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.

JOE RIVERA, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR JOSEPH RIVERA, V, AND JENICA RIVERA, MINORS, AND JOE RIVERA AS SPECIAL ADMINISTRATOR TO THE ESTATE OF PAMELA RIVERA, APPELLANTS, *v.* PHILIP MORRIS, INCORPORATED, A VIRGINIA CORPORATION, RESPONDENT.

No. 49396

June 4, 2009 209 P.3d 271

Certified question, pursuant to NRAP 5, regarding whether Nevada law recognizes a heeding presumption in strict product liability failure-to-warn cases. United States District Court, District of Nevada; David A. Ezra, Judge.[1]

The supreme court, SAITTA, J., held that Nevada law does not recognize a heeding presumption in strict products liability failure-to-warn cases because a heeding presumption shifts burden of proving causation from the plaintiff to the manufacturer.

Question answered.

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[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.

[1]The Honorable James C. Mahan presided over the case and the motions for summary judgment, but the case was later reassigned to The Honorable David A. Ezra.

Gillock, Markley & Killebrew, PC, and *Gerald I. Gillock*, Las Vegas; *Johnson Flora, PLLC*, and *Mark A. Johnson*, Seattle, Washington, for Appellants.

Jones Vargas and *Clark V. Vellis* and *John P. Desmond*, Reno; *Munger, Tolles & Olson, LLP*, and *Gregory Stone*, Los Angeles, California; *Shook, Hardy & Bacon, LLP*, and *Craig Proctor* and *William A. Yoder*, Kansas City, Missouri, for Respondent.

1. PRODUCTS LIABILITY.
   In strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries.
2. FEDERAL COURTS.
   Supreme court has the discretion to answer questions certified by a federal court, and to decide whether to exercise that discretion, supreme court looks at whether (1) the certified question's answer may be determinative of part of the federal case, (2) controlling Nevada precedent exists, and (3) the answer will help settle important questions of law. NRAP 5.
3. FEDERAL COURTS.
   Supreme court would answer question certified by federal district court asking whether Nevada law recognizes a heeding presumption in strict products liability failure-to-warn cases, as this was issue of first impression. NRAP 5.
4. PRODUCTS LIABILITY.
   Nevada law does not recognize a heeding presumption in strict products liability failure-to-warn cases because a heeding presumption shifts burden of proving causation from the plaintiff to the manufacturer, and shifting the burden of proving causation to the manufacturer, even if it is a temporary shift, is contrary to Nevada law, as well as public policy; rather than demanding that plaintiff prove that the inadequate warning caused his or her injuries, a heeding presumption requires the manufacturer to rebut the presumption that the plaintiff would have heeded an adequate warning by demonstrating that different warning would not have changed plaintiff's actions.
5. PRODUCTS LIABILITY.
   When bringing a strict product liability failure-to-warn case, the plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries.
6. EVIDENCE.
   The term ''burden of proof'' is an umbrella phrase that describes two related, but separate, burdens: (1) there is the ''burden of production,'' and the party that carries the burden of production must establish a prima facie case, and burden of production may be switched from one party to another by a presumption; and (2) there is the ''burden of persuasion,'' and the burden of persuasion rests with one party throughout the case and determines which party must produce sufficient evidence to convince a judge that a fact has been established. NRS 47.180.
7. PRODUCTS LIABILITY.
   In strict product liability cases, the plaintiff carries both the burden of production and the burden of persuasion.
8. PRODUCTS LIABILITY.
   To successfully prove a strict product liability failure-to-warn case, a plaintiff must produce evidence demonstrating the same elements as in other

strict product liability cases: (1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury.

9. PRODUCTS LIABILITY.
A product may be found unreasonably dangerous and defective if the manufacturer failed to provide an adequate warning.

10. PRODUCTS LIABILITY.
The burden of proving causation can be satisfied in strict product liability failure-to-warn cases by demonstrating that a different warning would have altered the way the plaintiff used the product or would have prompted plaintiff to take precautions to avoid the injury.

11. PRODUCTS LIABILITY.
A ''heeding presumption'' is a rebuttable presumption that allows a fact-finder to presume that the injured plaintiff would have heeded an adequate warning if one had been given, and thus, it shifts the burden of proving the element of causation from the plaintiff to the manufacturer.

12. PRODUCTS LIABILITY.
Plaintiff bears the burden of proving causation in strict product liability cases.

13. PRODUCTS LIABILITY.
A manufacturer must make products that are not unreasonably dangerous, no matter what instructions are given in a warning.

Before the Court EN BANC.[2]

OPINION

By the Court, SAITTA, J.:

The United States District Court, District of Nevada, has certified the question of whether Nevada law recognizes a heeding presumption in strict product liability failure-to-warn cases. A heeding presumption is a rebuttable presumption that allows a fact-finder to presume that the injured plaintiff would have heeded an adequate warning if one had been given. Thus, it shifts the burden of proving the element of causation from the plaintiff to the manufacturer. We exercise our discretion to answer this question and conclude that Nevada law does not recognize a heeding presumption.

[Headnote 1]

In Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries. Because a heeding presumption shifts the burden of proving causation from the plaintiff to the manufacturer, it is contrary to Nevada law. Rather than demanding that the plaintiff prove

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

that the inadequate warning caused his injuries, a heeding presumption requires the manufacturer to rebut the presumption that the plaintiff would have heeded an adequate warning by demonstrating that a different warning would not have changed the plaintiff's actions. While other jurisdictions have permitted this shifting of the burden of production, we are unwilling to do so.

FACTS AND PROCEDURAL HISTORY

Appellant Joe Rivera brought a wrongful death suit against respondent Philip Morris, Inc., on behalf of the estate and family of his wife, Pamela Rivera. Pamela began smoking in 1969, before the federal government required cigarette labels to include warnings that specifically addressed the health risks of smoking, including its causing lung cancer. Rather, from 1966 until 1985, cigarette labels warned only of general health risks. Beginning in 1985, the warnings were required to be more explicit, expressly warning of smoking's connection to lung cancer, heart disease, and emphysema, as well as the risks of smoking during pregnancy. Pamela smoked until she died in 1999 of brain cancer, which her estate alleges was caused by lung cancer.

Rivera filed a complaint for damages against Philip Morris in the state district court, which Philip Morris removed to the federal district court. Rivera's initial complaint set forth strict product liability and fraud claims. Rivera based the strict product liability claim on his contention that, by producing and selling cigarettes, Philip Morris breached its duty to Pamela not to manufacture and sell a product that was defective and unreasonably dangerous to her. By selling a defective and unreasonably dangerous product to Pamela, Rivera claimed that Philip Morris caused her death. The federal district court granted summary judgment on all claims in favor of Philip Morris on the grounds that the strict liability claim was preempted by the Federal Cigarette Labeling and Advertising Act of 1965, and that the fraud claims were either preempted by the same Act or, alternatively, that there was a lack of evidence that Pamela would have stopped smoking if Philip Morris had disclosed material information regarding the health effects of smoking. Rivera appealed to the United States Court of Appeals for the Ninth Circuit.

