed competency examiners. Subsequent to the competency examinations, but prior to the competency hearings, defense counsel for the petitioners moved to admit the results from the independent competency evaluations at the competency hearings. Those motions were denied and these consolidated writ petitions followed.

DISCUSSION

[Headnotes 2, 3]

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion or an arbitrary or capricious exercise of discretion. NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of mandamus will not issue, however, if the petitioners have a plain, speedy, and adequate remedy in the ordinary course of law. *See* NRS 34.170. Mandamus is an extraordinary remedy, and it is within the discretion of this court to determine whether these petitions will be considered. *Poulos v. District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982).

The issue raised by these writ petitions concerns whether defense counsel is permitted under NRS 178.415(3) to introduce independent competency evaluations during the competency hearing. This important legal issue needs clarification. Therefore, we exercise our discretion to consider petitioners' arguments. *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998) (noting that when ''an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, [the] consideration of a petition for extraordinary relief may be justified'' (citing *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993))).

[Headnotes 4, 5]

Department 5 interprets NRS 178.415(3) to limit the admissibility of evidence during the competency hearing to that which is ''related to treatment to competency and the possibility of ordering the involuntary administration of medication.'' Statutory interpretation is

[3]Under the competency procedures recently adopted by the Eighth Judicial District Court, all competency matters are assigned to a particular district court judge. In *Fergusen v. State*, this court reviewed the Eighth Judicial District Court's competency procedures and concluded that the district court may assign initial competency determinations to a particular district court judge. 124 Nev. 795, 803, 192 P.3d 712, 718 (2008). However, any ongoing competency issue must vest with the trial judge who has been assigned to hear the matter. *Id.* Finally, the determination of all competency matters that arise during trial must vest with the trial judge who has been assigned to hear the matter. *Id.*

a question of law, and we review Department 5's interpretation of NRS 178.415(3) de novo. *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004). In examining a statute, this court will look first to the statute's plain language. *Id*. If the plain language of the statute is ambiguous, or if the plain meaning of the statute was clearly not intended by the Legislature, this court will then turn to legislative intent for guidance. *Id.*; *see State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001) (citing *State v. State, Employees Assoc.*, 102 Nev. 287, 289-90, 720 P.2d 697, 699 (1986) (determining that ''plain and unambiguous'' language within a statute ''must be given effect'' unless from the language of the statute ''it clearly appears that such [an interpretation] was not so intended'')).

NRS 178.415(3) provides that, upon receiving the competency reports from the court-appointed competency examiners, the court ''shall permit counsel for both sides to examine the person or persons appointed to examine the defendant.'' Additionally, ''[t]he prosecuting attorney and the defendant may: (a) Introduce other evidence including, without limitation, evidence related to treatment to competency and the possibility of ordering the involuntary administration of medication; and (b) Cross-examine one another's witnesses.'' NRS 178.415(3)(a), (b).

The plain and unambiguous language of NRS 178.415(3) is expansive and in no way limits the prosecuting attorney's or defense counsel's ability to introduce evidence during the competency hearing. The plain meaning of the statute is evidenced by the phrases ''other evidence'' and ''without limitation,'' which denote expansive legislative intent. *See Alsenz v. Clark Co. School Dist.*, 109 Nev. 1062, 1065, 864 P.2d 285, 287 (1993); *see also St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 206-07 (5th Cir. 1996) (word ''including'' is generally given expansive reading, even without additional language of ''without limitation'').

[Headnote 6]

Despite the statute's plain language, Department 5 contends that this court must look to legislative intent for guidance. We are not convinced by this argument because the statute's plain meaning clearly supports an expansive interpretation. Nevertheless, we have canvassed the legislative history and find no intent beyond that which is clearly delineated in the plain language of the statute. Therefore, we conclude that Department 5's limited interpretation of NRS 178.415(3) is incorrect because both sides may introduce other evidence during the competency hearing, including independent competency evaluations.

In this case, while Department 5 found that petitioners' independent competency evaluations were relevant, it determined that their probative value was substantially outweighed by considera-

tions of undue delay, waste of time, or needless presentation of cumulative evidence. Department 5 explained that the petitioners' independent competency evaluations were needlessly cumulative because the court had already received competency reports from court-appointed competency examiners. We must now determine whether the petitioners' independent competency evaluations were properly excluded as an undue delay, waste of time, or needless presentation of cumulative evidence. This court recently addressed a similar issue in *Calvin v. State*, 122 Nev. 1178, 147 P.3d 1097 (2006).

[Headnote 7]

In *Calvin*, we considered whether the district court improperly limited the information the court-appointed competency examiners could consider during the competency examination and the subsequent competency hearing. *Id.* at 1183, 147 P.3d at 1100. We concluded that while the district court has the discretionary authority to admit or exclude evidence during the competency hearing, the competency process will be much better ''served when the district court and any appointed experts consider a wide scope of relevant evidence at every stage of the competency proceeding.'' *Id.* This does not compel the district court to consider ''every record and hear testimony from every witness the State or defense may wish to present; all evidence must still be relevant to the ultimate issues of whether the defendant understands the nature of the proceedings against him and can assist his counsel in his defense.'' *Id.* Even if the evidence being proffered is relevant, the district court may still exclude the evidence ''if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.'' NRS 48.035(2).

[Headnote 8]

In light of our decision in *Calvin*, we conclude that Department 5's line of reasoning was an arbitrary and capricious exercise of discretion because accuracy in the competency process is much better served when the district court considers a wide scope of relevant evidence. *Calvin*, 122 Nev. at 1183, 147 P.3d at 1100. Here, the petitioners' independent competency evaluations were, without question, relevant to the issue of competency. Furthermore, the district court's consideration of a single additional competency evaluation will not cause undue delay. Neither will the petitioners' independent competency evaluations be a waste of time nor will they constitute needless presentation of cumulative evidence. This is because the independent competency evaluations came to different conclusions than those submitted by the court-appointed competency examiners. Accordingly, we conclude that the probative value of the petitioners' independent competency evaluations is not ''substantially outweighed by considerations of undue delay, waste of time or needless presen-

tation of cumulative evidence.'' NRS 48.035(2). Therefore, we conclude that Department 5 manifestly abused its discretion in excluding this evidence.

CONCLUSION

NRS 178.415(3) provides that the prosecuting attorney and defense counsel may introduce other evidence, including independent competency evaluations, if the evidence is relevant to the issue of competency. Consequently, the petitioners are entitled to introduce their independent competency evaluations during the competency hearing since the evaluations are relevant to the issue of competency and the probative value of this information is not outweighed by NRS 48.035(2). Accordingly, we grant these consolidated writ petitions. The clerk of this court shall issue writs of mandamus instructing the district court to consider petitioners' independent competency evaluations at their competency hearings.

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

ALLSTATE INSURANCE COMPANY, APPELLANT, *v.* DEBORAH ANN FACKETT, RESPONDENT.

No. 49884

April 30, 2009 206 P.3d 572

Appeal from a district court summary judgment in a declaratory relief action regarding an uninsured/underinsured motorist insurance matter. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

After insured made a demand under her automobile policy for uninsured/underinsured motorist (UM) benefits for the death of her mother, who died from severe injuries suffered in a car accident, insurer filed a declaratory relief action seeking a declaration that the policy was valid and enforceable, that insured's mother was not an insured and, thus, that insured could not recover for her mother's death. The district court granted insured's motion for summary judgment. Insurer appealed. The supreme court held that: (1) policy limited recovery to insureds who suffered bodily injury, and thus insured, who did not suffer any bodily injury, was not entitled to UM benefits for the death of her mother, who was not an insured; (2) UM statute provides UM coverage for insureds who suffer bodily injury in an auto accident and does not provide coverage for legal claims an insured may have regarding a noninsured third party who

is injured by an uninsured/underinsured driver; and (3) policy limitation was consistent with UM statute, and thus policy limitation was enforceable.

Reversed and remanded.

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

Rogers, Mastrangelo, Carvalho & Mitchell and *Daniel E. Carvalho* and *Charles A. Michalek*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   Supreme court reviews a district court's grant of summary judgment de novo.
2. JUDGMENT.
   Summary judgment is appropriate when there is no genuine issue of material fact and, viewing all evidence and inferences from the evidence in a light most favorable to the nonmoving party, the moving party is entitled to a judgment as a matter of law. NRCP 56(c).
3. INSURANCE.
   Automobile insurance policy provision stating that insurer would pay damages which an insured person was legally entitled to recover from the owner or operator of an uninsured auto because of bodily injury sustained by an insured person limited recovery to insureds who suffered bodily injury, and thus insured, who did not suffer any bodily injury, was not entitled to uninsured/underinsured motorist benefits for the death of her mother, who was not an insured.
4. JUDGMENT.
   When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper.
5. APPEAL AND ERROR; INSURANCE.
   When there are no disputed material facts, supreme court reviews construction of an insurance policy as purely a question of law and construes any ambiguities in an insurance policy in favor of the insured.
6. STATUTES.
   To determine legislative intent, supreme court first looks at the plain language of a statute.
7. STATUTES.
   Supreme court only looks beyond the plain language of a statute if it is ambiguous or silent on the issue in question.
8. STATUTES.
   Supreme court reads statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.
9. INSURANCE.
   The two statutes that comprise Nevada's uninsured/underinsured motorist statutory scheme are incorporated into all applicable Nevada auto insurance policies. NRS 687B.145(2), 690B.020.
10. INSURANCE.
    Any auto insurance policy or provision that contravenes uninsured/underinsured motorist statutory scheme is void and unenforceable. NRS 687B.145(2), 690B.020.

11. INSURANCE.
    The purpose of the uninsured/underinsured motorist statutory scheme is to mitigate losses sustained by no-fault insureds who sustain injuries in a collision with an underinsured or uninsured driver through first-party benefits. NRS 687B.145(2), 690B.020.
12. INSURANCE.
    Uninsured/underinsured motorist (UM) statute provides UM coverage for insureds who suffer bodily injury in an auto accident and does not provide coverage for legal claims an insured may have regarding a noninsured third party who is injured by an underinsured/uninsured driver. NRS 687B.145(2).
13. INSURANCE.
    Automobile policy limiting uninsured/underinsured motorist (UM) coverage to insureds who suffered bodily injury was consistent with the plain language of UM statute, which did not extend coverage to noninsured third parties, and thus policy limitation was enforceable. NRS 687B.145(2).

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

OPINION

Per Curiam:

Respondent Deborah Ann Fackett's mother, Barbara Testa, suffered severe injuries when her car collided with Benjamin Bellville's car. Bellville was an underinsured driver, and Testa was insured under her own auto insurance policy. Fackett was insured with appellant Allstate Insurance Company. A few weeks after the accident, Testa died from her injuries. Fackett sued Bellville for the wrongful death of her mother and received his $1,000,000 policy limit. Fackett then made a demand under her Allstate insurance policy (Policy) for uninsured/underinsured motorist (UM) benefits for the death of her mother. Allstate denied coverage because Testa was not an insured person under the Policy. Allstate then filed a declaratory relief action, requesting that the court find that (1) the Policy was valid and enforceable and (2) Testa was not an insured, and therefore Fackett could not recover for Testa's death. Both parties moved for summary judgment. The district court granted Fackett's motion, denied Allstate's motion, and ruled as a matter of law that the Policy's provision requiring that the injured be an insured violated NRS 687B.145(2) because the statute does not require that the bodily injury be sustained by an insured. Therefore, the district court found that Fackett was entitled to UM benefits for Testa's death.

We must determine whether Allstate's UM policy provision, which limits recovery to insureds who suffer bodily injury, is enforceable and whether the district court erred in granting summary judgment in favor of Fackett. Our analysis of the district court's ruling has two prongs.

First, we must determine whether the Policy provision limiting recovery to insureds who suffer bodily injury is ambiguous. We conclude that the Policy is clear and unambiguous and limits recovery to insureds who suffer bodily injury.

Second, we must determine whether the Policy limitations contravene Nevada's UM statutory scheme or public policy. We conclude that neither NRS 687B.145(2) nor public policy requires that UM coverage provide recovery for injury to uninsured third parties. Thus, Allstate's Policy provision limiting recovery to insureds who suffer bodily harm is unambiguous, does not contravene NRS 687B.145(2), and therefore is enforceable.

Accordingly, we reverse.

FACTS AND PROCEDURAL HISTORY

Accident and insurance policy

Barbara Testa, respondent Deborah Fackett's mother, was a fault-free passenger in a vehicle that collided with Benjamin Bellville's vehicle. Testa was severely injured and died a few weeks later from her injuries. She was insured under her own policy and was not insured under Fackett's Allstate policy.

At the time of the accident and Testa's death, Fackett had an insurance policy with Allstate. The UM coverage provided that ''[Allstate] will pay damages which an insured person is legally entitled to recover from the owner or operator of an uninsured auto *because of bodily injury sustained by an insured person*.'' (Emphasis added.) According to the Policy, insured persons are:

> 1. [The named insured] and any relative who resides in [the named insured's] household.
>
> 2. Any person while in, on, getting into or out of [the named insured's] insured auto with [the named insured's] permission.
>
> 3. Any other person who is legally entitled to recover because of bodily injury to [the named insured], a relative who resides in [the named insured's] household, or an occupant of [the named insured's] insured auto with [the named insured's] permission.

The parties agree that Testa was not an insured person under the Policy.

In addition, the Policy defines an uninsured auto as, among other things, ''an underinsured motor vehicle which has liability protection in effect and applicable at the time of the accident but less than the applicable damages the insured person is legally entitled to recover.''

Fackett asserted a wrongful death claim against Bellville and ultimately settled with Bellville's insurance company for his $1,000,000 policy limit. The district court found that Bellville was

insured but ''lacked sufficient insurance to cover all claims involved in the accident.''

After the settlement, Fackett's attorney informed Allstate of his representation and requested a copy of Fackett's policy that was in effect at the time of the accident. Allstate then informed Fackett's attorney, in writing, that Testa was not an insured person under the Policy, and therefore UM benefits were not available to Fackett.

Fackett then made a formal demand for her UM Policy limits. She argued that NRS 687B.145 entitled her to recover any damages for which she is legally entitled to recover from the other driver. Because she was legally entitled to recover from Bellville for the wrongful death of her mother, Fackett reasoned that she was entitled to recover UM benefits as well. Allstate did not reconsider its earlier denial of the claim.

District court proceedings

Allstate filed a declaratory relief action seeking an order declaring that the Policy was valid and enforceable, and that Testa was not an insured person under the Policy, and therefore Fackett was not entitled to UM benefits for Testa's death. Allstate moved for summary judgment on its claim for declaratory relief.

Fackett filed an opposition and a countermotion for summary judgment. Fackett argued that she was entitled to summary judgment because (1) the UM statute must be construed broadly and strictly in favor of the insured, and (2) the Policy was void and unenforceable because it violated public policy by restricting coverage to injuries suffered by insureds.[1]

The district court granted Fackett's summary judgment motion and denied Allstate's motion. The district court found that states having UM statutes and public policies similar to Nevada allowed recovery in similar cases. As a result, the district court concluded that (1) NRS 687B.145 must be strictly construed in favor of the insured, (2) the statute does not require that the insured suffer physical bodily injury, and (3) the Policy's requirement that the injured be an insured contravenes the statute.[2] Therefore, the district court found that Fackett was entitled to UM benefits for Testa's death.

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[1]Fackett also argued that ''bodily injury'' includes emotional harm such as grief and sorrow. We do not reach the issue of whether bodily injury includes emotional harm, such as claims for negligent infliction of emotional distress or wrongful death, because the decision is not necessary to the determination of this appeal. Fackett was not involved in the accident, she was not present at the scene, and did not witness the accident, so she could not have suffered any harm in the accident.