In *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142 (9th Cir. 2005), the Ninth Circuit affirmed summary judgment on the fraud claims but reversed the district court on the strict product liability failure-to-warn claim. *Id.* at 1154-55. The Ninth Circuit first determined that none of Rivera's claims were preempted by federal law. *Id.* at 1146-50. The court decided that summary judgment was inappropriate on the strict product liability claim because the question of whether it was common knowledge when Pamela began smoking in

1969 that cigarette smoking caused lung cancer was a question of fact for a jury to decide. *Id.* at 1153. Further, the Ninth Circuit concluded that summary judgment was also inappropriate because whether a typical consumer in 1969 knew that cigarettes were addictive was also a question of fact for a jury. *Id.* at 1153-54. Accordingly, the Ninth Circuit affirmed in part and remanded the case for further proceedings solely on Rivera's strict product liability failure-to-warn claim. *Id.* at 1155.

On remand, Rivera filed a motion for partial summary judgment, asking the federal district court to recognize, as fact, certain assertions. Philip Morris filed a cross-motion for summary judgment on the strict product liability failure-to-warn claim. Philip Morris argued that Rivera could not prove that the alleged failure-to-warn caused Pamela's injuries because the record was void of any evidence that Pamela would have acted differently had Philip Morris provided additional information or warnings. In opposition, Rivera argued that the federal district court should apply a heeding presumption.

After the hearing on the parties' motions, the federal district court entered an order that granted, in part, Rivera's motion for partial summary judgment, by recognizing that Philip Morris cigarettes have been and are addictive and that they have caused and do cause cancer. The order also denied Philip Morris' motion for summary judgment, finding that Philip Morris had failed to overcome the presumption that Pamela would have heeded additional information and warnings had Philip Morris provided them.

Philip Morris moved for clarification and reconsideration of the federal district court's decision and for certification, pursuant to NRAP 5, of whether Nevada law recognizes a heeding presumption in strict liability failure-to-warn cases. The federal district court denied Philip Morris' motions. The parties then joined in a motion to certify the heeding presumption question to this court, which the federal district court granted.

DISCUSSION

NRAP 5 certification is appropriate

[Headnotes 2, 3]

At the outset, we address the threshold issue of whether the certified question should be answered by this court. Pursuant to NRAP 5, this court has the discretion to answer questions certified by a federal court. To decide whether to exercise that discretion, this court looks at whether ''(1) the certified question's answer may be determinative of part of the federal case, (2) controlling Nevada precedent exists, and (3) the answer will help settle important ques-

tions of law.'' *Federal Ins. v. Am. Hardware Mut. Ins.*, 124 Nev. 319, 322, 184 P.3d 390, 392 (2008).

Whether Nevada law recognizes a heeding presumption is a matter of first impression. Our answer will determine whether plaintiffs in strict product liability failure-to-warn cases will continue to bear the burden of proving causation throughout the entire case or whether that burden will first shift to the manufacturers who must rebut it. In this case, our answer may also be determinative of the federal case. If this court declines to adopt a heeding presumption, it is unlikely that Rivera can prove causation because the only evidence he has presented that Pamela would have heeded a more specific warning is speculative and, therefore, likely inadmissible. Accordingly, we answer the certified question.

Nevada law and public policy do not support a heeding presumption

Nevada law

[Headnotes 4, 5]

In Nevada, when bringing a strict product liability failure-to-warn case, the plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries. *Sims v. General Telephone & Electric*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991), *overruled on other grounds by Tucker v. Action Equip. and Scaffold Co.*, 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997), *overruled on other grounds by Richards v. Republic Silver State Disposal*, 122 Nev. 1213, 148 P.3d 684 (2006). Rivera admits that a heeding presumption would shift this burden from the plaintiff to the manufacturer, but argues that a heeding presumption is concordant with Nevada law because it is a rebuttable presumption that initially shifts the burden of proving causation to the manufacturer but shifts the burden back to the plaintiff upon the manufacturer rebutting the claim. We reject Rivera's argument. Instead, we conclude that shifting the burden of proving causation to the manufacturer in a strict product liability case, even if it is a temporary shift, is contrary to this state's law, as well as public policy.

[Headnote 6]

At the outset, we note that cases are governed, in part, by evidentiary burdens and determining which party carries these burdens. The determination of which party caries a burden is critical because it can impact the outcome of a case. The term ''burden of proof'' is an umbrella phrase that describes two related, but separate, burdens. *See Northwest Pipeline Corp. v. Adams County*, 131 P.3d 958, 960 (Wash. Ct. App. 2006). First, there is the burden of production. The party that carries the burden of production must establish a prima

facie case. *See Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493, 510 (Cal. 2001); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007); *Parsons v. State*, 116 Nev. 928, 937 n.7, 10 P.3d 836, 841 n.7 (2000). The burden of production may be switched from one party to another by a presumption. *See* NRS 47.180;[3] *Nevada Power Co. v. Public Util. Comm'n*, 122 Nev. 821, 835, 138 P.3d 486, 495-96 (2006). Second, there is the burden of persuasion. The burden of persuasion rests with one party throughout the case and ''determines which party must produce sufficient evidence to convince a judge that a fact has been established.'' 29 Am. Jur. 2d *Evidence* § 171 (2008) (citing *Hurley v. Hurley*, 754 A.2d 1283, 1286 (Pa. Super. Ct. 2000)); *see Northwest Pipeline Corp.*, 131 P.3d at 960.

[Headnotes 7-10]

In strict product liability cases, the plaintiff carries both the burden of production and the burden of persuasion. *See Shoshone Coca-Cola v. Dolinski*, 82 Nev. 439, 443, 420 P.2d 855, 857-58 (1966). To successfully prove a failure-to-warn case, a plaintiff must produce evidence demonstrating the same elements as in other strict product liability cases: ''(1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury.'' *See Fyssakis v. Knight Equipment Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 571 (1992). A product may be found unreasonably dangerous and defective if the manufacturer failed to provide an adequate warning. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238-39, 955 P.2d 661, 665 (1998). Further, the burden of proving causation can be satisfied in failure-to-warn cases by demonstrating that a different warning would have altered the way the plaintiff used the product or would have ''prompted plaintiff to take precautions to avoid the injury.'' *See Riley v. American Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993).

[Headnote 11]

A heeding presumption, which Rivera seeks this court to adopt, departs from well-settled and established Nevada law. Instead of requiring that the plaintiff prove each element of a strict product liability case, a heeding presumption removes the plaintiff's responsibility to carry the initial burden of production as to the element of causation. *See Riley*, 856 P.2d at 199; *Seley v. G. D. Searle & Co.*, 423 N.E.2d 831, 838 (Ohio 1981); *Technical Chemical Company v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972). A heeding presumption

[3]We note that since its adoption in 1971, NRS 47.180 has never been amended.

''allow[s] the fact-finder to presume that the person injured by product use would have heeded an adequate warning, if given.'' *Golonka v. General Motors Corp.*, 65 P.3d 956, 967 (Ariz. Ct. App. 2003); *Bushong v. Garman Co.*, 843 S.W.2d 807, 811 (Ark. 1992). Therefore, a heeding presumption shifts the burden of production from the plaintiff to the manufacturer, who must rebut the presumption by proving that the plaintiff would not have heeded a different warning. *Golonka*, 65 P.3d at 971; *Bushong*, 843 S.W.2d at 811; *see* NRS 47.180.

Rivera argues that this court's decisions in *Sims*, 107 Nev. 516, 815 P.2d 151, and *Stackiewicz v. Nissan Motors Corp.*, 100 Nev. 443, 686 P.2d 925 (1984), support our recognizing a heeding presumption. For the reasons set forth below, we reject this argument.

This court has consistently stated that the plaintiff must prove the element of causation. *Shoshone Coca-Cola*, 82 Nev. at 443, 420 P.2d at 857-58. In *Sims*, we concluded that the district court had improperly granted the manufacturer's motion for summary judgment because the fact-finder could have found that the evidence indicated that Sims would have heeded an adequate warning, if one was given. 107 Nev. at 524, 815 P.2d at 156. Notably, this court did not reverse because the fact-finder could *presume* that Sims would have followed an adequate warning. Instead, this court stated that the *evidence* could demonstrate that he would have adhered to an adequate warning. *See id.*

Similarly, in *Stackiewicz*, we concluded that the district court improperly granted the manufacturer's motion for a judgment notwithstanding the verdict because there was circumstantial evidence that could lead the fact-finder to conclude that the car's defect had caused Stackiewicz's injuries. 100 Nev. at 452, 686 P.2d at 930. Thus, our conclusions in *Sims* and *Stackiewicz* demonstrate this court's steadfast commitment to the principle that the burden of production as to the element of causation rests with the plaintiff in strict product liability cases. Moreover, we emphasize that we did not contemplate switching the burden of production from the plaintiff to the manufacturer in either *Sims* or *Stackiewicz*.

Restatement (Second) of Torts section 402A, comment j

Rivera next contends that this court should recognize a heeding presumption because this court has adopted the Restatement (Second) of Torts section 402A, comment j, which favors the presumption. We disagree. While this court has cited to the Restatement (Second) of Torts section 402A, comment j, the manner in which we relied on comment j indicates our intention to require the plaintiff in strict product liability failure-to-warn cases to carry the burden of production on the element of causation. Our use of comment j does not support a heeding presumption.

The Restatement (Second) of Torts section 402A governs strict product liability. Restatement (Second) of Torts § 402A (1965). Comment j to section 402A states, in pertinent part, ''[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.'' Many courts have interpreted comment j as giving rise to a rebuttable heeding presumption. *See, e.g.*, *Golonka*, 65 P.3d at 968; *Butz v. Werner*, 438 N.W.2d 509, 517 (N.D. 1989).[4]

In *Allison v. Merck and Company*, 110 Nev. 762, 878 P.2d 948 (1994), this court concluded that a drug manufacturer will be liable if it fails to market a vaccine with a proper warning. *Id.* at 774, 878 P.2d at 956. In so determining, this court cited the Restatement (Second) of Torts section 402A, comment j. *See id.* at 774 n.12, 878 P.2d at 956 n.12. We noted that comment j was consistent with our conclusion that a fact-finder could conclude from the evidence that the manufacturer was liable for underwarning the product. *Id.*

However, we did not adopt comment j wholesale. Instead, in citing comment j, we specifically noted that the *evidence* could demonstrate that the manufacturer had not provided a sufficient warning. *Id.* At no point did we imply that comment j supported adopting a presumption that the Allisons would have heeded an adequate warning had one been provided. Therefore, we reject Rivera's argument that this court's discussion of comment j to section 402A of the Restatement (Second) of Torts in *Allison* supports our adoption of a heeding presumption. To the contrary, we conclude that the manner in which we have previously cited to comment j indicates that we will not stray from the principle that the plaintiff carries the burden of production of the element of causation.

[Headnote 12]

Finally, we note that we are not alone in our decision to reject a heeding presumption. *See Riley*, 856 P.2d at 200 (concluding that the adoption of a heeding presumption was inconsistent with Montana's strict product liability failure-to-warn law, which requires the plaintiff to demonstrate that the inadequate warning caused his in-

[4]Even though some jurisdictions have adopted a heeding presumption without directly referencing the Restatement (Second) of Torts section 402A, comment j, *see, e.g.*, *Bushong*, 843 S.W.2d at 811; *Cunningham v. Charles Pfizer & Co., Inc.*, 532 P.2d 1377, 1382 (Okla. 1974); *Menard v. Newhall*, 373 A.2d 505, 506-07 (Vt. 1977), this fact does not change our decision to reject Rivera's invitation to adopt a heeding presumption. These courts have applied a heeding presumption in the same way as jurisdictions that reference comment j. Therefore, that some jurisdictions have adopted the heeding presumption without reference to comment j of the Restatement (Second) of Torts does not convince us to depart from the principle that the plaintiff bears the burden of production as to the element of causation in strict product liability cases.

juries); *DeJesus v. Craftsman Machinery Co.*, 548 A.2d 736, 744 (Conn. App. Ct. 1988) (concluding that there is no presumption that an inadequate warning was the proximate cause of the plaintiff's injuries because the plaintiff bears the burden of proving proximate cause); *Harris v. International Truck and Engine*, 912 So. 2d 1101, 1109 (Miss. Ct. App. 2005) (declining to adopt the heeding presumption because the Mississippi Supreme Court had an opportunity to do so but did not, instead noting that the plaintiff bore the burden of proving that his injury had been caused by his following the inadequate warning). We agree with these jurisdictions and now affirm the requirement that the plaintiff bear the burden of proving causation in strict liability cases.

For all of these reasons, we conclude that Nevada law does not support recognizing a heeding presumption. It is a firmly rooted part of Nevada law that the plaintiff in a strict product liability case bears the burden of proving all the elements of his case, including causation. Therefore, we decline Rivera's invitation to depart from this standard.

Public policy

Rivera further argues that public policy would be served by Nevada adopting a heeding presumption. We disagree.

Jurisdictions that have adopted a heeding presumption have cited public policy as a reason for their decision. *See, e.g.*, *Golonka*, 65 P.3d at 969. For instance, jurisdictions have noted that ''[b]y easing the burden of proving causation, '[t]he use of the heeding presumption provides a powerful incentive for manufacturers to abide by their duty to provide adequate warnings.' '' *Golonka*, 65 P.3d at 969 (alteration in original) (quoting *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993)). Courts have also noted that the heeding presumption '''' ''serves to reinforce the basic duty to warn—to encourage manufacturers to produce safer products, and to alert users of the hazards arising from the use of those products through effective warnings.'' '' '' *See House v. Armour of America, Inc.*, 929 P.2d 340, 347 (Utah 1996) (quoting *House v. Armour of America, Inc.*, 886 P.2d 542, 553 (Utah Ct. App. 1996) (quoting *Coffman*, 628 A.2d at 718)).