[2]We commend the district court for making specific findings of fact and conclusions of law, which greatly assisted this court by defining and clarifying the issues.

DISCUSSION

Allstate argues that the district court erred in granting Fackett summary judgment because the Policy language restricting recovery to injured insureds is consistent with Nevada's public policy and the plain language of the UM statute. Therefore, the limitation of recovery to insureds who are injured in an auto accident with an uninsured/underinsured motorist is enforceable. Fackett, however, argues that this court must strictly construe the UM statute in favor of the insured. This would require that UM coverage include any legal claims that an insured person has against an uninsured/underinsured driver, even when the person injured in the auto accident was not covered under the policy in question. We agree with Allstate's position because the Policy is unambiguous, it comports with the plain language of Nevada's UM statutory scheme, and is enforceable.

Standard of review

[Headnotes 1, 2]

''This court reviews a district court's grant of summary judgment de novo.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and, viewing all evidence and inferences from the evidence in a light most favorable to the nonmoving party, the moving party is entitled to a judgment as a matter of law. *Id.*; NRCP 56(c). In this case, the parties agree that there are no disputed material facts and only dispute whether Fackett is entitled to judgment as a matter of law under the applicable statutory and contractual provisions.

The Policy provision requiring that an insured sustain bodily injury or death

[Headnote 3]

Allstate argues that the express terms of the Policy's UM provision require that an insured sustain injury or death and therefore do not provide coverage for Fackett's mother.[3] We agree because the Policy is unambiguous and limits recovery to injured insureds.

[Headnotes 4, 5]

When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper. *Chwialkowski v. Sachs*, 108 Nev. 404, 406-07,

[3]Fackett argues that her original Allstate insurance policy provided coverage for ''damages because of bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured auto.'' Allstate then sent a Policy Endorsement that limited recovery by adding ''bodily injury

834 P.2d 405, 406 (1992). When there are no disputed material facts, this court reviews construction of an insurance policy as purely a question of law and construes any ambiguities in an insurance policy in favor of the insured. *Estate of Delmue v. Allstate Ins. Co.*, 113 Nev. 414, 417, 936 P.2d 326, 328 (1997).

At the time of the accident, Fackett's Policy stated, ''[Allstate] will pay damages which an insured person is legally entitled to recover from the owner or operator of an uninsured auto *because of bodily injury sustained by an insured person*.'' (Emphasis added.) This language is unambiguous and clearly states that any injury for which the insured will receive UM benefits must be a bodily injury suffered by the insured. Thus, we conclude Fackett was not entitled to UM benefits for the death of her mother because Fackett, the insured, did not suffer any bodily injury.

NRS 687B.145(2) does not entitle insureds to recover UM benefits for injuries to uninsured third parties

Allstate argues that the plain language of NRS 687B.145(2) only applies to bodily injury suffered by the insured. Fackett, on the other hand, argues that this court must strictly construe the UM statute in favor of recovery by insureds. Under this construction, Fackett reasons that the statutory scheme applies to bodily injury suffered by anyone whose injury gives the insured a legal claim against the uninsured driver. We conclude that Allstate's position is correct.

[Headnotes 6-8]

To determine legislative intent, this court first looks at the plain language of a statute. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000). We only look beyond the plain language if it is ambiguous or silent on the issue in question. *Id*. We read statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result. *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008).

[Headnotes 9, 10]

NRS 687B.145(2) and 690B.020 comprise Nevada's UM statutory scheme and are incorporated into all applicable Nevada auto insurance policies. *Continental Ins. Co. v. Murphy*, 120 Nev. 506, 509, 96 P.3d 747, 750 (2004) (describing these two statutes as the UM statutory scheme); *Hampton v. Brewer*, 103 Nev. 73, 74, 733 P.2d 852, 853 (1987) (noting that ''statutes must be construed in light of

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sustained by an insured person.'' Because the endorsed policy was effective at the time of the accident, we do not address the pre-endorsement policy language.

their purpose as a whole'' (citation omitted)); *Ippolito v. Liberty Mutual*, 101 Nev. 376, 378-79, 705 P.2d 134, 136 (1985) (incorporating the UM scheme into Nevada auto insurance policies). Any auto insurance policy or provision that contravenes this statutory scheme is void and unenforceable. *Continental*, 120 Nev. at 507, 96 P.3d at 748.

NRS 687B.145(2) provides, in pertinent part, that

> [u]ninsured and underinsured vehicle coverage must include a provision which enables the insured to recover up to the limits of his own coverage any amount of damages for *bodily injury* from his insurer *which he is legally entitled to recover* from the owner or operator of the other vehicle to the extent that those damages exceed the limits of the coverage for bodily injury carried by that owner or operator.

(Emphases added.) The plain language of the statute indicates that the insured can only recover for bodily injuries the insured personally suffers. The language ''bodily injury from *his* insurer which *he* is legally entitled to recover'' is referring to bodily injury suffered by the insured—not by any person whose injury may give rise to a legal claim by the insured against the uninsured motorist. Fackett argues a strict construction in which any person who has a claim against the uninsured motorist could recover under this statute. This interpretation strains the statute beyond its plain meaning.

[Headnote 11]

The plain meaning requirement that an insured suffer bodily injury is consistent with our prior interpretations of this statutory scheme and comports with other states' interpretations of similar statutes. The purpose of the UM statutory scheme is to mitigate losses sustained by no-fault insureds who sustain injuries in a collision with an underinsured or uninsured driver through first-party benefits. *State Farm Mut. Auto. Ins. Co. v. Fitts*, 120 Nev. 707, 709, 99 P.3d 1160, 1161 (2004); *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993). Our previous interpretations of the UM scheme presuppose that the insured was involved in a car accident and suffered damages in the accident. Thus, this court has interpreted these statutes as applying to insureds involved in car accidents and not to insureds who had a legal claim regarding an uninsured third person who was injured by an uninsured or underinsured driver.

Our plain-language reading of the UM statute is supported by the holdings of a growing number of states on the same issue, while Fackett's position is supported by only a shrinking minority of

states. Fackett points to seven jurisdictions[4] that once allowed insureds to recover UM benefits for the death of an uninsured third party.[5] However, four of the legislatures in these seven states have amended their statutes to disallow such recovery.[6] Nebraska's law is unclear because its statute requiring UM coverage is ambiguous, but its statutes defining an uninsured and underinsured motor vehicle refer to the injuries ''of an insured.'' Neb. Rev. Stat. §§ 44-6405, 44-6406, 44-6408 (2004). Also, Nebraska has legislation pending that would extend coverage to anyone occupying an insured vehicle with the consent of the insured and who is not entitled to UM coverage under any other policy. Legis. Bill 152, 101st Leg., 1st Reg. Sess. (Neb. 2009). Thus, only two of the seven jurisdictions cited by respondent, Iowa and New Mexico, still definitively allow recovery by insureds for the death of an uninsured third party. *See Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 574 (Iowa 1997); *Hinners v. Pekin Ins. Co.*, 431 N.W.2d 345, 346-47 (Iowa 1988); *State Farm Mut. Auto. Ins. Co. v. Luebbers*, 119 P.3d 169, 176 (N.M. Ct. App. 2005).

Many states have UM statutes almost identical to Nevada's statutes, and Allstate points to 16 jurisdictions with the same ''legal entitlement'' language as Nevada's scheme.[7] Courts in these states have held that UM coverage only applies to insureds who sustain bodily injury in an auto accident that was the fault of an uninsured motorist and have denied coverage for injury to uninsured third parties.[8] This trend comports with the plain language meaning of Nevada's UM statutory scheme.

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[4]These states include Georgia, Iowa, Maine, Maryland, Nebraska, New Mexico, and Ohio.

[5]*Gordon v. Atlanta Cas. Co.*, 611 S.E.2d 24, 25 (Ga. 2005); *Hinners v. Pekin Ins. Co.*, 431 N.W.2d 345, 346-47 (Iowa 1988); *Butterfield v. Norfolk & Dedham Ins. Co.*, 860 A.2d 861, 866-67 (Me. 2004); *Forbes v. Harleysville Mutual*, 589 A.2d 944, 953-54 (Md. 1991); *State Farm Mutual Automobile Ins. Co. v. Selders*, 190 N.W.2d 789, 792 (Neb. 1971); *State Farm Mut. Auto. Ins. Co. v. Luebbers*, 119 P.3d 169, 176 (N.M. Ct. App. 2005); *Sexton v. State Farm Mut. Auto. Ins. Co.*, 433 N.E.2d 555, 559 (Ohio 1982).

[6]Ga. Code Ann. § 33-7-11 (2008) (amended to allow recovery for the death of an insured, 2006 Ga. Laws 816); Me. Rev. Stat. Ann. tit. 24-A, § 2902 (2008) (amended to clarify that injury must be sustained by the insured, 2005 Me. 1573); Md. Code Ann., Ins. § 19-509 (West 2008) (amended to clarify that recovery for wrongful death is only available when insured suffers wrongful death, 1991 Md. Laws 3422); Ohio Rev. Code Ann. § 3937.18 (LexisNexis 2002) (amended to specifically allow exclusions for ''[w]hen the person actually suffering the bodily injury . . . is not an insured under the policy,'' 2001 Ohio Laws 784-85).

[7]These states include Alaska, Arizona, California, Colorado, Delaware, Florida, Illinois, Indiana, Louisiana, Mississippi, Missouri, Oklahoma, Rhode Island, South Dakota, Washington, and Wisconsin.

[8]*Delancey v. State Farm Mut. Auto. Ins. Co.*, 918 F.2d 491, 495 (5th Cir. 1990) (holding that neither Mississippi's wrongful death statute nor its UM

[Headnote 12]

The plain language of NRS 687B.145(2) provides UM coverage for insureds who suffer bodily injury in an auto accident and does not provide coverage for legal claims an insured may have regarding a noninsured third party who is injured by an underinsured/uninsured driver. This plain language reading is consistent with our prior interpretations of Nevada's UM statutory scheme as well as the law of a growing majority of states.

CONCLUSION

[Headnote 13]

We conclude that Allstate's Policy was unambiguous and its provision limiting UM coverage to insureds who suffer bodily injury is consistent with the plain language of NRS 687B.145(2), which does not extend coverage to noninsured third parties. Thus, Allstate's Policy limitation is enforceable, and the district court erred in granting

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statute allows an insured to recover for the death of an uninsured third party); *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840, 844 (D. Alaska 1977) (denying father recovery under UM coverage for wrongful death of uninsured daughter); *Bartning v. State Farm Fire & Cas.*, 793 P.2d 127, 129 (Ariz. Ct. App. 1990) (holding that the legislature did not intend to provide coverage under a UM policy for injuries to third parties); *Smith v. Royal Ins. Co. of America*, 230 Cal. Rptr. 495, 497 (Ct. App. 1986) (denying insured UM recovery for wrongful death of her uninsured father); *Farmers Ins. Exchange v. Chacon*, 939 P.2d 517, 520, 522 (Colo. App. 1997) (denying insured children's recovery for uninsured mother's wrongful death); *Temple v. Travelers Indemnity Co.*, No. 98C-08-088 WCC, 2000 WL 33113814, at *4-*6 (Del. Super. Ct. Nov. 30, 2000) (interpreting UM statute as only applying to insureds injured in accidents); *Valiant Ins. Co. v. Webster*, 567 So. 2d 408, 410 (Fla. 1990) (denying father UM recovery for death of uninsured son), *receded from on other grounds in Government Employees Ins. Co. v. Douglas*, 654 So. 2d 118 (Fla. 1995); *State Farm Mut. Auto. Ins. Co. v. George*, 762 N.E.2d 1163, 1165-66 (Ill. App. Ct. 2002) (denying insured's UM claim on behalf of child for loss of society of child's uninsured mother); *Ivey v. Massachusetts Bay Ins. Co.*, 569 N.E.2d 692, 695 (Ind. Ct. App. 1991) (denying husband UM recovery for uninsured wife's wrongful death because husband did not suffer bodily injury); *Spurlock v. Prudential Ins. Co.*, 448 So. 2d 218, 219 (La. Ct. App. 1984) (holding insured could not recover for wrongful death of uninsured third party); *Livingston v. Omaha Property & Cas. Ins. Co.*, 927 S.W.2d 444, 446 (Mo. Ct. App. 1996) (denying coverage of insured mother's claim under UM policy as decedent daughter was not an insured under the policy); *London v. Farmers Ins. Co., Inc.*, 63 P.3d 552, 556 (Okla. Civ. App. 2002) (holding that allowing UM coverage to be extended for injuries sustained by a person who is not an insured under the claimant's policy would create coverage under the statute where none previously existed); *Terilli v. Nationwide Mut. Ins. Co.*, 641 A.2d 1321, 1322 (R.I. 1994) (denying child's UM claim for loss of consortium of severely injured parent); *Gloe v. Iowa Mut. Ins. Co.*, 694 N.W.2d 238, 249 (S.D. 2005) (denying recovery to insured for uninsured parents' deaths); *Allstate Ins. Co. v. Hammonds*, 865 P.2d 560, 564 (Wash. Ct. App. 1994) (holding insured could not recover loss of consortium for severe injury of uninsured son); *Ledman v. State Farm Mut. Auto. Ins. Co.*, 601 N.W.2d 312, 317 (Wis. Ct. App. 1999) (denying recovery because emotional harm is not bodily injury).

Fackett's summary judgment motion. Accordingly, we reverse and remand to district court with instructions to enter summary judgment in favor of Allstate.

SEAN ANDREW HANNON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 50594

May 21, 2009 207 P.3d 344

Appeal from a judgment of conviction, pursuant to a plea of nolo contendere, of one count of possession of a controlled substance. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

The supreme court, PARRAGUIRRE, J., held that reported domestic disturbance to which officer responded did not represent an emergency of the sort justifying a warrantless entry into the residence, abrogating *Geary v. State*, 91 Nev. 784, 544 P.2d 417 (1975), and *State v. Hardin*, 90 Nev. 10, 518 P.2d 151 (1974).

Reversed.

[Rehearing denied July 31, 2009]

[En banc reconsideration denied September 15, 2009]

Dennis A. Cameron, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Respondent.

1. SEARCHES AND SEIZURES.
   Under the circumstances, viewed objectively and regardless of officer's subjective motivations, reported domestic disturbance involving defendant and his girlfriend, to which officer responded to learn from girlfriend, through an opened door, that nobody inside the home was injured and that nobody else was inside except defendant, who was visible to officer, did not represent an emergency of the sort justifying a warrantless entry into the residence, abrogating *Geary v. State*, 91 Nev. 784, 544 P.2d 417 (1975), and *State v. Hardin*, 90 Nev. 10, 518 P.2d 151 (1974). U.S. CONST. amend. 4.
2. CRIMINAL LAW.
   In cases involving use of the emergency exception to the warrant requirement, while supreme court defers to the factual findings supporting the district court's ruling on a motion to suppress evidence, it reviews de novo whether the emergency exception justifies a warrantless entry. U.S. CONST. amend. 4.
3. SEARCHES AND SEIZURES.
   Warrantless home entries, the chief evil against which the Fourth Amendment protects, are presumptively unreasonable unless justified by a

well-delineated exception, such as when exigent circumstances exist. U.S. CONST. amend. 4.

4. SEARCHES AND SEIZURES.
One exigency that serves as an exception to the warrant requirement is the need to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. U.S. CONST. amend. 4.

5. SEARCHES AND SEIZURES.
Unlike hot pursuit situations or the need to preserve evidence, warrantless entries for emergency reasons do not require probable cause. U.S. CONST. amend. 4.

6. SEARCHES AND SEIZURES.
For purposes of applying the emergency exception to the warrant requirement, a law enforcement officer's subjective motivation is irrelevant; rather, the reasonableness of an emergency home entry depends on whether the circumstances, viewed objectively, justify the action or, more specifically, whether law enforcement had an objectively reasonable basis to believe that there was an immediate need to protect the lives or safety of themselves or others. U.S. CONST. amend. 4.