[Headnote 13]

We have held that the public policy behind strict product liability law is that manufacturers and distributors of defective products should be held responsible for injuries caused by these products. *See, e.g.*, *Allison*, 110 Nev. at 769, 878 P.2d at 953. However, we conclude that public policy is best served by our rejecting a heeding presumption. As noted in the Restatement (Third) of Torts, comment

j to section 402A of the Restatement (Second) of Torts implies that a manufacturer can satisfy its duty of making products safe by providing adequate warnings. Restatement (Third) of Torts: Products Liability § 2 cmt. *l* (1998). We find such a result to be untenable. Instead, we strongly adhere to the principle that a manufacturer must make products that are not unreasonably dangerous, no matter what instructions are given in the warning. Therefore, we conclude that it is better public policy not to encourage a reliance on warnings because this will help ensure that manufacturers continue to strive to make safe products. Further, as noted by the *Riley* court, it is not logical to presume that a plaintiff would have heeded an adequate warning, if provided. *See Riley*, 856 P.2d at 200. ''[W]arnings are everywhere in the modern world and often go unread or, where read, ignored.'' *Id*. For these reasons, we conclude that a heeding presumption has no place in our law.

Therefore, because we conclude that neither Nevada law nor public policy militate in favor of adopting a heeding presumption, we answer the certified question in the negative.

CONCLUSION

Nevada law is clear that a plaintiff bears the burden of proving causation in strict product liability cases. The heeding presumption inappropriately shifts the burden of production from the plaintiff to the manufacturer. Accordingly, because we decline to alter Nevada's established law concerning the plaintiff's burden of proof of causation in strict product liability cases, we answer this certified question in the negative.

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

DANIEL ANTHONY RAMET, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 50204

June 4, 2009 209 P.3d 268

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The supreme court, DOUGLAS, J., held that: (1) as a matter of first impression in Nevada, the State could not introduce evidence of defendant's refusal to consent to a warrantless search of his home

and could not argue to the jury that the refusal was evidence of guilt; and (2) error in the State's introduction of evidence of defendant's refusal to consent and jury argument that the refusal was evidence of guilt was harmless.

Affirmed.

Philip J. Kohn, Public Defender, and *Robert L. Miller*, Deputy Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, and *Nancy A. Becker*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   The State, at a murder trial, could not introduce evidence of defendant's refusal to consent to a warrantless search of his home and could not argue to the jury that the refusal was evidence of guilt. U.S. CONST. amend. 4.
2. ARREST; SEARCHES AND SEIZURES.
   Fourth Amendment prohibits unreasonable searches and seizures, thereby granting individuals the right to refuse entry and search without a warrant. U.S. CONST. amend. 4.
3. CRIMINAL LAW.
   The State may not introduce evidence of a defendant's refusal to submit to a warrantless search or argue it to a jury as evidence of guilt. U.S. CONST. amend. 4.
4. CRIMINAL LAW.
   Error in the State's introduction of evidence of defendant's refusal to consent to a warrantless search of his home and closing argument that the refusal was evidence of guilt was harmless at a trial for first-degree murder; defendant confessed during trial that he strangled victim, stopped and checked her pulse, and then continued to strangle her. U.S. CONST. amend. 4.

Before PARRAGUIRRE, DOUGLAS and PICKERING, JJ.

OPINION

By the Court, DOUGLAS, J.:

Appellant Daniel Anthony Ramet was convicted of first-degree murder. On appeal, Ramet raises several points of error allegedly committed during his trial, only one of which merits detailed consideration.[1] Ramet contends that the testimony concerning his refusal to consent to a search of his home, taken together with the prose-

[1]Ramet also argues that: (1) the State did not present sufficient evidence to establish the corpus delicti for first-degree murder absent his statements prior to and at trial; (2) the district court erred in denying his motion to suppress his

cutor's comment on it, was violative of his Fourth Amendment rights.

We conclude that the district court erred in allowing testimony and argument regarding Ramet's invocation of his Fourth Amendment right. However, the error in admitting the statements was harmless. We therefore affirm Ramet's conviction.

FACTS AND PROCEDURAL HISTORY

Ramet killed his 20-year-old daughter, Amy Ramet, in the home they shared. Ramet strangled Amy for a minute or two and then stopped; she moved, and he checked for a pulse, and then he strangled her for ''another couple of minutes.'' He continued to live in his home with Amy's body for three weeks, sending text messages from her cell phone to allay the fears of his younger daughter, Delsie, and his ex-wife, Bernadette.

After not being able to speak with Amy for three weeks, Bernadette and Delsie became so worried that they filed a missing person's report. Three days later, unsatisfied with the police's efforts, they decided to break into Ramet's home. Bernadette broke a window with a baseball bat and a foul smell came out, prompting them to call the police. Shortly thereafter, the police arrived at Ramet's home and the officers asked to perform a welfare check on Amy. Ramet refused, claiming it was a ''search and seizure issue.'' The police obtained a search warrant and discovered Amy's badly decomposed body in Ramet's home. Ramet was arrested and he confessed to killing his daughter.

Prior to trial, the defense sought to preclude any reference to Ramet's statements about search and seizure, arguing that the fact that Ramet had exercised a constitutional right was irrelevant and more prejudicial than probative. The district court denied the motion, finding Ramet's statement relevant and more probative than prejudicial.

At trial, the State presented testimony from two officers regarding Ramet's refusal to consent to a search of his home. On the stand, Officer Yant testified that Ramet's statements that he did not want the police in his house because ''it would be a search and seizure issue'' made the police even more suspicious. Officer Yant repeated

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statement to the police because the waiver of his *Miranda* rights and his statement were not voluntary; (3) the district court erred in denying his motion to suppress the recordings of telephone calls he made while in jail; (4) the district court erred in failing to declare a mistrial, sua sponte, based on the jury's exposure to unduly prejudicial prior bad act evidence; and (5) the prosecutor committed misconduct during closing argument by making arguments that were not supported by evidence. We have considered these issues and conclude that these additional challenges are without merit.

Ramet's statement that ''it would be a search and seizure issue'' two more times. Officer Bertges also repeated Ramet's statement during his testimony.

In addition, evidence of Ramet's refusal to submit to a search was used by the State to incriminate Ramet. During closing argument, the prosecuting attorney commented on Ramet's refusal: ''[a]nd when the police come to the house on two different occasions, he won't even let them conduct a welfare check. He's hiding something.''

DISCUSSION

[Headnote 1]

Ramet contends that the introduction of evidence that he refused to submit to a search of his home and reference to this incident in the State's closing argument violated his rights under the Fourth Amendment. We agree that the Fourth Amendment gives Ramet the constitutional right to refuse to consent to a search and his assertion of that right cannot be evidence of his guilt.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

[Headnote 2]

The Fourth Amendment prohibits unreasonable searches and seizures, thereby granting individuals the right to refuse entry and search without a warrant. U.S. Const. amend. IV; *see Schneckloth v. Bustamonte*, 412 U.S. 218, 234, 248 (1973); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). The Supreme Court has held that the Fifth Amendment right against self-incrimination also prohibits the State from commenting on the invocation of that right as evidence of the defendant's guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). The Court has concluded that asserting one's constitutional right cannot be a crime, nor can it be evidence of a crime. *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967); *District of Columbia v. Little*, 339 U.S. 1, 7 (1950).

While there are no Nevada cases on point, the Ninth Circuit Court of Appeals, in *United States v. Prescott*, held that ''refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing.'' 581 F.2d at 1351; *see also United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976). That court reasoned that ''[t]he right to refuse [entry] protects both the innocent and the guilty, and to use its exercise against the defendant would be, as the Court said in *Griffin*, a penalty imposed by courts for exercising a constitutional right.'' *Prescott*, 581

F.2d at 1352. We agree with the reasoning of the Ninth Circuit. Allowing the prosecution to use evidence of a defendant's invocation of a constitutional right against him would ''make meaningless the constitutional protection against unreasonable searches and seizures.'' *Bargas v. State*, 489 P.2d 130, 132 (Alaska 1971).