Before PARRAGUIRRE, DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we consider whether an emergency reason existed for a warrantless entry into a private residence. In resolving this issue, we bring our standard for emergency home entries into conformity with the recent United States Supreme Court decision in *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). Under that standard, the warrantless entry into appellant's apartment was unlawful as there was no objectively reasonable basis to believe that the two occupants or any undisclosed third party may have been in danger inside. Accordingly, we conclude that the district court erred in denying appellant's motion to suppress the evidence of marijuana recovered during a subsequent search and reverse the district court's judgment of conviction.

FACTS AND PROCEDURAL HISTORY

On the afternoon of July 29, 2006, appellant Sean Andrew Hannon and his girlfriend, Lea Robinson, were overheard arguing in their apartment. During the argument, Robinson became emotional, screamed at Hannon, and slammed the bathroom door against the wall.

Having overheard ''yelling and screaming [and] thumping against the walls'' in Hannon's apartment, a neighbor called 911 to report a possible domestic disturbance. In response, Officer Eric Friberg and his trainee were dispatched to the scene. Before knocking on Hannon's door, the officers confirmed with the neighbor what he had overheard.

Although approximately 45 minutes had elapsed since the argument had dissipated, Robinson answered the door red-faced, crying, and breathing hard. As Robinson opened the door, Officer Friberg observed Hannon in the background in a tank top and underwear. He appeared to be flushed and ''angry.''

Speaking to Robinson through the cracked door, Officer Friberg explained that he was responding to a possible domestic disturbance and asked if she was injured. Robinson replied no, though she admitted having a verbal argument with Hannon earlier that day. Robinson was then asked whether anyone else was inside and whether they were injured. Robinson answered that nobody was injured and that nobody else was inside except Hannon.

Despite these reassurances, Officer Friberg stated that he ''needed to come inside to check everybody's welfare and make sure everybody was okay.'' He then asked Robinson for permission to enter. Robinson refused to allow the officers to enter and asked if they had a warrant. The officers then sought permission from Hannon. Again, the officers were told that they could not come inside the apartment.

Although he had twice been denied entry, Officer Friberg persisted by ''push[ing] the [apartment] door slightly open.'' As the officers crossed the unit's threshold, Hannon ran into the kitchen and threw a dark bag into a cupboard, prompting Officer Friberg to push his way past Robinson into the apartment. According to Officer Friberg, he forcibly entered the apartment, not because of Hannon's sudden dash to the kitchen, but to protect the safety of its occupants.

Once inside, the officers conducted a protective sweep and observed marijuana and assorted paraphernalia on the living room table and marijuana leavings on the kitchen counter. Based on these observations, Officer Friberg advised his sergeant by phone that he wanted to seek a warrant to search Hannon's kitchen cupboard.

Having overheard the call, Hannon asked Officer Friberg whether ''[y]ou tear up houses when you obtain search warrants?'' Concerned with avoiding a full-blown search, Hannon offered to allow the officers to search the cupboard if they would forgo a warrant.

Officer Friberg accepted the offer. After verifying Hannon's consent, he then recovered a pillowcase-sized plastic bag of marijuana from the kitchen cupboard. Thereafter, Hannon was arrested for the possession of a controlled substance for the purpose of sale.

Following his arrest, Hannon filed a motion to suppress, challenging the reasonableness of the warrantless entry. At the evidentiary hearing, Officer Friberg admitted that ''[he] didn't have evidence'' that another occupant may have been inside who needed emergency assistance, he ''just had suspicions.''

Nevertheless, applying the emergency home entry standard recently announced in *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006), the district court considered Robinson's distressed appearance, the nature of the 911 call, and Officer Friberg's experience and training in domestic violence situations, and concluded that there was ''objective information'' to justify the warrantless entry and denied Hannon's motion. As a result, Hannon entered a conditional plea of nolo contendere to simple possession.[1] This appeal followed.[2]

DISCUSSION

[Headnotes 1, 2]

In this case, the police entered Hannon's apartment for a single stated purpose—to render emergency aid to any potential third parties inside. Given the entry's one-dimensional nature, this case deals exclusively with the emergency exception to the warrant requirement. While we defer to the factual findings supporting the district court's ruling on Hannon's motion, we review de novo whether the emergency exception justifies the warrantless entry here. *See State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000).

Emergency exception

[Headnotes 3, 4]

Warrantless home entries, the chief evil against which the Fourth Amendment protects, *see Payton v. New York*, 445 U.S. 573, 585 (1980), are presumptively unreasonable unless justified by a well-delineated exception, such as when exigent circumstances exist. *See Camacho v. State*, 119 Nev. 395, 400, 75 P.3d 370, 374 (2003). Under established law, *see, e.g.*, *Alward v. State*, 112 Nev. 141, 151, 912 P.2d 243, 250 (1996), *overruled in part on other grounds by Rosky v. State*, 121 Nev. 184, 190-91 & n.10, 111 P.3d 690, 694 & n.10 (2005), one such exigency is the need to ''render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'' *Brigham City*, 547 U.S. at 403.

[Headnote 5]

Unlike ''hot pursuit'' situations or the need to preserve evidence, warrantless entries for emergency reasons do not require probable cause. *See U.S. v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). Emergencies, therefore, are analytically distinct from other exigent cir-

[1]NRS 174.035(3) (permitting conditional pleas of nolo contendere in exchange for the right to appeal a pretrial ruling).

[2]While this case was assigned to District Judge Jerome M. Polaha, who accepted Hannon's change of plea and entered the judgment of conviction in this matter, District Judge Janet Berry heard and decided Hannon's suppression motion.

cumstances. 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.6(a), at 451 (4th ed. 2004). Thus, although some taxonomical debate exists regarding its proper classification, whether as a type of exigency or a freestanding exception to the warrant requirement, *id.*; *compare U.S. v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002) (''[E]mergency situations involving endangerment to life fall squarely within the exigent circumstances exception.''), *with People v. Hebert*, 46 P.3d 473, 478-79 (Colo. 2002) (warrantless emergency entries fall within the community caretaking exception), emergency entries are ''assessed separately and by a distinct test.'' LaFave, *supra*, § 6.6(a), at 451 n.6.

Controlling standard—Brigham City v. Stuart

Although Nevada's existing two-pronged test for emergency home entries permits courts to consider law enforcement's subjective motivations, the standard recently announced in *Brigham City* eliminates such a consideration. 547 U.S. at 404.

Under Nevada's existing test, an emergency home entry is permissible without a warrant if law enforcement officers (1) reasonably believe that emergency assistance is needed, and (2) lack the '''''accompanying intent to either arrest or search.''''' *See, e.g.*, *Geary v. State*, 91 Nev. 784, 790 n.3, 544 P.2d 417, 421 n.3 (1975) (quoting *State v. Hardin*, 90 Nev. 10, 15, 518 P.2d 151, 154 (1974) (quoting E. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 Buff. L. Rev. 419, 426-27 (1973))). This test—the wording of which derives from a law review article—was first adopted in *State v. Hardin*, 90 Nev. at 16, 518 P.2d at 154, and has since been applied in later cases, though with varying degrees of attention to its second prong. *Compare Alward*, 112 Nev. at 151, 912 P.2d at 250 (not citing or applying the second prong), *Johnson v. State*, 97 Nev. 621, 624, 637 P.2d 1209, 1211 (1981) (citing but not applying second prong), *abrogated in part by Horton v. California*, 496 U.S. 128 (1990), *Koza v. State*, 100 Nev. 245, 253, 681 P.2d 44, 49 (1984) (same), *and Geary*, 91 Nev. at 790 n.3, 544 P.2d at 421 n.3 (same), *with Murray v. State*, 105 Nev. 579, 583, 781 P.2d 288, 290 (1989) (citing and applying second prong), *Banks v. State*, 94 Nev. 90, 97-98, 575 P.2d 592, 597 (1978) (same), *and Hardin*, 90 Nev. at 15-16, 518 P.2d at 154 (same).

To the extent that our caselaw still condones inquiring into law enforcement's subjective motivations in the context of an emergency home entry, as other courts have done, *see, e.g.*, *U.S. v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008); *U.S. v. Najar*, 451 F.3d 710, 718 (10th Cir. 2006); *State v. Edwards*, 945 A.2d 915, 918 (Vt. 2008),

we abandon our previous test in favor of the standard announced in *Brigham City*, which clarifies ''the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation.'' 547 U.S. at 402.

[Headnote 6]

Under that standard, a law enforcement officer's ''subjective motivation is irrelevant.'' *Id*. at 404. Rather, the reasonableness of an emergency home entry depends on whether '' 'the circumstances, viewed *objectively*, justify [the] action,' '' *id*. (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978) (alteration in original)), in other words, whether law enforcement had an objectively reasonable basis to believe that there was an immediate need to protect the lives or safety of themselves or others. *See Snipe*, 515 F.3d at 952; *Najar*, 451 F.3d at 718; *see also U.S. v. Huffman*, 461 F.3d 777, 785 (6th Cir. 2006).

Officer Friberg lacked an objectively reasonable belief

Applying the *Brigham City* standard, the district court concluded that there was ''objective information'' to justify the emergency entry into Hannon's apartment. Even accepting the district court's factual findings as true, *see Lisenbee*, 116 Nev. at 1127, 13 P.3d at 949, we disagree and conclude that this warrantless home entry was not justified on emergency grounds because there was no objectively reasonable basis to believe that a third party was injured inside.

With respect to this issue, both sides analogize and distinguish this case from *Brigham City*, where officers responded at 3 a.m. to complaints about a loud house party and overheard '' 'some kind of a [tumultuous] fight' '' inside. 574 U.S. at 406. Through a window, the officers saw a juvenile—who, with fists clenched, was being restrained by four adults—punch an adult in the face, sending the adult to the sink spitting blood. *Id*. In view of those circumstances, the United States Supreme Court determined that the officers had an objectively reasonable basis for believing that the injured adult might need help and that there was an imminent threat of violence. *Id*.

Here, by contrast, Officer Friberg had noticeably less information than the officers in *Brigham City* to support his belief that a third party was endangered inside Hannon's apartment.

First, unlike *Brigham City*, which involved actual violence as well as the clear threat ''that the violence . . . was just beginning,'' *id*., Officer Friberg did not witness, let alone overhear, sounds of an altercation when he arrived. Tellingly, because there was therefore no apparent need for swift action, *see Huffman*, 461 F.3d at 785; *U.S. v. Holloway*, 290 F.3d 1331, 1334 (11th Cir. 2002), instead of entering and announcing his presence (as occurred in *Brigham City*), Officer Friberg casually knocked on Hannon's front door.

Second, unlike in *Brigham City*, in which the officers witnessed the attack and the victim spitting blood, although Robinson was crying, Hannon appeared ''angry,'' and both were flushed and breathing heavily, neither exhibited observable signs of injury. Moreover, when asked by Officer Friberg, both responded that they were unharmed. Thus, even if there was initial reason to believe that Hannon or Robinson may have been injured, Officer Friberg's concerns should have been allayed after interviewing Hannon and Robinson at the door.

Additionally, in contrast to *Brigham City*, where other partygoers were seen inside and surrounding the house, 547 U.S. at 406, no similar indicia existed to believe that a third person was inside Hannon's apartment, a point with which Officer Friberg agreed by admitting that while he suspected that another person might have been inside, ''[he] didn't have evidence.''

Considering the totality of these circumstances, Officer Friberg arrived at a quiet apartment in response to a 911 dispatch call regarding a possible domestic disturbance that—by all accounts—seemed to have already dissipated. Officer Friberg had no reason to believe that Hannon or Robinson had been injured, and had even less reason to believe that Hannon's apartment may have harbored an unidentified third person in need of emergency assistance.

Given the above, we conclude that Officer Friberg lacked an objectively reasonable basis to believe that there was an immediate need to protect the occupants of Hannon's apartment, real or suspected. Because the initial warrantless entry into Hannon's apartment was unlawful, we conclude that the marijuana recovered during the subsequent search was illegally seized. *See Ford v. State*, 122 Nev. 796, 803-04, 138 P.3d 500, 505 (2006); *see generally Wong Sun v. United States*, 371 U.S. 471 (1963). Accordingly, the district court's judgment of conviction is reversed.

CONCLUSION

Based on the totality of the circumstances, we conclude that the warrantless entry into Hannon's apartment was not justified by an objectively reasonable belief that there was an immediate need to protect the occupants of Hannon's apartment. Because no emergency reason existed for forgoing a warrant, we conclude that the district court erred in denying Hannon's motion to suppress. Accordingly, we reverse the district court's judgment of conviction.

DOUGLAS and PICKERING, JJ., concur.

HARTFORD FIRE INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; AND RICHARDSON CONSTRUCTION, INC., APPELLANTS, *v.* TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS HEALTH AND WELFARE TRUST; TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS JOINT PENSION TRUST; AND TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS VACATION TRUST, RESPONDENTS.

No. 49059

May 28, 2009 208 P.3d 884

Certified questions under NRAP 5 from the Ninth Circuit Court of Appeals in an action to recover unpaid trust contributions from a contractor and a surety. United States Court of Appeals for the Ninth Circuit; Alex Kozinski and Raymond C. Fisher, United States Circuit Judges, and Frederic Block, United States District Judge.

The supreme court, GIBBONS, J., held that: (1) trustees had standing to assert claims on behalf of subcontractors' workers against payment bond, (2) trustees were required to provide general contractor with notice in order to recover against general contractor's payment bond, but (3) trustees were not required to provide general contractor with notice in order to bring a direct action against general contractor seeking recovery of unpaid contributions.

Questions answered.

Parker, Nelson & Arin, Chtd., and *Theodore Parker, III*, Las Vegas, for Appellant Richardson Construction.

Watt, Tieder, Hoffar & Fitzgerald, LLP, and *David R. Johnson*, Las Vegas, for Appellants Hartford Fire Insurance Company & Hartford Accident and Indemnity Company.

Brownstein Hyatt Farber Schreck, P.C., and *Adam P. Segal* and Kirk M. Reynolds, Las Vegas, for Respondents.

Daniel M. Shanley, Las Vegas; *DeCarlo, Connor & Shanley* and *Desmond C. Lee*, Los Angeles, California, for Amici Curiae Southwest Carpenters Health and Welfare Trust, Southwest Carpenters Pension Trust, Southwest Carpenters Vacation Trust, and Southwest Carpenters Training Fund.

Kevin B. Christensen, Chtd., and *Evan L. James* and *Kevin B. Christensen*, Las Vegas, for Amici Curiae Trustees of the Southern

Nevada Glaziers and Fabricators Pension Trust Fund, Glazing Health and Welfare Fund, and the Glaziers Joint Apprenticeship Training Trust.

Kolesar & Leatham, Chtd., and *Alan J. Lefebvre* and *Matthew J. Christian*, Las Vegas, for Amicus Curiae Surety & Fidelity Association of America.

Laquer, Urban, Clifford & Hodge LLP and *Michael A. Urban* and *Gia A. McGillivray*, Las Vegas, for Amici Curiae Trustees of the Operating Engineers Pension Trust, Trustees of the Operating Engineers Health and Welfare Fund, Trustees of the Operating Engineers Vacation-Holiday Fund, Trustees of the Operating Engineers Journeyman Apprentice Training Trust, Bricklayers & Allied Craftworkers Local 13 Health Benefits Fund, and Bricklayers & Allied Craftworkers Local 13 Defined Contribution Pension Trust.

1. FEDERAL COURTS.

   Supreme court may answer questions of law certified to it by a federal court when: (1) the court's answers to the certified questions may be determinative of part of the federal case, (2) there is no clearly controlling Nevada precedent, and (3) the answers to the certified questions will help settle important questions of law. NRAP 5(a).

2. PUBLIC CONTRACTS.

   Trustees of employee-benefit trust funds had standing, as representatives of subcontractor's workers, to bring a claim against payment bond, which general contractor was required by statute to procure on public works project to secure payment for subcontracted labor, to recover unpaid contributions that subcontractor owed to the trust funds pursuant to memorandum agreement with workers' union; trustees were third-party beneficiaries under the memorandum agreement between subcontractor and the union, and trustees stood in the shoes of the workers. NRS 339.035.

3. PUBLIC CONTRACTS.

   Trustees of employee-benefit trust funds were required to provide general contractor with notice in order to bring suit on payment bond, which general contractor was required by statute to procure on public works project to secure payment for subcontracted labor, to recover unpaid contributions that subcontractor owed to the trust funds pursuant to memorandum agreement with workers' union; payment-bond statute required that claimants who only had a contractual relationship with a subcontractor to serve notice on the general contractor of the labor being provided and the amount claimed, trustees stood in the shoes of subcontractors' workers for purposes of the statute, public policy did not override the notice prerequisite for recovery, and fact that the contractor may have been in a better position than the trustees to know who was performing work for subcontractor did not relieve trustees of the notice requirement. NRS 339.035.

4. PUBLIC CONTRACTS.

   Trustees of employee-benefit trust funds were not required to provide general contractor notice in order to bring direct action against general contractor, pursuant to statute providing that general contractors on public works projects assumed subcontractors' liability for indebtedness for labor, to recover unpaid contributions that subcontractor owed to the trust funds under subcontractor's memorandum agreement with workers' union; though

payment-bond statute required trustees to provide notice to general contractor in order to recover on general contractor's payment bond, statute allowing a direct recovery against general contractor did not require that notice be provided to the general contractor, and the two statutes did not conflict, as general contractor's obligation to indemnify bond surety arose under the terms of the parties' bond agreement, not under the statutes. NRS 339.035, 608.150.

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, J.:

The Ninth Circuit Court of Appeals has certified two questions of law to this court concerning various trustees' attempts to collect unpaid contributions owed to employee-benefit trust funds. This matter arose when a public works subcontractor failed to contribute to employee-benefit trust funds, which were created as part of a collective bargaining agreement between the subcontractor and its employees' union. After the subcontractor failed to pay employee-benefit contributions owed to the trusts, the trusts' trustees sued, in federal court, the general contractor and its surety to recover the unpaid contributions. The trustees sued the general contractor under NRS 608.150, which makes general contractors liable for their subcontractors' employees' unpaid wages, including fringe-benefit trust-fund contributions. They sued the surety under NRS 339.035(1), which allows ''any claimant who has performed labor or furnished material'' under a bonded, public works construction contract and who has not been paid in full, to bring an action on the payment bond to recover the amount due.

Just before trial, however, the surety moved for summary judgment, contending that the trustees had failed to meet a condition precedent to recovery: providing the general contractor with the notice required by NRS 339.035(2), which provides that ''[a]ny claimant who has a direct contractual relationship with any subcontractor,'' but no such direct relationship with the general contractor, ''express or implied,'' may bring an action on a payment bond only if the claimant provided written notice of the claim to the general contractor. In response, the trustees also moved for summary judgment against the surety and the general contractor. The federal district court apparently disagreed that notice was required and granted summary judgment to the trustees. The surety and the general contractor then appealed to the Ninth Circuit Court of Appeals, which subsequently certified to this court two questions under NRAP 5.

[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter.

The certified questions ask us to determine whether the trustees must comply with NRS 339.035(2)'s notice requirement to recover (1) on the payment bond against the surety, and (2) against the general contractor under NRS 608.150.

The first question's answer is informed by the nature of the trustees' standing to recover against the payment bond under NRS 339.035, which is loosely based on their status as third-party beneficiaries to the labor agreement. That is, because the trustees are third-party beneficiaries, we conclude that they should be able to represent the employees who have claims against the surety. The trustees consequently stand in the employees' shoes for purposes of recovering on the payment bond under NRS 339.035.

The answer to the first question, then, is yes, notice is required to proceed with claims against the bond. Because the employees would be required to provide notice of their claims to the general contractor before recovering on the payment bond under NRS 339.035's clear terms, the trustees, standing in their shoes, likewise are required to do so.

The answer to the second question is no, the trustees are not required to provide notice to proceed with NRS 608.150 claims against the contractor. NRS 608.150 is in a statutory chapter completely separate from NRS 339.035, and NRS 608.150 plainly does not require that the trustees provide the contractor with notice of their claims before seeking to recover from the contractor under that statute.

FACTS AND PROCEDURAL HISTORY

Appellant Richardson Construction, Inc., was a general contractor on various southern Nevada public works projects. To secure payment for any subcontracted labor and materials provided to the public works construction projects, as NRS 339.035 requires, Richardson entered into bond agreements with appellant Hartford Fire Insurance Company and its related entity, appellant Hartford Accident and Indemnity Company (collectively, Hartford). Under the bond agreements, Hartford and Richardson were jointly and severally liable for labor, materials, and equipment contributed to the projects. Hartford asserts, moreover, that as part of the bond agreements, Richardson agreed to indemnify Hartford for any recovery on the payment bond.

Richardson then subcontracted some of its work to Desert Valley Landscape & Maintenance, Inc. Desert Valley was party to a ''memorandum labor agreement'' with the local chapter of a laborers' union, Laborers' International Union of North America, Local 872. Under the labor agreement, Desert Valley was required to render payments, *i.e.*, fringe-benefit contributions, to certain employee-benefit trust funds administered on behalf of its employees, includ-

ing those who worked on the Richardson public works project. The trust funds were created under an agreement between Local 872 and various southern Nevada contractor associations, pursuant to the federal Labor Management Relations Act, 29 U.S.C. § 186(c)(5) (2006) (describing a valid employee-benefit trust fund), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002 (2006) (defining an employee-benefit plan). They provided pension, health coverage, and vacation benefits to employees of companies that were parties to labor agreements with Local 872.

Although Desert Valley was required to render payments to the trusts for Richardson projects' employees, it never did so. Consequently, in September 1998, respondents, the trusts' trustees, instituted an action against Desert Valley in federal district court, asserting a cause of action under ERISA, which generally provides that an employer must comply with its obligation arising under a labor agreement to make employee-benefit contributions. *See* 29 U.S.C. § 1145 (2006). According to Hartford and Richardson, Desert Valley answered the complaint but later filed for bankruptcy, and as a result, the trustees' ERISA action against Desert Valley remained inactive for several years, until the trustees amended the complaint to include state-law-based claims against Hartford and Richardson. The claims against Hartford were based on NRS 339.035, which allows any claimant who has performed labor or furnished material to bring an action on the contractor's payment bond for any unpaid amount. The claims against Richardson were based on NRS 608.150, which makes a general contractor liable for a subcontractor's failure to pay for labor and materials.

Although the federal district court ultimately entered a default judgment against Desert Valley, the action proceeded with respect to Hartford and Richardson, and shortly before trial, Hartford moved for summary judgment. In its motion, Hartford argued that the trustees had failed to meet a condition precedent to recovering on the payment bond: providing Richardson with the notice required by NRS 339.035(2), which provides that claimants who have direct contractual relationships with the subcontractor, but not with the general contractor, must give written notice to the general contractor before making a claim on the bond.

The trustees opposed Hartford's motion and moved for summary judgment against Hartford and Richardson. With respect to Hartford, the trustees argued that, because they did not have a direct contractual relationship with the subcontractor, which NRS 339.035(2) ties to the notice requirement, they were not obligated to provide Richardson with notice of the claims before bringing an action on the payment bond. As regards Richardson, the trustees asserted that no issues of fact remained with respect to Desert Valley's failure to pay its workers for their labor and materials, given the default judg-

ment entered against Desert Valley, and thus, Richardson was liable for that failure under NRS 608.150's clear terms. The federal district court granted summary judgment to the trustees. Hartford and Richardson then appealed to the Ninth Circuit Court of Appeals.

In a published order, the Ninth Circuit then certified two legal questions to this court under NRAP 5:

> In order to recover against a defendant surety under [NRS 339.035(1)], must plaintiff trustees, who are not in a direct contractual relationship with the subcontractor, comply with the notice requirements of [NRS 339.035(2)]?
>
> In order to recover against a defendant contractor under [NRS 608.150] in a case where unpaid trust contributions are covered by a statutory payment bond, *see* [NRS 339.025], must plaintiff trustees, who are not in a direct contractual relationship with the subcontractor, comply with the notice requirements of [NRS 339.035(2)]?

Trustees of Const. Industry v. Hartford Fire Ins., 482 F.3d 1064, 1066 (9th Cir. 2007).

We accepted the certified questions and directed briefing. In addition to the parties' briefs, three amici curiae briefs supporting the trustees and one amicus brief supporting Hartford and Richardson have been filed, as permitted.[2]

DISCUSSION

[Headnote 1]

We may answer questions of law certified to us by a federal court when (1) our answers to the certified questions may be determinative of part of the federal case, (2) there is no clearly controlling Nevada precedent, and (3) the answers to the certified questions will help settle important questions of law. NRAP 5(a); *Volvo Cars of North America v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006). Our consideration of the questions here is appropriate because the answers will likely determine the matter pending in the Ninth Circuit

[2]In support of the trustees, Southwest Carpenters Health and Welfare Trust, Southwest Carpenters Pension Trust, Southwest Carpenters Vacation Trust, Southwest Carpenters Training Fund, Trustees of the Southern Nevada Glaziers and Fabricators Pension Trust Fund, Glazing Health and Welfare Fund, the Glaziers Joint Apprenticeship Training Trust, Trustees of the Operating Engineers Pension Trust, Trustees of the Operating Engineers Health and Welfare Fund, Trustees of the Operating Engineers Vacation-Holiday Fund, Trustees of the Operating Engineers Journeyman Apprentice Training Trust, Bricklayers & Allied Craftworkers Local 13 Health Benefits Fund, and Bricklayers & Allied Craftworkers Local 13 Defined Contribution Pension Trust have filed amicus briefs. In support of Hartford and Richardson, the Surety & Fidelity Association of America has filed an amicus brief.

Court of Appeals and no clearly controlling Nevada precedent exists with respect to the questions, which raise important legal issues.

Both certified questions concern NRS 339.035, which provides as follows:

> 1. Subject to the provisions of subsection 2, any claimant who has performed labor or furnished material in the prosecution of the work provided for in any contract for which a payment bond has been given . . . and who has not been paid in full . . . may bring an action on such payment bond in his own name to recover any amount due him for such labor or material[.]
>
> 2. Any claimant who has a direct contractual relationship with any subcontractor of the contractor who gave such payment bond, but no contractual relationship, express or implied, with such contractor, may bring an action on the payment bond only [if he provided certain written notices of the claim to the contractor.]

Although Nevada precedent concerning NRS 339.035 is sparse, the statute is modeled after federal law, the Miller Act, 40 U.S.C. §§ 270b and 270c (1935); *see Garff v. J. R. Bradley Co.*, 84 Nev. 79, 85, 436 P.2d 428, 432 (1968) (ZENOFF, J., dissenting), and thus, federal caselaw interpreting the Miller Act is persuasive in addressing issues surrounding NRS 339.035. *See Edgington v. Edgington*, 119 Nev. 577, 584, 80 P.3d 1282, 1288 (2003) (providing that when a federal statute is adopted in a Nevada statute, using substantially similar language, ''a presumption arises that the [L]egislature knew and intended to adopt the construction placed on the federal statute by federal courts'' (quoting *State, Bus. & Indus. v. Granite Constr.*, 118 Nev. 83, 88, 40 P.3d 423, 426 (2002))).

As an initial matter, although the certified questions presuppose that the trustees have standing to assert claims against a surety under NRS 339.035, this court has not before so provided. Accordingly, as analyzing the trustees' standing in the first instance informs our answers to the certified questions, we first address the trustees' standing to file a claim against a payment bond under NRS 339.035. Next, we will answer the Ninth Circuit's certified questions, first addressing whether the trustees were required to comply with NRS 339.035(2)'s notice requirement to recover on the payment bond, then addressing whether the trustees were required to comply with NRS 339.035(2)'s notice requirement to recover from Richardson under NRS 608.150.[3]

[3]Hartford and Richardson also provide argument (1) with respect to whether the trustees may recover liquidated damages and attorney fees pursuant to the payment bond and (2) that the trustees are effectively seeking amounts that

The trustees' standing to file a claim on the payment bond under NRS 339.035

[Headnote 2]

With regard to the trustees' standing to file a claim against the payment bond under NRS 339.035, subsection 1 of that statute provides that ''any claimant *who has performed labor or furnished material* in the prosecution of the work provided for in any contract for which a payment bond has been given . . . and who has not been paid in full'' may bring an action on the bond. (Emphasis added.) Subsection 2 of NRS 339.035, read in accordance with federal interpretations, further limits ''claimants'' to those persons who have either a direct contractual relationship with the general contractor or a direct contractual relationship with a subcontractor and who provide notice to the general contractor. *See, e.g.*, *MacEvoy Co. v. United States*, 322 U.S. 102, 108 (1944). Here, the trustees provided no labor or materials and have no direct contractual relationship with Richardson; their relationship with Desert Valley at best renders them third-party beneficiaries of the labor agreement between Desert Valley and Local 872. *See Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977) (noting that an individual obtains third-party-beneficiary status when contracting parties demonstrate a clear intent to benefit the individual, a third party, by their contract).

While the parties agree that the trustees are third-party beneficiaries and that their status as such impacts their standing to bring claims under NRS 339.035, they disagree on how their third-party-beneficiary status affects their standing. Hartford and Richardson essentially argue that the trustees ''stand in the shoes'' of the laborers. The trustees, on the other hand, contend that they are ''preferred'' third-party beneficiaries, given their role under ERISA to protect employee pensions and vacation and health benefits, meaning that they have special standing to bring NRS 339.035 claims, broader than that of the employees that they represent.

We agree that the trustees are third-party beneficiaries under the memorandum agreement. But while we have recognized that a third-party beneficiary has a direct right of action against the promisor in contract, *Hemphill v. Hanson*, 77 Nev. 432, 436 n.1, 366 P.2d 92, 94 n.1 (1961), that right is not necessarily carried forward to claims against a nonparty surety, which are allowable by statute. *See Morelli v. Morelli*, 102 Nev. 326, 329, 720 P.2d 704, 706 (1986) (providing that, while a third-party beneficiary is generally ''subject to the defenses that would be valid as between the parties,'' the no-

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Richardson already paid to the Labor Commissioner pursuant to the Commissioner's claim on behalf of the employees under NRS 608.150. But those issues could not properly be, and were not, included in the Ninth Circuit's certified questions, and thus, they are not before us.

tion that a third-party beneficiary steps into the shoes of a contracting party is a ''misstatement of the law''); *see also* Restatement (Second) of Contracts § 309 cmt. c (1981) (providing that a third-party beneficiary's right to enforce a contract is ''direct, not merely derivative''). Thus, their third-party-beneficiary status alone is insufficient to confer the trustees with standing under NRS 339.035.

The trustees' status as constructive assignees of the workers' claims under NRS 339.035

Nevertheless, whether the trustees' have standing to sue under NRS 339.035 is closely tied to their third-party-beneficiary status. In *United States v. Carter*, 353 U.S. 210, 211-12 (1957), the United States Supreme Court addressed whether trustees are entitled to recover unpaid contributions to employee-benefit trust funds under the federal Miller Act, 40 U.S.C. §§ 270b and 270c (1935), a statute nearly identical to NRS 339.035. At that time, the Miller Act provided that '' '[e]very person who has furnished labor or material in the prosecution of the work provided for in [a public works contract] and who has not been paid in full therefore . . . shall have the right to sue on such payment bond . . . for the sum or sums justly due him.' ''[4] *Carter*, 353 U.S. at 215 (quoting 40 U.S.C. § 270b(a) (1935)).