Other jurisdictions have also held that the prosecution may not use a defendant's refusal to consent to a search as evidence of guilt. *See U.S. v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000) (the Fourth Amendment entitled defendant to withhold consent to the search, and so introducing the invocation of that right as evidence of guilt may have been inconsistent with due process); *U.S. v. Thame*, 846 F.2d 200, 206-07 (3d Cir. 1988) (error for the prosecutor to argue that the defendant's refusal to consent to search of his bag constituted evidence of his guilt); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979) (right to refuse to consent to warrantless search of car would be ''effectively destroyed if, when exercised, it could be used as evidence of guilt''); *State v. Palenkas*, 933 P.2d 1269, 1280, 1282 (Ariz. Ct. App. 1996) (prosecutor's use of defendant's contacting his attorney and his invocation of his right to refuse a warrantless search as evidence of his guilt denied due process and required a new trial); *People v. Wood*, 127 Cal. Rptr. 2d 132, 136 (Ct. App. 2002) (defendant's invocation of his rights under the Fourth Amendment was improperly used to demonstrate his consciousness of guilt; however, this error was harmless); *People v. Keener*, 195 Cal. Rptr. 733, 735-36 (Ct. App. 1983) (the trial court improperly admitted evidence of defendant's refusal to allow police to enter his apartment to show a consciousness of guilt); *Gomez v. State*, 572 So. 2d 952, 953 (Fla. Dist. Ct. App. 1990) (police officer's comment on defendant's refusal to consent to a search without probable cause was constitutional error); *People v. Stephens*, 349 N.W.2d 162, 163-64 (Mich. Ct. App. 1984) (the Fourth Amendment gives the defendant the constitutional right to refuse to consent to a search and the assertion of that right cannot be evidence of a crime).

[Headnote 3]

We agree with the cases cited above; therefore, we hold that the State may not introduce evidence of a defendant's refusal to submit to a warrantless search, or argue it to the jury as evidence of guilt. The defendant's invocation of his Fourth Amendment right cannot be used as evidence of a crime or consciousness of guilt, and the district court abused its discretion by admitting this evidence.

[Headnote 4]

Because the error involved a violation of a federal constitutional guarantee, we may not consider it harmless unless we can say ''beyond a reasonable doubt that the error complained of did not con-

tribute to the verdict obtained.'' *Chapman v. California*, 386 U.S. 18, 24 (1967). In this case, there was overwhelming evidence of Ramet's guilt. Ramet confessed during trial that he strangled his daughter, stopped and checked her pulse, and then continued to strangle her. Under these circumstances, we can conclude beyond a reasonable doubt that the constitutional violation did not affect the jury's verdict.

CONCLUSION

In this appeal, we conclude that the State may not introduce evidence of or reference a defendant's invocation of his Fourth Amendment right to refuse to consent to a search of his home without a warrant. However, we conclude that the error in this case was harmless beyond a reasonable doubt. Accordingly, we affirm the judgment of conviction.

PARRAGUIRRE and PICKERING, JJ., concur.

HD SUPPLY FACILITIES MAINTENANCE, LTD., APPELLANT, *v.* LEIF BYMOEN, AN INDIVIDUAL; AND AZ PARTS–MASTER, INC., AN ARIZONA CORPORATION, RESPONDENTS.

No. 50989

June 11, 2009 210 P.3d 183

Certified questions under NRAP 5 concerning whether Nevada's rule prohibiting the assignment of noncompetition covenants in asset purchase transactions applies when a successor corporation acquires the covenants of noncompetition, nonsolicitation, or confidentiality as the result of a merger. United States District Court for the District of Nevada; Philip M. Pro, Judge.

The supreme court, PARRAGUIRRE, J., held that rule prohibiting the assignment of employee noncompetition covenants in asset purchase transactions does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger.

Questions answered.

Lewis & Roca, LLP, and *Daniel F. Polsenberg*, Las Vegas; *Ford & Harrison, LLP*, and *Dinita L. James*, Phoenix, Arizona, for Appellant.

Fennemore Craig, P.C., and *David W. Dachelet*, Las Vegas; *Quarles & Brady Streich Lang, LLP*, and *Eric B. Johnson*, Phoenix, Arizona, for Respondents.

1. ASSIGNMENTS.
   There is a basic policy in the law of contractual assignments of honoring an obligor's choice to contract with only the original obligee, thereby ensuring that the obligor is not compelled to perform more than his or her original obligation.
2. ASSIGNMENTS.
   Personal services contracts are not assignable absent consent. Restatement (Second) of Contracts § 317.
3. CORPORATIONS.
   In a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity.
4. ASSIGNMENTS; CORPORATIONS.
   Rule prohibiting the assignment of employee noncompetition covenants in asset purchase transactions absent an agreement negotiated at arm's length that explicitly permits assignment and that is supported by separate consideration does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger, regardless of whether the type of covenant is one of noncompetition, nonsolicitation, or confidentiality.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

The United States District Court for the District of Nevada has certified, under NRAP 5, three questions concerning ''[w]hether the Nevada rule stated in *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004), that 'absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee [non-competition] covenants are not assignable,' applies when a successor corporation acquires a non-competition covenant[, or a covenant of nonsolicitation or confidentiality] as a result of a merger?'' We answer these questions in the negative and clarify that *Traffic Control*'s rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger.

FACTS AND PROCEDURAL HISTORY

These certified questions arise from a federal district court action brought by appellant HD Supply Facilities Maintenance, Ltd. (HDS), to enforce restrictive covenants in an employment agreement against its former employee, respondent Leif Bymoen, and respondent AZ Partsmaster, Inc. (AZP), Bymoen's current employer.

HDS is the product of two separate mergers. In the first merger, Bymoen's original employer, Century Maintenance Supply, Inc., was acquired by Hughes Supply, Inc. In the second, Hughes merged

with a subsidiary of The Home Depot, Inc. The surviving corporation—renamed HDS—emerged as one of the largest maintenance, repair, and operations supplies distribution firms in the United States. As Century's successor-in-interest, HDS claims to have succeeded to the restrictive covenants of former Century employees, including Bymoen's.

While at Century, Bymoen entered into covenants of nonsolicitation and confidentiality, as well as a noncompetition covenant restricting him for six months after his termination from ''engag[ing] in any business activity, directly or indirectly, whether for profit or otherwise, which is similar to or competitive with the business of Century in any market area then being served by Century.'' The agreement did not contain an assignment clause.

Over the course of the two mergers and eventual name change, Bymoen continued in his position as a sales representative with Century's successors. On September 22, 2006, however, Bymoen voluntarily resigned from HDS and immediately took a sales position with AZP, an HDS competitor. Within days of joining AZP, Bymoen sent solicitation letters to his former HDS clients.

Learning of Bymoen's actions, HDS alerted AZP that Bymoen was allegedly in breach of the covenants contained in his original employment agreement with Century, HDS's predecessor. Nevertheless, AZP continued to employ Bymoen, prompting HDS to bring a federal action against both AZP and Bymoen for breach of contract, misappropriation of trade secrets, tortious interference with contractual relations, and breach of fiduciary duty.

Once suit was filed, Bymoen moved to dismiss HDS's contract claims on grounds that the restrictive covenants at issue were unenforceable under *Traffic Control* because he did not consent to their assignment when he was employed with Century. In response, HDS distinguished *Traffic Control* as limited to its facts, arguing first that the nonassignability rule announced in that decision was limited to asset purchase transactions, and second, that the rule did not govern the covenants of nonsolicitation and confidentiality.

Considering these conflicting arguments, the federal court concluded that *Traffic Control* was not clearly controlling precedent because it ''d[id] not directly answer'' the basic issue before it:

> whether a successor company may enforce an employee's noncompete, non-solicitation, and confidentiality covenants where the company claims the right to enforce the covenants through a . . . merger rather than through an asset purchase.

As a result, this issue was certified to this court under NRAP 5, in the form of three separate questions, which can be summarized as follows: whether the Nevada rule stated in *Traffic Control Services v. United Rentals*, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004),

that ''absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee noncompetition covenants are not assignable,'' applies when a successor corporation acquires (1) a noncompetition covenant, (2) a nonsolicitation covenant, or (3) a confidentiality covenant as the result of a merger?

DISCUSSION

These three certified questions ask us to clarify whether *Traffic Control*'s rule of nonassignability applies when a successor corporation acquires covenants of noncompetition, nonsolicitation, or confidentiality as the result of a merger. Because we conclude that *Traffic Control* does not apply in the context of a statutory merger, we answer these questions in the negative.

Traffic Control's rule of nonassignability

In *Traffic Control*, this court addressed ''whether an employer in a corporate sale may assign rights under an employee's covenant not to compete without the employee's consent.'' 120 Nev. at 169, 87 P.3d at 1055. Confronting an apparent split of authority, the court resolved the issue in the negative and announced that ''absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee noncompetition covenants are not assignable.'' *Id*. at 172, 87 P.3d at 1057.

Notwithstanding this broad language, which in Bymoen's view suggests that *Traffic Control* has a wider application, HDS argues that *Traffic Control* is narrowly limited to its facts, and as such, its rule prohibiting assignments does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger. For the following two reasons, we agree.

Traffic Control is a narrow decision based on the law of contract

HDS asserts that *Traffic Control*'s nonassignability rule is grounded in the common law of contractual assignments and, therefore, does not control whether a restrictive covenant may be validly acquired in the context of a statutory merger. In view of *Traffic Control*'s discrete facts and narrow reasoning, we agree.

Rather than support a comprehensive inquiry into different types of corporate transactions and their various consequences for assignments, *Traffic Control*'s narrow set of facts—which involved the attempted assignment by a selling company of a noncompetition covenant under an asset purchase agreement—supported a much more limited inquiry, namely, whether the noncompetition covenant

passed to the acquiring company under an asset purchase agreement without the employee's consent. *Id.* at 169-71, 87 P.3d at 1055-56.

Nevertheless, despite the narrow facts before it, the court framed its inquiry somewhat generically as whether a noncompetition covenant was assignable in a ''corporate sale,'' *id.* at 169, 87 P.3d at 1055, and, even more expansively, as whether the covenant was assignable ''through the medium of an asset sale (*or otherwise*).'' *Id.* at 172, 87 P.3d at 1057 (emphasis added). However, by seeming to treat an asset purchase as indistinguishable from other corporate transactions, the court's inquiry in *Traffic Control* was framed as if its restrictive rule would apply in any transactional context, which is the principal source of confusion underlying these certified questions.

As a result, we have been asked to determine the significance of this apparent incongruity—*i.e.*, whether, despite its broadly framed inquiry, *Traffic Control* is nonetheless limited to asset purchase transactions. In this regard, we agree with HDS that the limited scope of *Traffic Control*'s rule of nonassignability is betrayed by the nature of the court's reasoning and the narrowness of its concerns.

In *Traffic Control*, the court reasoned that because the covenants are ''personal'' in nature[1] and replacing a former employer with another obligee could fundamentally change the nature of an employee's obligation, noncompetition covenants could not be assigned without employee consent. *Id.* at 174-75, 87 P.3d at 1058-59.

[Headnote 1]

Notably, by conditioning assignability on consent, *Traffic Control* protects against unbargained-for changes in the scope of the restraint barring a covenanting employee from competing with his or her former employer. *See id.* at 174, 87 P.3d at 1058. In this way, the rule of *Traffic Control* echoes the basic policy in the law of contractual assignments of honoring an obligor's choice to contract with only the original obligee, thereby ensuring that the obligor is not compelled to perform more than his or her original obligation. *See Munchak Corporation v. Cunningham*, 457 F.2d 721, 725-26 (4th Cir. 1972); *Roeder v. Ferrell-Duncan Clinic, Inc.*, 155 S.W.3d 76, 89 (Mo. Ct. App. 2004).

Carrying this policy further, beyond requiring employee consent as a general matter, *Traffic Control* imposes two additional condi-

[1]These covenants are considered ''personal'' to the employee since deciding whether to refrain from competition with an employer after termination is based on an individualized assessment of that particular employer's ''character and personality.'' *Traffic Control*, 120 Nev. at 174, 87 P.3d at 1058.

tions to a valid assignment: an express assignability clause negotiated at arm's length and separate consideration. *Id.* at 175, 87 P.3d at 1059. As the court explained, the intended purpose of these conditions is to ''place[ ] the burden on the employer to seek assignability and adequately compensate[ ] the party with the lesser bargaining power for the possibility that a stranger to the covenant may ultimately assume the right to its enforcement.'' *Id.*

[Headnote 2]

Given this reasoning, which reveals a single-minded concern with preserving an employee's individualized choice to covenant not to compete with a particular employer, we conclude that *Traffic Control*'s rule of nonassignability stands for the general proposition, grounded in the law of contractual assignments, that personal services contracts are not assignable absent consent. *See* Restatement (Second) of Contracts § 317 (1981); 29 Richard A. Lord, *Williston on Contracts* § 74:10 (4th ed. 2003); 6 Am. Jur. 2d *Assignments* § 15 (2008); 6A C.J.S. *Assignments* § 32 (2004); *see, e.g.*, *Sisco v. Empiregas, Inc. of Belle Mina*, 237 So. 2d 463, 466-67 (Ala. 1970); *SDL Enterprises, Inc. v. DeReamer*, 683 N.E.2d 1347, 1349-50 (Ind. Ct. App. 1997); *Clark v. Shelton*, 584 P.2d 875, 877 (Utah 1978). As a protection under the law of contract, the rule therefore logically applies in the contractual setting of an asset purchase transaction because, in an asset purchase, ''the transaction introduces into the equation an entirely different entity, the acquiring business.'' *Corporate Exp. Office Products v. Phillips*, 847 So. 2d 406, 412 (Fla. 2003).

However, despite the rule's natural affinity to asset purchases, Bymoen contends that *Traffic Control*'s prohibition on assignments without consent can be generalized to other forms of corporate transactions, including mergers. As discussed below, we disagree.