The U.S. Supreme Court acknowledged that the trustees were ''neither persons who have furnished labor or material, nor [were] they seeking 'sums justly due' to persons who have furnished labor or material.'' *Id.* at 218. Nevertheless, after analyzing cases arising under a predecessor of the Miller Act, the Heard Act of 1894, *see* 40 U.S.C. § 270 (1934), which established that ''assignees of the claims of persons furnishing labor or material'' came within a statutory bond's protection, the Supreme Court noted that the analyses applied likewise to the Miller Act, which, the Supreme Court concluded, was even broader and more liberal in its scope than the Heard Act. *Carter*, 353 U.S. at 219. Thus, without determining whether any assignment occurred for Miller Act purposes, the Supreme Court noted that ''[i]f the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. . . . The trustees stand in the shoes of the employees and are entitled to enforce their rights.'' *Id.* at 219-20; *cf. U.S. Design &*

[4]The relevant provision of the federal Miller Act currently reads as follows:

> [a] person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor. . . . The action must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

40 U.S.C. § 3133(b)(2) (2006).

Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 50 P.3d 170 (2002) (recognizing that employee-benefit trust-fund trustees are representatives of the employees earning the trust-fund contributions).

Given the trustees' third-party-beneficiary status, the Supreme Court's analysis in *Carter* is persuasive here, and thus, we conclude that, like assignees, the trustees ''stand in the shoes'' of the workers and should be permitted to recover under NRS 339.035. *Edgington v. Edgington*, 119 Nev. 577, 584, 80 P.3d 1282, 1288 (2003) (providing that when a federal statute is adopted in a Nevada statute, using substantially similar language, '' 'a presumption arises that the [L]egislature knew and intended to adopt the construction placed on the federal statute by federal courts' '' (quoting *State, Bus. & Indus. v. Granite Constr.*, 118 Nev. 83, 88, 40 P.3d 423, 426 (2002))). Indeed, in *U.S. Design & Construction v. International Brotherhood of Electrical Workers Local 357*, 118 Nev. 458, 50 P.3d 170, this court, without analysis, recognized that employee-benefit trust-fund trustees represent the employees who earned the trust-fund contributions by providing labor. Accordingly, the trustees have standing as representatives of the claimants. We do not agree, however, that the trustees' third-party-beneficiary status gives them any rights under NRS 339.035 over and above what the Legislature has given to the persons whom they represent and who are addressed in the statute—the employees.

NRS 339.035's notice requirement, as applied to claims against the surety

[Headnote 3]

As noted, NRS 339.035(2) provides that ''[a]ny claimant who has a direct contractual relationship with any subcontractor of the contractor who gave such payment bond, but no contractual relationship, express or implied, with such contractor, may bring an action on the payment bond'' if he provides certain notice of the claim to the contractor. Thus, NRS 339.035 foresees two types of claimants: those who have a contractual relationship with the contractor and those who have a contractual relationship with only the subcontractor. *Cf. MacEvoy Co. v. United States*, 322 U.S. 102 (1944). Those claimants who have a contractual relationship with only the subcontractor must, under NRS 339.035(2), serve notice on the contractor of the labor or materials being provided and the amount claimed. Because the trustees represent the subcontractor's employees in wage claims made under NRS 339.035, they stand in the employees' shoes and are required, as the employees would be, to provide notice to Richardson to recover on the payment bond. Indeed, this court already has acknowledged the importance of providing the contractor with notice to recover on the payment bond. *Garff v. J. R. Bradley Co.*, 84 Nev. 79, 83, 436 P.2d 428, 431 (1968). In

particular, in an action by suppliers of labor and material to recover on a payment bond, this court analyzed NRS 339.035(2)'s notice requirement, acknowledging that NRS 339.035 ''creates a remedy in circumstances where none existed before,'' and thus concluding that ''[i]t is not unfair to demand compliance with the preconditions for suit.'' *Id*.

Nevertheless, the trustees contend that they were not required to provide notice under NRS 339.035's clear terms, for public policy reasons, and as a matter of practicality.

NRS 339.035's notice-requirement language

With respect to the statute's language, the trustees point out that only a ''claimant who has a direct contractual relationship with any subcontractor of the contractor'' is required to provide notice. As third-party beneficiaries of the memorandum labor agreement, the trustees maintain, they do not have a direct contractual relationship with the subcontractor, Desert Valley, and thus, they were not required to provide notice to Richardson to recover on the payment bond. This argument lacks merit, however, in light of our conclusion that the trustees stand in the employees' shoes for NRS 339.035 purposes. As only claimants with a direct contractual relationship to the contractor or a subcontractor may sue on the payment bond, the trustees are either standing in the place of those persons, subject to all of the same requirements, or they have no standing to sue the surety at all.

Notice in light of public policy

With respect to their argument that public policy overrides the statutory prerequisite, the trustees primarily rely on reasoning set forth by the U.S. Supreme Court in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). In *Lewis*, as in this case, trustees of employee-benefit trust funds sought to recover an employer's unpaid contributions to the trust funds. *Id*. at 460-62. The employer had withheld contributions associated with time periods during which union work stoppages and strikes occurred, believing that those events violated the labor agreement. *Id*. at 462. According to the employer, because the trustees were third-party beneficiaries of the labor agreement, they were subject to the same defense as would have been valid against the employees, *viz.*, that the union violated the labor agreement by engaging in strikes and work stoppages, and thus, the employees were not entitled to benefits for that time period. *Id*.

Therefore, in *Lewis*, the U.S. Supreme Court considered whether the employer may assert the union's breaches of the labor agreement as a defense against the trustees, based on their third-party beneficiary status. *Id*. at 464. After considering ''the interests of the

union, the [employer], and the trustees in the fund under the collective bargaining agreement,'' *id*. at 464, the Court noted that because of the trustees' important role as third-party beneficiaries under the labor agreement—to provide ''security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death''—a labor agreement is not a typical third-party contract and the typical third-party-beneficiary contract principles do not apply. *Id*. at 468-69. Based on that determination, the Supreme Court concluded that ''the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by an employer to contribute to a welfare fund'' meeting the requirements of the Labor Management Relations Act. *Id*. at 470-71; *see also* 29 U.S.C. § 186(c)(5) (1947).

The trustees rely on that conclusion and point to several federal court decisions adopting its reasoning, *see, e.g.*, *Cement and Concrete Workers Dist. v. Frascone*, 68 F. Supp. 2d 166 (E.D.N.Y. 1999); *Benson v. Brower's Moving & Storage, Inc.*, 726 F. Supp. 31 (E.D.N.Y. 1989); *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986); *Southern Cal. Retail Clerks Union v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984), to argue that, although they are third-party beneficiaries of the labor agreement, because of their unique role to protect employee pensions and health benefits, public policy supports interpreting NRS 339.035 more broadly as to them.

But the circumstances in *Lewis* and its holding are ultimately inapposite to this case. Although *Lewis* involved a trust fund that met Labor Management Relations Act requirements, it did not concern a claim against a surety pursuant to that law. *Lewis*, 361 U.S. at 461-62. Instead, the trustees instituted a contract action against the contractor. Thus, in *Lewis*, the Supreme Court analyzed the trustees' unique role as third-party beneficiaries of a collective bargaining agreement, not as claimants under the federal Miller Act.[5] *Id*. at 468.

In addition, *Lewis* concerned an employer's attempt to use the union's breaches of the collective bargaining agreement against the trustees to justify withholding its promised contributions to

[5]While subsequent federal court cases, including those relied on by the trustees, have used *Lewis*'s third-party-beneficiary discussion when considering trustees' significant role to protect employee-benefit funds, *see, e.g.*, *Cement and Concrete Workers Dist. v. Frascone*, 68 F. Supp. 2d 166 (E.D.N.Y. 1999); *Benson v. Brower's Moving & Storage, Inc.*, 726 F. Supp. 31 (E.D.N.Y. 1989); *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986); *Southern Cal. Retail Clerks Union v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984), none determined that that unique status excused compliance with statutory requirements for recovering unpaid contributions to employee-benefit trust funds.

employee-benefit trust funds. *Lewis*, 361 U.S. at 464. Unlike *Lewis*, this particular issue does not concern any defenses regarding a breach of the collective bargaining agreement, but rather a failure to comply with statutory notice requirements. Thus, the Supreme Court's holding—that parties to a collective bargaining agreement must unequivocally agree that a union's breaches of the agreement relieve the contractor of its obligation to contribute to employee-benefit trust funds—is inapposite to this case.[6] *Id*. at 470-71.

Moreover, as Hartford and Richardson contend, notwithstanding various courts' conclusions that employee-benefit trust-fund trustees are not typical third-party beneficiaries, the trustees have pointed to no decision concluding that a trustee is excluded from providing notice to a contractor to recover on a payment bond under the federal Miller Act or states' ''Little Miller Acts.''[7] Indeed, the cases in which courts have concluded that the usual third-party beneficiary defenses did not apply did not concern the trustees' compliance with the Miller Act's requirements. *See, e.g.*, *Cement and Concrete Workers Dist.*, 68 F. Supp. 2d 166; *Benson*, 726 F. Supp. 31; *Southwest Administrators, Inc.*, 791 F.2d 769; *Southern Cal. Retail Clerks Union*, 728 F.2d 1262. As Hartford and Richardson assert, then, while courts have concluded that trustees are not typical third-party beneficiaries, no court has concluded that, in light of their special status, they are not required to comply with the federal Miller Act's or states' versions of the Miller Act's notice requirement.

Thus, while employee-benefit trust funds serve a significant purpose that might provide some flexibility when trustees attempt to re-

[6]The concept that a union's breaches of a collective bargaining agreement generally may not be asserted against employee-benefit trust-fund trustees to relieve the contractor of an obligation under the agreement to make employee-benefit trust-fund contributions is similar to the theory noted above that, because a third-party beneficiary has a direct right to enforce a contract, the promisor may not use defenses arising from separate transactions to defeat the third-party beneficiary's interest in the contract. *See* Restatement (Second) of Contracts § 309 cmt. c (1981) (providing that, because a third-party beneficiary's right to enforce a contract is a direct, not derivative right, ''claims and defenses of the promisor against the promisee arising out of separate transactions do not affect the right of the beneficiary,'' except in accordance with the contract's terms).

[7]Similarly, Southwest Carpenters Health and Welfare Trust, Southwest Carpenters Pension Trust, Southwest Carpenters Vacation Trust, and Southwest Carpenters Training Fund, in their amicus brief, contend that employee-benefit trust funds detrimentally rely on an employer's promise under a collective bargaining agreement to pay employee benefits, and thus, trustees are not subject to the defenses that might otherwise be available to the employer as the promisor. *Hansen v. Proctor*, 74 N.W.2d 281, 284-85 (Minn. 1955). But the case on which the Southwest Carpenters Trusts rely to support their argument concerned an action against the promisor based on the parties' contract. *Id*. at 282-83. As noted, this case does not concern an action on the parties' contract, the collective bargaining agreement, but rather a statutory claim implicating that agreement.

cover funds under the Miller Act, we are unwilling to ignore an express legislative prerequisite to recovery against a surety. If the Legislature intends for trustees to recover under NRS 339.035 without complying with the notice prerequisite, it is perfectly capable of modifying the statute to so provide.

Practicality of providing notice

The trustees also argue, however, that as a practical matter notice should be a precondition for a suit on the payment bond only for those in a direct contractual relationship with the subcontractor. This is so, they assert, because trustees have no reasonable basis to know what work is occurring, since they generally do not have direct access to project or job files that might document a laborer's time and material furnished to a project. Essentially, the trustees contend that notice is unnecessary because contractors are in a better position to acquire information on which a payment bond claim may be made, since they have continuing access to job sites and files. But this court already has acknowledged the importance of providing contractors with notice, regardless of a contractor's access to the information that may underlie a statutory bond claim. Specifically, this court noted that

> contractors frequently are aware of the identity of the suppliers of materials to subcontractors; frequently [they] know the identity of those performing labor for the subcontractor. However, such awareness or knowledge, standing alone, does not erase the duty which the [L]egislature has placed upon claimants to give . . . notices before becoming eligible to file suit on a payment bond.

Garff v. J. R. Bradley Co., 84 Nev. 79, 83, 436 P.2d 428, 431 (1968). Thus, although a contractor may indeed be aware of potential claimants and claims, as the trustees suggest,[8] this court already has stated the importance that claimants, like the trustees, nonetheless comply with statutory mandate to provide the contractor with notice. Moreover, as amicus curiae Surety & Fidelity Association of America indicates, to require that those in a direct contractual relationship with the subcontractor provide the contractor with notice of a claim on the payment bond, while absolving those who represent them, such as the trustees, from such a requirement, is unsound. *See*

[8]Trustees of the Southern Nevada Glaziers and Fabricators Pension Trust Fund, Glazing Health and Welfare Fund, and the Glaziers Joint Apprenticeship Training Trust, in their amicus brief, point to NRS 338.070(4), which requires contractors to maintain detailed labor records. According to the Glaziers Trusts, those detailed records obviate the need for the trustees to provide Richardson with notice of their claims on behalf of the Desert Valley's employees.

MacEvoy Co. v. United States, 322 U.S. 102, 107-08 (1944) (noting that it would be ''absurd'' to require notice from persons in direct contractual relationship with a subcontractor to recover on a bond but not from more remote claimants). Accordingly, we conclude that trustees' claims against a surety are subject to NRS 339.035's notice requirements.[9]

The trustees' claim under NRS 608.150 and NRS 339.035's notice requirement

[Headnote 4]

Turning to Hartford and Richardson's contention that NRS 339.035(2)'s notice requirement applies to claims under NRS 608.150, NRS 608.150(1) provides that

> [e]very original contractor making or taking any contract in this State for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor or any contractors acting under, by or for the original contractor in performing any labor, construction or other work included in the subject of the original contract . . . .

This court already has determined that employee-benefit trust contributions constitute ''indebtedness for labor,'' *Tobler and Oliver v. Bd. Trustees*, 84 Nev. 438, 442, 442 P.2d 904, 906-07 (1968), and

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And Trustees of the Operating Engineers Pension Trust, Trustees of the Operating Engineers Health and Welfare Fund, Trustees of the Operating Engineers Vacation-Holiday Fund, Trustees of the Operating Engineers Journeyman Apprentice Training Trust, Bricklayers & Allied Craftworkers Local 13 Health Benefits Fund, and Bricklayers & Allied Craftworkers Local 13 Defined Contribution Pension Trust, in their amicus brief, point to NAC 338.092(1)'s and NAC 338.094(1)(c)'s requirements that a contractor maintain detailed records regarding labor on its projects to argue that Richardson had sufficient notice in this case to obviate the trustees' need to comply with NRS 339.035's notice requirement.

[9]The trustees also contend that ERISA gives them standing as claimants under NRS 339.035, independent of their third-party-beneficiary status and any actual or constructive assignment of the employees' claims. But even if the trustees' standing is based on ERISA, which we need not resolve, notice is still a requirement under the Miller Act. Indeed, even the case relied on by the trustees to argue that their standing under the Miller Act is based on ERISA required that the trustees provide the contractor with notice of the payment bond claims. *See U.S. for Use & Benefit of IBEW v. Hartford Ins.*, 809 F. Supp. 523, 526 (E.D. Mich. 1992) (discussing employee-benefit trust-fund trustees' compliance with the federal Miller Act's notice requirement, after determining that ERISA provided the trustees with a statutory right and duty to enforce the payment of trust-fund contributions). Accordingly, although under any ERISA-based standing theory the trustees would appear to have direct authority to recover unpaid contributions, nothing therein abrogates NRS 339.035's notice requirement.

that trustees of employee-benefit trusts have standing to sue under NRS 608.150 as representatives of the employees. *U.S. Design & Constr. v. I.B.E.W. Local 357*, 118 Nev. 458, 50 P.3d 170 (2002).