Asset purchases are distinct from mergers

Although the court in *Traffic Control* lacked a similar opportunity, the Florida Supreme Court in *Corporate Express Office Products v. Phillips* addressed whether different forms of corporate transactions affect whether consent is necessary to effect a valid assignment of a covenant not to compete. 847 So. 2d 406.

Notably, while *Corporate Express* was cited in *Traffic Control* as authority for requiring consent to assignability in the context of an asset purchase, 120 Nev. at 174 n.10, 87 P.3d at 1058 n.10, as the certifying court expressed in its order denying Bymoen's and AZP's motion to dismiss HDS's contract claims, the citation of *Corporate Express* in *Traffic Control* is ''ambiguous'' because it was unclear whether we would adopt the remainder of the Florida Supreme

Court's reasoning regarding mergers. For purposes of these certified questions, we consider *Corporate Express*'s reasoning regarding mergers to be persuasive.

In *Corporate Express*, a corporation sued three former employees to enforce noncompetition covenants that purportedly passed to it from two of its predecessors, one of which the corporation claimed to have acquired through a 100-percent stock purchase and a subsequent merger, and the other via an asset purchase and a subsequent merger. 847 So. 2d at 407-08. Thus, unlike in *Traffic Control*, with three types of transactions before it—an asset purchase, a 100-percent stock purchase, and mergers—the court in *Corporate Express* was able to squarely address ''whether the nature of the . . . transaction affects whether . . . consent to an assignment of a noncompete agreement is necessary.'' *Id.* at 409.

In answering affirmatively, the court sharply distinguished between the nature of an asset purchase and a merger. Unlike in a merger, in which ''two corporations . . . unite into a single corporate existence,'' the acquiring corporation in an asset purchase becomes, in effect, a wholly new employer. *Id.* at 412-14. Accordingly, based on its recognition of a merging corporation's shared existence with its successor, the court concluded that, under Florida's merger statute, ''the surviving corporation in a merger assumes the right to enforce a noncompete agreement entered into with an employee of the merg[ing] corporation by operation of law, and no assignment is necessary.'' *Id.* at 414.

Although under a slightly varied rationale, these sharp distinctions were recently reiterated in *Aon Consulting v. Midlands Financial*, 748 N.W.2d 626 (Neb. 2008). There, the Nebraska Supreme Court considered whether a successor corporation could enforce a former employee's nonsolicitation covenant under Maryland's merger statute, which controlled under the merger agreement. *Id.* at 636. However, even though the Maryland and Florida statutes were based on similar language, *compare* Md. Code Ann., Corps. & Ass'ns § 3-114 (LexisNexis 2008) *with* Fla. Stat. Ann. § 607.1106 (West 2007), instead of embracing *Corporate Express*'s ''corporate continuity'' rationale, the court in *Aon Consulting* concluded simply that a nonsolicitation covenant is a corporate asset, and as such ''passes by operation of law to a successor corporation as the result of a merger, regardless of whether the agreement would otherwise be assignable.'' 748 N.W.2d at 637.

[Headnote 3]

Notably, despite some superficial differences in their rationales, *Corporate Express* and *Aon Consulting* looked directly to the relevant merger statute—as opposed to contract principles—to resolve whether a restrictive covenant transferred to a successor cor-

poration following a merger. Indeed, when a relevant merger statute exists, the issue of a covenant's assignability is not controversial. *See* 19 C.J.S. *Corporations* § 909 (2008). As the majority of courts have concluded when considering this issue, in a merger, the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity.[2] *See, e.g.*, *UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116, 1122 (D. Haw. 1998); *Corporate Express*, 847 So. 2d at 414; *Alexander & Alexander, Inc. v. Koelz*, 722 S.W.2d 311, 313 (Mo. Ct. App. 1986); *Aon Consulting*, 748 N.W.2d at 637; *Farm Credit Services v. Wysocki*, 627 N.W.2d 444, 450-53 (Wis. 2001).

[Headnote 4]

While this particular issue has never been directly confronted in Nevada, historically, this court has recognized a hard-and-fast distinction between the implications of a merger, which is a statutory creature, and an asset purchase, which is not. Specifically, in *Lamb v. Leroy Corp.*, a case involving whether an acquiring corporation was liable for a selling corporation's debts, the court contrasted an asset purchase, in which an acquirer does not assume the liabilities of the seller, with a merger, which ''imposes upon the surviving corporation all liabilities of the constituent corporations so merged.''[3] 85 Nev. 276, 279, 454 P.2d 24, 26 (1969). Thus, in light of *Corporate Express* and *Aon*, which treat mergers as distinct from asset purchases, and *Lamb*, which confirms that this basic distinction exists in Nevada, we clarify that *Traffic Control*'s rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger.[4]

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[2]This interpretation finds further support in the official comment to section 11.07 of the Model Business Corporation Act, which provides that ''all property owned by, and every contract right possessed by, each corporation . . . that merges into the survivor is vested in the survivor without reservation or impairment.'' 3 Model Bus. Corp. Act Ann. § 11.07 cmt. (2008). In explaining the effect of a merger under this model provision, the comment clarifies that a merger does ''not give rise to a claim that a contract with a party to the merger is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger.'' *Id.* This is so, according to the drafters, because ''[a] merger is not a conveyance, transfer, or assignment,'' but rather a unique process of combining corporate entities. *Id.*

[3]Although *Lamb* was construing former NRS 78.495, which provided that in the event of a merger the ''surviving corporation . . . shall possess all the rights, privileges, powers and franchises . . . and be subject to all the restrictions, disabilities and duties of each of the constituent corporations so merged,'' this early statute differs little in regard to the succession of rights of a surviving entity set forth in NRS 92A.250, Nevada's modern merger statute.

[4]Nevertheless, Bymoen urges this court to follow the reasoning of *Smith, Bell & Hauk, Inc. v. Cullins*, 183 A.2d 528 (Vt. 1962), in which the Vermont

Covenants of nonsolicitation and confidentiality

Since we have clarified that *Traffic Control*'s rule of nonassignability does not apply to statutory mergers, we need not address whether our conclusion would change depending on the type of covenant—whether one of noncompetition, nonsolicitation, or confidentiality—that a successor corporation stands to inherit in this type of corporate transaction.

CONCLUSION

The rule of nonassignability adopted in *Traffic Control* does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger. Accordingly, we answer the three certified questions in the negative.

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

PICKERING, J., concurring:

I concur in the majority's decision to limit *Traffic Control Services v. United Rentals*, 120 Nev. 168, 87 P.3d 1054 (2004), to the asset sale setting, despite the range of its dicta. I write separately to emphasize NRS 613.200(4), which *Traffic Control* mentions only briefly, and the majority's opinion does not cite. This statute sets controlling Nevada public policy. It provides that restrictive covenants in Nevada employment agreements are enforceable so long as ''the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.'' NRS 613.200(4). But for the stare decisis respect due *Traffic Control*, in my estimation judicial analysis of the enforceability of restrictive covenants in the merger and acquisition setting should begin and end with NRS 613.200(4).[1] In other respects, such covenants should be judged by the same rules as apply to contracts generally.