With respect to whether NRS 339.035(2) also requires trustees to provide notice when attempting to recover unpaid funds directly from the contractor under NRS 608.150, Hartford and Richardson contend that to allow otherwise effectively creates an end-run around NRS 339.035(2)'s notice requirement. Specifically, Hartford and Richardson maintain that, although NRS 608.150 allows a claimant to recover directly from the contractor, whereas NRS 339.035 allows a claimant to recover on the payment bond, the effect is the same, since Richardson ultimately will have to indemnify Hartford for any payment on the bond. Thus, they assert, because Richardson ultimately will be liable whether under NRS 608.150 or NRS 339.035, the preconditions to recovering under NRS 339.035 should also apply under NRS 608.150.

To support that argument, Hartford and Richardson point to authority recognizing that ''[w]hen two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, an ambiguity is created and [this court] will attempt to reconcile the statutes.'' *Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005). But Hartford and Richardson's argument assumes that NRS 608.150 and NRS 339.035 conflict. That is not the case. In particular, NRS 339.035 allows a claimant to recover on the payment bond, while NRS 608.150 allows a claimant to recover directly from the general contractor. Even if Richardson is required to indemnify Hartford for any recovery by the trustees on the payment bond, that result arises under the terms of the parties' bond agreement or principles of equity, not the statutes. *See Medallion Dev. v. Converse Consultants*, 113 Nev. 27, 32, 930 P.2d 115, 119 (1997) (noting that indemnity is '' '[a] contractual or equitable right under which the entire loss is shifted from the tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible' '' (quoting *Black's Law Dictionary* 769 (6th ed. 1991))), *superseded in part by statute*, NRS 17.245, *as recognized in Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004).

Further, and significantly, NRS 608.150's plain language does not require that notice be provided to a contractor for its enforcement. Indeed, NRS 608.150(3) specifically grants a right of enforcement to the district attorney, which has been extended to certain private parties, *U.S. Design & Constr.*, 118 Nev. at 462, 50 P.3d at 172, and that right is not tied to a notice requirement. Thus, to determine that NRS 608.150 imposes a notice requirement for its enforcement would contravene principles of statutory construction, which we

will not do here. Consequently, NRS 608.150 does not include within its provisions NRS 339.035(2)'s requirement that the general contractor receive notice before trustees can recover unpaid contributions owed to employee-benefit trusts.

CONCLUSION

Under NRS 339.035's clear terms, a subcontractor's employees are required to provide notice to the general contractor of their claims for the subcontractor's unpaid contributions before recovering on the contractor's payment bond. Likewise, because employee-benefit trust-fund trustees are third-party beneficiaries of the subcontractor's promise to make the contributions, we conclude that they represent the employees and, thus, are permitted to make claims on the payment bond. Since they stand in the employees' shoes, they also are required to provide the contactor with notice of their claims before recovering against the payment bond under NRS 339.035. But as NRS 608.150 plainly does not require that the trustees provide the contractor with notice of their claims before recovering from the contractor, no such notice is necessary to recover under that statute. We thus answer the Ninth Circuit's questions by concluding that trustees must provide NRS 339.035 notice as to claims against a surety under that chapter, but not as to claims against a contractor under NRS 608.150.

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

LAS VEGAS TAXPAYER ACCOUNTABILITY COMMITTEE; LAS VEGAS REDEVELOPMENT REFORM COMMITTEE; D. TAYLOR; CHRISTOPHER BOHNER; AND KEN LIU, APPELLANTS, *v.* CITY COUNCIL OF THE CITY OF LAS VEGAS, NEVADA; BEVERLY K. BRIDGES, IN HER OFFICIAL CAPACITY AS CITY CLERK OF THE CITY OF LAS VEGAS; LIVEWORK, LLC, A DELAWARE LIMITED LIABILITY COMPANY; FC VEGAS 20, LLC, A NEVADA LIMITED LIABILITY COMPANY; FC VEGAS 39, LLC, A NEW YORK LIMITED LIABILITY COMPANY; AND DOWNTOWN LAS VEGAS ALLIANCE, A NEVADA NONPROFIT CORPORATION, RESPONDENTS.

No. 53657

May 28, 2009 208 P.3d 429

Appeal from a district court order denying declaratory, injunctive, and extraordinary writ relief as to a municipal initiative and refer-

endum. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The supreme court, HARDESTY, C.J., held that: (1) city council did not have the authority to decide that referendum and initiative, which were procedurally valid, would not be placed on the ballot due to substantive invalidity, and city should have brought a court action to determine substantive invalidity; (2) statute imposing single-subject and description-of-effect requirements on petitions for initiatives or referendums applied to municipal ballot measures; (3) statute establishing a deadline for filing challenges to proposed initiatives or referendums did not apply to municipal measures; (4) proposed initiative amending city charter to require voter approval for lease-purchase arrangements in excess of $2 million and to require voter approval for all major redevelopment decisions violated single-subject requirement; and (5) description of effect for referendum proposing to repeal city's redevelopment ordinance was materially misleading.

Affirmed.

McCracken, Stemerman & Holsberry and *Richard G. McCracken, Andrew J. Kahn*, and *Paul L. More*, Las Vegas, for Appellants.

Kummer Kaempfer Bonner Renshaw & Ferrario and *Tami D. Cowden, Mark E. Ferrario*, and *Jason Woodbury*, Las Vegas, for Respondents Livework, FC Vegas 20, FC Vegas 39, and Downtown Las Vegas Alliance.

Bradford R. Jerbic, City Attorney, and *Phil Byrnes*, Deputy City Attorney, Las Vegas; *Lewis and Roca LLP* and *Daniel F. Polsenberg, Jacqueline A. Gilbert*, and *Jennifer B. Anderson*, Las Vegas, for Respondents City Council of the City of Las Vegas and Beverly K. Bridges.

1. DECLARATORY JUDGMENT.
   When legal, not factual, issues are at play, the supreme court reviews de novo a district court order resolving a request for declaratory relief.
2. MANDAMUS.
   While a district court's decision to deny extraordinary writ relief is generally reviewed for an abuse of discretion, the supreme court resolves issues of statutory construction de novo in such a context.
3. MUNICIPAL CORPORATIONS.
   City council did not have the authority to decide, despite the procedural validity of initiative petition and referendum petition, that the proposed initiative and proposed referendum would not be placed on the municipal ballot due to the measures' substantive invalidity, namely that the initiative violated statutory single-subject requirement and that the referendum's description of effect was misleading, and instead city should have placed the

procedurally compliant measures on the ballot unless it filed an appropriate action and obtained a ruling that the proposed measures were substantively invalid. NRS 295.009, 295.205, 295.210, 295.215.

4. MUNICIPAL CORPORATIONS.
   If a city council or other local governing body believes that a proposed municipal ballot measure is substantively invalid, despite complying with procedural requirements and receiving sufficient signatures, then it must file an action in the appropriate district court seeking declaratory, injunctive, or other relief to prevent the measure's placement on the ballot. NRS 295.210(4), 295.215(1).
5. MUNICIPAL CORPORATIONS.
   In an action seeking to prevent proposed initiatives or referendums that are otherwise procedurally valid from being placed on a municipal ballot on the grounds that the measures are substantively invalid, measures' opponents bear the burden of demonstrating that the measures are clearly invalid.
6. MUNICIPAL CORPORATIONS.
   Purpose of the single-subject requirement for initiatives and referendums is to promote informed decisions and to prevent the enactment of unpopular provisions by attaching them to more attractive proposals or concealing them in lengthy, complex initiatives. NRS 295.009.
7. MUNICIPAL CORPORATIONS.
   Purpose of the description-of-effect requirement for initiatives and referendums is to facilitate the constitutional right to meaningfully engage in the initiative process by helping to prevent voter confusion and promote informed decisions. NRS 295.009.
8. MUNICIPAL CORPORATIONS.
   Statute imposing single-subject and description-of-effect requirements on petitions for initiative or referendum applies to municipal ballot measures and is not limited to statewide ballot measures. NRS 295.009.
9. STATUTES.
   When interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit.
10. STATUTES.
    When a statute is facially clear, supreme court will generally not go beyond its language in determining the Legislature's intent.
11. STATUTES.
    No part of a statute should be rendered meaningless and its language should not be read to produce absurd or unreasonable results.
12. MUNICIPAL CORPORATIONS.
    Statute establishing a deadline for challenging a proposed initiative or referendum applies only to statewide ballot initiatives and does not apply to municipal measures; statute requires that a challenge to an initiative measure be brought 15 days after the measure is filed with the Secretary of State, county and city measures are filed with the county and city clerks respectively, and thus by its plain language statute only applies to statewide initiatives. NRS 295.061.
13. STATUTES.
    Supreme courts looks first to a statute's plain language in determining its application.
14. MUNICIPAL CORPORATIONS.
    In order for an initiative that is comprised of more than one part to comply with the statutory single-subject requirement, each initiative's parts must be functionally related and germane to each other and the initiative's purpose or subject. NRS 295.009(1)(a), 295.009(2).

15. MUNICIPAL CORPORATIONS.

Proposed municipal initiative that would add a new section to city charter with two provisions, the first requiring voter approval for lease-purchase arrangements that obligated the city to pay more than $2 million per year, and the second designating the city's voters as the city's legislative body for purposes of redevelopment statutes, which would have the effect of requiring voter approval for key aspects of the redevelopment planning process, violated statutory single-subject requirement for initiatives, and initiative thus was invalid; though initiative's proponents contended its purpose was to require voter approval for major redevelopment decisions, ''voter approval'' was an excessively general subject that could not meet the single-subject requirement. NRS 295.009(1)(a), 295.009(2).

16. MUNICIPAL CORPORATIONS.

Supreme court would not consider whether severance of proposed initiative amending city charter, which contained a provision requiring voter approval for lease-purchase arrangements that obligated the city to pay more than $2 million a year and another provision that required voter approval for key aspects of the redevelopment planning process, was possible, in appeal of district court decision that initiative violated statutory single-subject requirement, though initiative contained a severance clause, where proponents did not argue in their opening brief that, if the initiative was held to violate the single-subject requirement, the measure was severable.

17. MUNICIPAL CORPORATIONS.

Preelection review of whether statement of effect for proposed referendum, which would repeal city's redevelopment ordinance, was materially misleading, was appropriate, as a description of effect was a statutory requirement for placement on the ballot. NRS 295.009(1)(b).

18. MUNICIPAL CORPORATIONS.

While a referendum's summary and title need not be the best possible statement of a proposed measure's intent, it nevertheless must still be straightforward, succinct, and nonargumentative. NRS 295.009(1)(b).

19. MUNICIPAL CORPORATIONS.

Description of effect for referendum, which proposed to repeal city's redevelopment ordinance, was materially misleading, and thus referendum was invalid, as the description of effect stated that the referendum's passage would halt only new, additional development projects, but the repeal of the redevelopement ordinance would effectively repeal the entire redevelopment plan, and the referendum did not provide a replacement plan that could administer the existing redevelopment projects. NRS 295.009(1)(b).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we consider whether the district court properly refused to require the Las Vegas City Council to place a proposed local initiative and referendum on the June 2009 ballot for the general city election. In reaching its decision, the district court ruled that the City Council had discretion to consider the measures' substantive validity in determining whether to place them on the ballot. We disagree and conclude that the City Council improperly refused

to place these measures on the ballot. In the future, should the City Council believe that a ballot measure is invalid, it must comply with its statutory duty to place the measure on the ballot, and it may then file an action in district court challenging the measure's validity.

Nevertheless, in determining whether the district court abused its discretion in denying relief, and based on considerations of judicial economy and efficiency, we must consider the City of Las Vegas's objections to the statute while placing the burden on the City to demonstrate the measures' invalidity. The district court concluded that NRS 295.009, which requires that ballot questions pertain to a single subject and that they include an accurate description of effect, applies to municipal initiatives and referenda. We conclude that the district court's ruling was correct because, by its terms, the statute applies to all petitions for an initiative or referendum. The district court further rejected appellants' contention that NRS 295.061's time limits bar consideration of the City's objections to the measures, holding that this statute applies only to statewide measures. The district court's reasoning, based on the statute's language, was sound, and we determine that the district court properly interpreted NRS 295.061. Finally, in applying NRS 295.009 to the measures at issue, the district court properly found that the proposed initiative pertains to more than one subject and that the description of effect for the proposed referendum is materially misleading. Therefore, we affirm the district court's order denying appellants' petitions to require that these measures be placed on the ballot.

FACTS AND PROCEDURAL HISTORY

Appellants are two unincorporated associations formed pursuant to NRS 295.205 to submit and circulate a proposed initiative and referendum and three individuals who are members of both committees and registered voters. Respondents are the Las Vegas City Council and Las Vegas City Clerk Beverly K. Bridges, as well as parties who were permitted to intervene in the district court.[1]

One of the factors motivating appellants to organize the committees and circulate the ballot measures was their objections to a redevelopment project for the new city hall in Las Vegas. The agreement between the City and the respondent developers is for a lease-purchase arrangement, whereby the City would lease the city hall from the developers, with an option to purchase the property.

In December 2008 and January 2009, appellants circulated two petitions within the City of Las Vegas: the Las Vegas Taxpayer Ac-

[1]Specifically, three of the entities permitted to intervene were Livework, FC Vegas 20, and FC Vegas 39, developers who have a contract with the City to perform feasibility studies and other preparatory work for a new Las Vegas City Hall. The final intervenor in the district court and respondent in this appeal is the Downtown Las Vegas Alliance, a group of downtown businesses.

countability Act Initiative (the Taxpayer Initiative) and the Las Vegas Redevelopment Reform Referendum (the Redevelopment Referendum). The Taxpayer Initiative would amend the Las Vegas Charter to add a new section with two provisions. The first provision requires voter approval for lease-purchase arrangements that obligate the City to pay more than $2 million per year; it mandates that all such arrangements contemplated for the next two years be presented at each general election. The second provision designates the voters of Las Vegas as the City's ''legislative body,'' as that term is used in certain redevelopment statutes. The latter provision would have the effect of requiring voter approval for key aspects of the redevelopment planning process under Nevada law, including adoption of a plan, amendment of and material deviation from a plan, and approval of certain redevelopment projects. The Redevelopment Referendum seeks to repeal Las Vegas Ordinance 5830, which was passed in 2006 and which adopted the Amended and Restated Redevelopment Plan that is currently in place for Las Vegas.

On December 9, 2008, appellants submitted the form of these petitions to the Las Vegas City Clerk, along with affidavits from the committee members, as required by NRS 295.205(1). They then began to gather signatures. On January 22, 2009, appellants presented signed petitions containing more than twice the minimum number of signatures required by Nevada law.

In the interim, by December 19, 2008, shortly after the petitions were filed with the City Clerk, the Las Vegas mayor voiced disapproval of the measures and indicated that the measures would not appear on the ballot. Following this announcement, appellants sent a letter to the Las Vegas City Attorney asking for information about the City's objections. The City did not respond to the letter and did not file any court action to enjoin or otherwise prevent the measures from proceeding.

The Clark County Department of Elections, which was charged with reviewing the signed petitions, determined on January 29, 2009, that the petitions contained a sufficient number of signatures. On February 10, 2009, the City Clerk issued an official certification of the petitions' sufficiency. Appellants requested an explanation for why the certification was delayed; the Clerk stated that the City was ''looking into its legal options.''

At a council meeting on March 4, 2009, after continuing the matter from its February 17, 2009, meeting, the City Council officially announced that it would not approve the City Clerk's certifications of sufficiency or place the measures on the ballot. The Council based its decision on an opinion from the City Attorney's office. The City does not dispute that appellants complied with the procedural requirements for collecting signatures and submitting their petitions or that sufficient signatures were obtained.

Less than a week after the March 4 City Council meeting, appellants filed an original petition for a writ of mandamus with this court, *Las Vegas Taxpayer Accountability Committee v. City Council of Las Vegas, Nevada*, Docket No. 53388, insisting that because of time constraints, they had no alternative but to seek relief from this court in the first instance. The developers who are parties to the city hall contract were permitted to intervene and file an answer, and an amicus brief was filed by the Downtown Las Vegas Alliance and others. The intervenors and the amici urged this court to keep the measures off the ballot.

Following oral argument, this court denied the petition in an order, holding that appellants were required to seek relief in the district court in the first instance. The order specifically noted that expedited proceedings are available at the district court level and, in essence, rejected appellants' contention that they had no time to proceed in district court.

On April 10, 2009, two days after this court denied the writ petition, appellants filed a district court action seeking mandamus and declaratory relief. The district court set an expedited hearing that began on the afternoon of April 15, 2009, and continued on April 16, 2009. The hearing included both argument and testimony, primarily from Las Vegas City Attorney Bradford Jerbic. Jerbic testified concerning the measures' asserted shortcomings that, in the City's view, properly prevented their placement on the ballot.

The district court issued its ruling on Friday, April 17, 2009. In a clear, thorough order, the district court denied appellants' requested relief. First, the district court held that, under this court's precedent, it could not compel the City to place invalid measures on the ballot. Accordingly, the district court determined that the City's objections to the measures must be examined. The district court then concluded that NRS 295.009's single-subject and description-of-effect requirements applied to municipal ballot questions, and both measures were invalid under that statute: the initiative violated the single-subject requirement, and the referendum's description of effect was materially misleading. The district court therefore denied appellants any relief. This appeal followed.

DISCUSSION

In resolving this appeal, we first consider appellants' argument that the City Council and City Clerk had a ministerial duty to place the measures on the ballot once the City Clerk had confirmed that they had sufficient signatures and met all procedural requirements. While we agree with appellants' position, we nevertheless then turn to respondents' objections to the measures, while placing the burden on respondents to demonstrate the measures' invalidity. We next consider whether the single-subject requirement and description-of-

effect requirement set forth in NRS 295.009 apply to municipal ballot measures. We must also consider whether respondents' objections are barred by the time limitation set forth in NRS 295.061. Finally, we examine the district court's application of NRS 295.009 to the measures at issue to determine whether the proposed initiative complied with the single-subject rule and whether the referendum's description of effect is materially misleading.

Standard of review

[Headnotes 1, 2]

When legal, not factual, issues are at play, this court reviews de novo a district court order resolving a request for declaratory relief. *Nevadans for Nevada v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). And while a district court's decision to deny extraordinary writ relief is generally reviewed for an abuse of discretion, *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000), we resolve issues of statutory construction de novo even in this context. *Nevadans for Prop. Rights v. Sec'y of State*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (2006).

The City had a ministerial duty to place procedurally proper measures on the ballot

Relying on the plain language of NRS 295.215(1) and several cases from other jurisdictions, appellants argue that, after the measures were verified as procedurally correct with sufficient signatures, the City Clerk had a ministerial duty to place them on the ballot. They further argue that the City Council lacked the judicial capacity to evaluate the validity of the measures by any other standards, such as their constitutionality or whether they violated provisions of Nevada's redevelopment statutes. Respondents argue that this court has already rejected appellants' position in previous opinions and held that writ relief is warranted only if the measures are properly placed on the ballot. They contend that the City was not required to seek a judicial declaration of the measures' invalidity. The district court concluded that the City had the discretion to consider the merits of the proposed measures and the court then considered the City's objections to the measures.

Procedural requirements for placing measures on the ballot

NRS 295.205(1) provides that a petition for a municipal ballot measure must be filed with the City Clerk. The City Clerk must then confer with the City Council to determine whether the measure would have any fiscal effect; if so, the City Council must prepare a fiscal note to be posted on the City Clerk's website. NRS 295.205(4). The measure's proponents then have up to 180 days to gather signatures, or until 130 days before the election, whichever is

earlier, and they must then submit the signatures to the City Clerk for verification. NRS 295.205(5). Other subsections of the statute set forth guidelines for the documents' form and requirements for the circulators' affidavits. NRS 295.205(6) and (7).

Once the signatures have been submitted, the City Clerk has 20 days to verify the signatures pursuant to NRS 295.250-295.290. NRS 295.210(1). If the measure is certified as sufficient, then it must be presented to the City Council, and the Clerk's certificate ''is a final determination as to the sufficiency of the petition.'' NRS 295.210(2). NRS 295.210(4) provides that a final determination of sufficiency is subject to judicial review in the district court on an expedited basis.

NRS 295.215 sets forth the procedure to be followed once a measure has been certified as sufficient. The statute provides that, once the City Clerk verifies that a ballot measure has sufficient signatures and that it is procedurally correct, the City Council ''shall promptly consider the proposed initiative ordinance in the manner provided by law for the consideration of ordinances generally or reconsider the referred ordinance by voting its repeal.'' NRS 295.215(1). The City Council has 30 days to perform this task. *Id*. If the City Council ''fails to adopt the proposed initiative ordinance without any change in substance or fails to repeal the referred ordinance, the council *shall* submit the proposed or referred ordinance to the registered voters of the city.'' *Id*. (emphasis added). The vote must be held at the next general city election. NRS 295.215(2).

[Headnote 3]

Nothing in the language of these statutes grants the City Council authority to decide, despite a measure's procedural validity, that it should not be placed on the ballot for other reasons, such as objections based on its asserted substantive defects.

Under authority interpreting similar statutes, the City has no discretion to refuse to place procedurally valid measures on the ballot

In support of their argument that the City had no discretion in this matter, appellants cite ample authority from several other jurisdictions. For example, in *Williams v. Parrack*, 319 P.2d 989, 990 (Ariz. 1957), the governing city charter section provided that, if the Phoenix City Council did not adopt a duly proposed initiative, the council ''shall proceed to call a special election.'' On the city attorney's advice, the council and the mayor refused to call a special election for a proposed initiative. *Id*. When the measure's proponent sought mandamus relief to require the initiative's placement on the ballot, the council argued that the measure was beyond the initiative power. *Id*. The Arizona Supreme Court refused to consider the council's objections to the initiative, stating ''[w]e are concerned

here only with whether the city council has the power to decline to act upon a petition proposing an initiated ordinance duly certified to it as being sufficient in form and having affixed thereto the required number of signatures. . . .'' *Id.* at 991. The court concluded that the council's duty was ''purely ministerial and mandatory,'' and the court therefore affirmed the lower court's order granting mandamus. *Id.*

Similarly, California courts have repeatedly held that registrars of voters, county clerks, and the attorney general do not have discretion to bar an initiative's placement on the ballot due to stated concerns over the measure's substantive validity, but rather, such concerns must be presented to the court. *See Schmitz v. Younger*, 577 P.2d 652 (Cal. 1978) (issuing mandamus to require attorney general to prepare title and summary for initiative, despite assertion that initiative violated single-subject requirement); *Farley v. Healey*, 431 P.2d 650, 653 (Cal. 1967) (Traynor, C.J.) (ordering registrar of voters and county clerk to proceed with signature verification notwithstanding their contention that measure was beyond the initiative power).[2] These cases are well-reasoned and comport with the plain language of Nevada's statutory provisions, which do not allow a local governing body to refuse to place a procedurally valid measure on the ballot.

Nevada's precedent does not support the City's contention that it has no ministerial duty to place procedurally valid measures on the ballot

Respondents rely on two cases in which this court considered the merits of a city's objections to a ballot measure in determining whether to require the city to place the measure on the ballot, *State v. Reno City Council*, 36 Nev. 334, 136 P. 110 (1913), and *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 50 P.3d 546 (2002), *overruled in part on other grounds by Garvin v. Dist. Ct.*, 118 Nev. 749, 765 n.71, 59 P.3d 1180, 1190 n.71 (2002). Respondents contend that these two cases establish that the City Council had no duty in this case to place the proposed measures on the ballot when it had concerns about their validity, despite the mandatory language of NRS 295.215(1).

First, in the 1913 case, the Reno City Council refused to place on the ballot a municipal initiative that would grant a liquor license to a particular individual. *Reno City Council*, 36 Nev. 334, 136 P. 110. This court held that mandamus would not issue to require a void

[2]Other cases cited by appellants to support their argument that the City Clerk and City Council had a ministerial duty to place the proposed measures on the ballot include *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993); *Heidtman v. City of Shaker Heights*, 119 N.E.2d 644 (Ohio Ct. App. 1954); *Fried v. Augspurger*, 164 N.E.2d 466 (Ohio Ct. Com. Pl. 1959); and *Philadelphia II v. Gregoire*, 911 P.2d 389 (Wash. 1996).

measure's placement on the ballot. *Id*. at 338, 136 P. at 111. Notably, however, the statutes discussed above were not in effect at that time, and no statutory duties were addressed in the opinion.

More recently, in *Glover*, 118 Nev. 488, 50 P.3d 546, an initiative's proponents had argued in the district court that the Carson City Board of Supervisors had a duty to place the measure on the ballot; the district court rejected that argument. But on appeal, the proponents did not renew this argument, and the opinion does not discuss the nature of the duties imposed by NRS 295.215(1). Rather, the arguments focused on the proponents' contention that the Board could not participate in a court action challenging a ballot measure and the Board's objection that the measure concerned administrative rather than legislative matters. Consequently, this court's opinion did not consider the issue of whether the Board had a ministerial duty under NRS 295.215(1) to place the measure on the ballot.

[Headnote 4]

We conclude that, as neither *Reno City Council* nor *Glover* addressed a city council's duty under NRS 295.215(1), respondents' argument lacks merit. If a city council or other local governing body believes that a proposed ballot measure is substantively invalid, despite complying with procedural requirements and receiving sufficient signatures, then it must file an action in the appropriate district court seeking declaratory, injunctive, or other relief to prevent the measure's placement on the ballot. *See* NRS 295.210(4). Under NRS 295.215(1), a city council may not simply refuse to place the measure on the ballot.

Nevertheless, the district court relied on *Reno City Council* and *Glover* in determining that the City had discretion to consider the merits of the proposed measures in deciding whether they should be placed on the ballot.[3] The district court therefore proceeded to address the City's objections and determined that the measures were invalid. Under these circumstances, we conclude that judicial economy and efficiency will be best served by reviewing the district court's ruling on the City's objections.

But we emphasize that, hereafter, a city council must comply with NRS 295.215(1) and place a procedurally compliant measure on the ballot unless it has filed an appropriate action in the district court and obtained a ruling that the proposed measure is invalid. We note the possibility that, in light of the absence of any statutory or other deadline for filing an action raising such objections, a city could delay filing an action to the point that the court's consideration of the issues is jeopardized. In such circumstances, if the city has

[3]The City Council also cited to a 1995 Attorney General Opinion, addressing a proposed referendum similar to the instant referendum and concluding that the City Council could refuse to place it on the ballot. 95-16 Op. Att'y Gen. 69 (1995).

complied with its statutory duty to place the measure on the ballot, then laches may prevent preelection adjudication of the city's objections. And conversely, if the city has failed to comply with its statutory duty, a special election may be necessary and appropriate to guarantee the citizens' right to vote on the proposed measure.[4]

[Headnote 5]

Consequently, we next consider the objections asserted by respondents in determining whether the district court properly denied relief. We note that, although holding that the registrar of voters and county clerk had a ministerial duty to place the challenged measures on the ballot, the California Supreme Court in *Farley* considered the asserted objections while placing the burden on the measure's opponents to make a ''compelling showing'' that the measure was clearly invalid. 431 P.2d at 652; *see also deBottari v. Norco City Council (Hanzlik)*, 217 Cal. Rptr. 790, 792-93 (Ct. App. 1985). We agree with California's allocation of the burden of proof, and therefore, respondents bear the burden of demonstrating that the measures are clearly invalid. We thus proceed to determine whether the district court properly ruled that they have done so.

NRS 295.009's single-subject and description-of-effect requirements apply to municipal ballot measures

[Headnotes 6, 7]

NRS 295.009 imposes two requirements on ''[e]ach petition for initiative or referendum'': that it concern a single subject and that it contain a description of effect of no more than 200 words.[5] We have previously identified the purposes of these requirements. Specifically, the single-subject requirement helps both in promoting informed decisions and in preventing the enactment of unpopular provisions by attaching them to more attractive proposals or concealing

[4]While we directed the parties to brief the issue of this court's authority to order a special election, we need not reach the issue in this case in light of our disposition today.

[5]The full text of NRS 295.009 is as follows:

> 1. Each petition for initiative or referendum must:
>
> (a) Embrace but one subject and matters necessarily connected therewith and pertaining thereto; and
>
> (b) Set forth, in not more than 200 words, a description of the effect of the initiative or referendum if the initiative or referendum is approved by the voters. The description must appear on each signature page of the petition.
>
> 2. For the purposes of paragraph (a) of subsection 1, a petition for initiative or referendum embraces but one subject and matters necessarily connected therewith and pertaining thereto, if the parts of the proposed initiative or referendum are functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the interests likely to be affected by, the proposed initiative or referendum.

them in lengthy, complex initiatives (*i.e.*, logrolling). *Nevadans for Prop. Rights v. Sec'y of State*, 122 Nev. 894, 905, 141 P.3d 1235, 1242 (2006) (citing with approval *Campbell v. Buckley*, 203 F.3d 738, 746 (10th Cir. 2000)).[6] And the requirement that each measure include a description of effect facilitates the constitutional right to meaningfully engage in the initiative process by helping to '' 'prevent voter confusion and promote informed decisions.' '' *Nevadans for Nevada v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006) (quoting *Campbell*, 203 F.3d at 746).

[Headnote 8]

Appellants argue that NRS 295.009 is limited to statewide ballot measures. Respondents assert that the statute applies to all initiatives and referenda in Nevada, including the measures at issue in this case. The district court concluded that the statute applies to municipal ballot measures. We agree with the district court.

[Headnotes 9-11]

It is well established that, when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Thus, when a statute is facially clear, we will generally not go beyond its language in determining the Legislature's intent. *Id.* Also, no part of a statute should be rendered meaningless and its language '' 'should not be read to produce absurd or unreasonable results.' '' *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quoting *Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488, 492, 50 P.3d 546, 548 (2002), *overruled in part on other grounds by Garvin v. Dist. Ct.*, 118 Nev. 749, 765 n.71, 59 P.3d 1180, 1190 n.71 (2002)).

NRS 295.009's plain language states that its requirements apply to ''[*e*]*ach* petition for initiative or referendum.'' NRS 295.009(1) (emphasis added). Nothing in the statute indicates that it was intended to apply solely to statewide measures. Also, the reasons for the statute's requirements apply equally to statewide and municipal measures, and to interpret the statute to exclude municipal ballot measures would therefore yield an unreasonable and absurd result.

The interpretation urged by appellants would require this court to ignore the plain meaning of the term ''each'' as used in the statute, thereby rendering that term meaningless. We have reviewed the extrajurisdictional authority cited by appellants and do not find it persuasive as to Nevada's statute. In particular, we acknowledge the vig-

[6]In *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984), the Florida Supreme Court recognized a third benefit of the single-subject rule: unlike other means of enacting law, the initiative process typically does not allow for input in drafting proposed laws.

orous debate that exists in this country concerning whether single-subject requirements are wise as a matter of policy, and we recognize that their application can be difficult. But the Legislature has decided the policy issue for Nevada by enacting NRS 295.009, and the requirement is proper under the Federal and Nevada Constitutions. *Nevadans for Prop. Rights*, 122 Nev. at 902-06, 141 P.3d at 1240-43. Accordingly, we conclude that municipal initiatives and referenda must meet NRS 295.009's requirements.

NRS 295.061 does not apply to municipal measures, either directly or through Las Vegas City Charter section 5.030

[Headnote 12]

Appellants assert that, if NRS 295.009's single-subject and description-of-effect provisions apply to municipal initiatives, then so must NRS 295.061's deadline for bringing challenges on those bases. Respondents counter that NRS 295.061 applies only to statewide initiatives, not municipal initiatives, and therefore its deadline does not bar their objections. The district court ruled that NRS 295.061 did not apply to municipal measures, and we conclude that the district court was correct.

[Headnote 13]

Again, we look first to the statute's plain language in determining its application. *State, Dep't of Motor Vehicles v. Terracin*, 125 Nev. 31, 34, 199 P.3d 835, 837 (2009) (noting that when the language of the statute is plain and unambiguous, this court may not look beyond that plain and unambiguous language); *McKay*, 102 Nev. at 648, 730 P.2d at 441. Here, NRS 295.061(1) provides a procedural mechanism for asserting challenges to a measure based on the single-subject requirement and the description of effect, when the measure is ''placed on file with the Secretary of State pursuant to NRS 295.015'' by specifying that such challenges should be filed in the First Judicial District Court within 15 days after the measure is filed with the Secretary of State. Only statewide measures are filed with the Secretary of State; county and city measures are filed with the county and city clerks, respectively. NRS 295.095 (county measures); NRS 295.205 (city measures). Therefore, the statute's plain language indicates that NRS 295.061 applies only to statewide initiatives. Moreover, it would be absurd to interpret the statute to require that challenges to local measures be filed in the First Judicial District Court rather than the locality in which they are proposed, here, Clark County. *Harris Assocs.*, 119 Nev. at 642, 81 P.3d at 534 (stating that statutes should be interpreted to avoid absurd or unreasonable results).

Appellants correctly identify a procedural gap in the statutory scheme, in that the Legislature prescribed a specific procedure for

asserting single-subject and description-of-effect objections only with regard to statewide, not local, measures. That the Legislature could have addressed local measures is illustrated by NRS 295.105(4) and NRS 295.210(4), which set forth expedited procedures for challenging the sufficiency of, respectively, county and city ballot measures in the local district court on shortened time. But the Legislature could have deemed these procedural mechanisms sufficient for local measures, particularly since the district court, unlike this court, is well-suited to gather evidence, to hold hearings on short notice, and to expedite issuance of a decision. Notably, after appellants' first writ petition to this court was denied, the district court completed its proceedings in little more than one week. Moreover, the Legislature could have reasonably concluded that the local city council was better able to tailor the procedure for enforcing the single-subject and description-of-effect requirements to local conditions and that, pursuant to its authority to control city elections under NRS 293C.110, it could do so if it wished. Accordingly, we reject appellants' contention that NRS 295.061 applies to bar consideration of respondents' objections.

The Taxpayer Accountability Initiative violates the single-subject requirement

We have previously held that objections to a measure's validity based on the statutory provisions governing initiatives, such as the single-subject requirement, are properly considered preelection. *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 883-85, 141 P.3d 1224, 1228-29 (2006). We therefore turn to respondents' objections to the initiative based on NRS 295.009's single-subject requirement.

Appellants assert that the initiative concerns the single subject of ''voter approval of use of taxpayer funds to finance large new development projects'' and that this subject is sufficiently defined to satisfy NRS 295.009. Respondents contend that the initiative concerns two unrelated subjects: lease-purchase agreements and redevelopment plans. They further maintain that only an exceptionally broad subject, such as ''voter approval'' could encompass both of the initiative's provisions and that a subject so defined does not meet the statute's requirements. The district court determined that the initiative consisted of two unrelated provisions and was therefore invalid under the single-subject requirement.

NRS 295.009(1)(a) requires that an initiative must ''[e]mbrace but one subject and matters necessarily connected therewith and pertaining thereto.'' NRS 295.009(2) expands on this requirement, stating that it is met ''if the parts of the proposed initiative or referendum are functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the inter-

ests likely to be affected by, the proposed initiative.'' As noted above, the single-subject requirement helps to promote informed decisions and to prevent logrolling. *Nevadans for Prop. Rights*, 122 Nev. at 905, 141 P.3d at 1242 (citing *Campbell*, 203 F.3d at 746).

[Headnote 14]

In *Nevadans for Property Rights*, this court noted that NRS 295.009(2) plainly describes the standard that must be used in determining whether an initiative is comprised of more than one subject: each initiative's parts must be ''functionally related'' and ''germane'' to each other and the initiative's purpose or subject. 122 Nev. at 906-07, 141 P.3d at 1243. Thus, in resolving this issue, this court must first determine the initiatives' purpose or subject.

A primary purpose cannot be determined from the initiative itself and its description of effect

To determine the initiative's purpose or subject, this court looks to its textual language and the proponents' arguments. *Id.* at 907, 141 P.3d at 1243. In this case, the title of the proposed initiative is the ''Las Vegas Taxpayer Accountability Act Initiative.'' The description of effect does not articulate an overarching purpose or theme and never uses the words ''taxpayer'' or ''accountability.'' Rather, the description of effect states that the first section of the proposed new city charter provision would require voter approval for certain lease-purchase agreements entered into by the City, and it then avers that the second section would establish that the City's voters would serve as the ''legislative body'' for certain redevelopment purposes. Neither the title nor the description indicate how these two provisions relate to any single subject. It is therefore difficult to discern the measure's primary purpose in order to evaluate whether its provisions are ''functionally related'' and ''germane'' to that purpose, as required by *Nevadans for Property Rights*, 122 Nev. at 907, 141 P.3d at 1243.

Appellants' articulation on appeal of the measure's subject is ''excessively general'' and therefore violates the single-subject rule

[Headnote 15]

The district court determined that the initiative was composed of two unrelated sections. In the district court's view, the first section imposed a voter-approval requirement for all lease-purchase agreements for all public buildings, not only those that were part of redevelopment projects. The district court therefore found that this section of the initiative ''attempt[ed] to limit the Council's powers to use lease-purchase agreements to conduct business.'' The district court next considered the second section and determined that, by attempting to substitute the City's voters as the ''legislative body''

under certain redevelopment statutes, it attempted to limit the powers of the Las Vegas Redevelopment Agency, an entity separate from the City.

The district court thus concluded that the initiative petition included ''two distinct subjects, one relating to voter approval for *all* lease purchase agreements (whether for redevelopment projects or otherwise), and the other seeking to govern the redevelopment agency by popular vote.'' The district court rejected appellants' suggested subject of ''requiring voter approval for expenditure of taxes for development projects,'' since the measure's second section called for voter approval of much more than particular projects, as it would require voter approval for virtually all aspects of redevelopment planning.

In interpreting their constitutional single-subject requirement for initiatives, California courts have held that an initiative proponent may not circumvent the single-subject rule by phrasing the proposed law's purpose or object in terms of ''excessive generality'': '' 'For example, the rule obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as ''government'' or ''public welfare.'' ' '' *Harbor v. Deukmejian*, 742 P.2d 1290, 1303 (Cal. 1987) (quoting *Brosnahan v. Brown*, 651 P.2d 274, 284 (Cal. 1982)) (invalidating a proposed law for violating the single-subject rule because the only commonality among the provisions, ''fiscal affairs'' and ''statutory adjustments'' to state budget were too general of topics); *see also Chem. Specialties Mfrs. v. Deukmejian*, 278 Cal. Rptr. 128, 133 (Ct. App. 1991) (determining, under a ''functionally related or reasonably germane'' standard, that an initiative proposing to require disclosures pertaining to, among other things, household toxic products, senior health insurance, and senior nursing homes, could not proceed under the general rubric ''public disclosure, *i.e.*, truth in advertising'' and violated California's single-subject rule).

[Headnote 16]

The proponents indicate that the measure's purpose is to provide the voters of Las Vegas with greater input into the City's redevelopment decisions by requiring voter approval for major redevelopment decisions. But ''voter approval,'' as held by the California Supreme Court, is an excessively general subject that cannot meet NRS 295.009's requirement. *Senate of the State of Cal. v. Jones*, 988 P.2d 1089, 1101-02 (Cal. 1999). And the purported single subject articulated in appellants' opening brief, ''voter approval of use of taxpayer funds to finance large new development projects,'' is no better, when the proposed initiative is not limited to the financing of ''large new development projects'' but instead encompasses the far more complex task of adopting and amending redevelopment plans. The district court properly evaluated the proposed initiative's provi-

sions and concluded that the initiative violates the single-subject requirement. We therefore hold that the measure is invalid.[7]

The Redevelopment Reform Referendum's description of effect is materially misleading

Preelection review is appropriate

[Headnote 17]

Appellants first challenge the propriety of this court reviewing the referendum's statement of effect preelection, arguing that this court rejected a similar attempt to review substantive constitutional matters in the guise of a procedural challenge in *Herbst Gaming, Inc. v. Secretary of State*, 122 Nev. 877, 141 P.3d 1224 (2006). The City Attorney, however, contends that the district court properly reviewed the description-of-effect challenge preelection because the matter concerns limits on the city's self-governing power, which this court stated in *Herbst Gaming*, 122 Nev. at 883, 141 P.3d at 1228, could be reviewed preelection. Because, under NRS 295.009(1)(b), the description of effect is a statutory requirement for placement on the ballot, it is ''virtually always ripe for preelection review.'' *Id*. We see no reason to depart from this general rule here, and thus conclude that it is appropriate for preelection review.

The description of effect violates NRS 295.009(1)(b)

Turning to the merits of the description-of-effect issue, appellants contend that the district court erred in determining that the description of effect was materially misleading. The referendum's description of effect sets forth, in full:

> The referendum asks registered voters in the City of Las Vegas to repeal Ordinance No. 5830, entitled ''An Ordinance to Adopt an Amended and Restated Redevelopment Plan, Which Includes Additional Property Within the Plan, and to Provide for other Related Matters.'' Ordinance No. 5830 amended and restated the Redevelopment Plan for the Downtown Las Vegas Redevelopment Area by expanding the area covered by the Plan, restating the purpose of the Redevelopment Plan, determining that blight existed in the Redevelopment Area covered by the Redevelopment Plan, and making certain other findings. *Repeal of Ordinance No. 5830 would prevent the Redevelopment Agency from undertaking further redevelopment projects in*

[7]Appellants did not argue in their opening brief that, if the initiative was held to violate the single-subject requirement, the measure was severable. Accordingly, although the initiative contains a severance clause, we do not consider whether severance may have been possible under *Nevadans for Property Rights v. Secretary of State*, 122 Nev. 894, 141 P.3d 1235 (2006).

> *the Redevelopment Area or incurring further indebtedness to support such additional projects.*

(Emphasis added.) Appellants argue that the referendum's description of effect correctly states that a repeal of Ordinance No. 5830 would only act prospectively, to prevent the adoption of any additional redevelopment projects and the incurring of additional indebtedness until a new redevelopment plan is adopted. During any interim after the referendum's passage, appellants contend, the redevelopment agency would remain in place and, under NRS 279.676, any existing incurred debts would continue to be paid so long as there is sufficient tax increment from existing plan areas.

The City Attorney, however, contends that the district court correctly determined that the referendum's description of effect was materially misleading. Specifically, the City Attorney argues that the referendum, if passed, would result in the complete termination of the redevelopment plan. Thus, the proposed referendum's statement of effect, which states that passage of the referendum would merely result in the prevention of additional development projects under the redevelopment plan, is inadequate under NRS 295.009(1)(b), as it fails to accurately inform the voters that the referendum's passage would also affect current and existing projects, and debts incurred thereby.

[Headnote 18]

Under NRS 295.009(1)(b), referendum petition signature pages must include a description summarizing the proposed law. This court has noted that this ''description of effect'' is significant as a tool to help '' 'prevent voter confusion and promote informed decisions.' '' *Nevadans for Nevada v. Beers*, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006) (quoting *Campbell v. Buckley*, 203 F.3d 738, 746 (10th Cir. 2000)). Additionally, while a referendum's summary and title ''need not be the best possible statement of a proposed measure's intent,'' it nevertheless must still be ''straightforward, succinct, and nonargumentative.'' *Herbst Gaming*, 122 Nev. at 889, 141 P.3d at 1232 (internal quotations omitted). '' 'This court has consistently provided that the district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence.' '' *Bedore v. Familian*, 122 Nev. 5, 9-10, 125 P.3d 1168, 1171 (2006) (quoting *Clark County v. Sun State Properties*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003)).

[Headnote 19]

Here, the district court made factual findings regarding the referendum and NRS 295.009(1)(b). Specifically, the district court found that the true effect of the referendum would be to completely terminate the redevelopment plan and, consequently, to impair out-

standing securities issued by the Redevelopment Agency. The district court also found that the referendum's statement of effect was materially misleading because, by stating that the referendum's passage would halt only new, additional development projects, it failed to inform the voters that the repeal of Ordinance No. 5830 would also affect existing redevelopment projects. We agree with the district court that the description of effect materially fails to accurately identify the consequences of the referendum's passage. Because Ordinance No. 5830 adopted the current redevelopment plan, the referendum's repeal of that ordinance effectively repeals the entire redevelopment plan, and the referendum does not provide any replacement plan that could administer the existing redevelopment projects.[8] Thus, because this description of effect does not satisfy NRS 295.009(1)(b), we affirm the district court's findings on this point.

The description of effect cannot be saved by a ''prospective'' application of the referendum

Finally, appellants argue that, even if the City Attorney is correct that the referendum can be read in the manner that would result in a complete termination of the redevelopment plan, the referendum is salvageable, as its repeal of an existing statute could nonetheless be read and applied in a ''prospective'' manner so as to preserve the local electorate's constitutional right to referendum. For instance, as support for this possible ''prospective'' application of the referendum's repeal of Ordinance No. 5830, appellants distinguish between the effect of a statute declared ''void'' and the effect of a statute that is ''repealed,'' as set forth in the Missouri Supreme Court case, *R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744 (Mo. 2004). In light of our determination that the referendum's proposed repeal of Ordinance No. 5830 would terminate the entire redevelopment plan, we reject appellants' arguments that the description of effect can be saved by a ''prospective'' application of the referendum.

CONCLUSION

Upon certification by the City Clerk that the proposed measures had sufficient signatures and otherwise met procedural requirements, the City Council had a duty to place the measures on the ballot, regardless of its objections to the measures' substantive validity. In light of our opinion today, it must promptly assert any such objections in an action filed in the appropriate district court for an

[8]*See* Las Vegas Municipal Code § 1.04.040 (stating that the repeal of an ordinance does not automatically revive any ordinance that was previously in effect either before or at the time the ordinance repealed took legal effect).

expedited decision. But under the circumstances of this case and to serve judicial efficiency and economy, we have nevertheless considered respondents' objections to the proposed measures, while placing the burden of establishing the measures' invalidity on respondents.

We conclude that respondents have met this burden. First, NRS 295.009's single-subject and description-of-effect requirements apply to all initiatives and referenda in Nevada. Moreover, respondents' objections on these bases are not barred by NRS 295.061, which applies only to statewide measures. Next, respondents have demonstrated that the proposed initiative violates the single-subject requirement and that the proposed referendum's description of effect is misleading. Thus, the district court properly concluded that the measures were invalid.[9]

Accordingly, we affirm the district court's judgment.

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

[9]In light of our conclusion that the measures are invalid on the bases discussed in this opinion, we do not consider respondents' other objections to the measures.