Supreme Court concluded that an acquiring corporation in a stock purchase transaction could not enforce a former employee's noncompetition covenant under Vermont's now-superseded merger statute, which provided that upon an asset sale, merger, or consolidation of different corporate entities, the acquiring corporation ''shall possess all the rights, privileges and benefits of the original corporation *properly exercisable* under the laws of [Vermont].'' *Id.* at 531 (emphasis added) (citing Vt. Stat. Ann. tit. 11, §§ 161, 165 (1958)). However, *Cullins* is unpersuasive because the court read the phrase ''properly exercisable'' as subjecting the noncompete agreement at issue in that case to the common law rule of nonassignability that we recognized in *Traffic Control*. Thus, while *Cullins* may remain good law with respect to asset purchase transactions, we are not persuaded that it has any application to mergers.

[1]The 1995 Legislature added paragraph 4 to NRS 613.200 ''to make it clear that the statute of Nevada does not prevent th[e]se kind of reasonable contracts from existing.'' Hearing on S.B. 128 Before the Senate Comm. on Commerce

As the federal district court's certification order reflects, *Traffic Control* can fairly be read to apply to all changes in an employer's ownership, whether accomplished by asset sale, dissolution, merger, or stock sale. Thus, *Traffic Control* frames the question presented as ''whether noncompetition covenants may be assigned from one employer to another through the medium of an asset sale (*or otherwise*).'' 120 Nev. at 172, 87 P.3d at 1057 (emphasis added). It answers the question in equally broad terms: ''Covenants not to compete are personal in nature and therefore are not assignable absent the employee's express consent. Further, an employer must obtain such consent through arm's-length negotiation with the employee, supported by valuable consideration beyond that necessary to support the underlying covenant.'' *Id*. at 176, 87 P.3d at 1060.

Whether an employer's business is transferred by asset sale, as opposed to merger or stock sale, should make little difference to an affected employee, if that information is even known. Nonetheless, to explain its narrow reading of *Traffic Control*, the majority distinguishes between asset sales and other forms of corporate acquisition, finding no ''assignment'' in rights that succeed by merger as distinguished from asset sale. While I agree with the majority, what I respectfully submit is missing from its analysis are the policy reasons for disavowing *Traffic Control*'s dicta.

There are a number of reasons to limit *Traffic Control* to its stated facts. First, its ''personal services'' rationale is questionable, given that ''the 'personal' nature of an employment contract ends following termination'' and has little application to modern employment relationships. *Sogeti USA LLC v. Scariano*, 606 F. Supp. 2d 1080, 1084, 1086 (D. Ariz. 2009) (criticizing *Traffic Control* and predicting the Arizona Supreme Court would reject its holding); *see AutoMed Technologies, Inc. v. Eller,* 160 F. Supp. 2d 915, 924 (N.D. Ill. 2001) (noting that, while ''[a]n employee has a clear interest in controlling for whom he works . . . the identity of the party enforcing a restrictive covenant should make little difference to a former employee'' challenging a restrictive covenant).

Second, the criteria set out in NRS 613.200(4) and in similar law elsewhere for determining the enforceability of restrictive covenants are better suited to the job of assessing the fairness of enforcing re-

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and Labor, 68th Leg. (Nev., Feb. 24, 1995) (comments of Senator Raggio). Reportedly, the Legislature was concerned that if Nevada did not permit such contracts to protect trade secrets and clients, businesses would choose not to operate in this state. *Id.* The Legislature considered whether the statutory limitations afforded employees sufficient protection and concluded that they did. ''These kinds of contracts have to have valuable consideration. These types of covenants are enforceable; they do not involve involuntary servitude if they are supported by valuable consideration, if they impose no greater restraint on the employee than necessary to protect the business and goodwill of the person.'' *Id*.

strictive covenants than corporate law distinctions between mergers, stock acquisitions, and asset sales. *See Sogeti*, 606 F. Supp. 2d at 1085. These criteria focus on the employment relationship itself, not the transactional or corporate means by which a change in the parties to that relationship occurs: Did the change in employer, however accomplished, materially change the scope of the restrictive covenant for which consideration was given, making its enforcement unreasonable? This is the right question to ask, regardless of how the successor came to stand in the original employer's shoes. Nonetheless, under *Traffic Control* as narrowed by the majority's opinion, in an asset sale setting, pre-acquisition restrictive covenants are not enforceable without new consideration and employee consent (unless the preexisting contract specifies free assignability), whereas in the merger or stock acquisition setting, they are. And this is true whether the new employer is a whale devouring a minnow or a retiring parent transferring a small business to a daughter or son, and without regard to the consideration given for the original covenant.

Third, contract law normally allows assignment of contract rights unless assignment is prohibited by express contract term, statute, or public policy, or the particular circumstances of the case are such that allowing substitution materially varies the burden or risk of performance. Restatement (Second) of Contracts § 317 (1981). *Traffic Control*'s ''holding that restrictive covenants may never be assigned without consent'' thus reverses the normal common law rule allowing assignment and imposes ''new public policy restrictions on contract rights.'' *See AutoMed*, 160 F. Supp. 2d at 924, *cited with approval in Sogeti*, 606 F. Supp. 2d at 1086. In the 1995 amendments to NRS 613.210(4), the Legislature set public policy to govern creation and enforcement of restrictive covenants in contracts that apply to Nevada businesses with Nevada employees. This is a valid exercise of legislative prerogative. *Cf. Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 292-93 (Cal. 2008) (rejecting a Ninth Circuit decision suggesting California courts would judicially adopt a ''narrow-restraint'' exception to California statute that, unlike Nevada's, invalidates restrictive covenants unless a specific statutory exception applies; and noting that it would ''leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint [statutory] rule''). By imposing additional requirements, beyond those stated in the statute, *Traffic Control* unsettles normal contract-law-based expectations that the Legislature intended to foster.

Finally, as the employer conceded at argument, avoiding invalidation under *Traffic Control*'s per se rule is only a first step; the court will still have to assess whether the contract, viewed in light of the new, post-merger day, satisfies NRS 613.200(4). Today's case apparently does not present conflicts between Nevada and other

states' laws. But as the Vermont law analyzed by the majority, *ante* n.4, suggests, we can expect that issue to visit next. The question becomes whether the multilayered analysis our decisional law now requires adds anything beyond complexity and delay to fair and efficient dispute resolution in this arena. I submit that it does not.

ST. JAMES VILLAGE, INC., APPELLANT, *v.* JENNIFER A. CUNNINGHAM; CRAIG CUNNINGHAM; JAMES H. SALADIN; AND THELMA L. SALADIN, RESPONDENTS.

No. 49398

June 25, 2009 210 P.3d 190

Appeal from a district court order dismissing a complaint in an easement action. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Owner of servient estate brought a declaratory action, seeking authorization to unilaterally relocate an easement to facilitate development of the property and alleging that the relocation would not materially inconvenience the dominant estate owners. The district court dismissed the complaint, and the servient estate owner appealed. The supreme court, HARDESTY, C.J., held that an easement with metes and bounds described in the deed could not be unilaterally relocated by owner of servient estate.

Affirmed.

[Rehearing denied September 15, 2009]

McDonald Carano Wilson LLP and *John Frankovich* and *Kimberly H. Albro*, Reno, for Appellant.

Woodburn & Wedge and *Nicholas F. Frey*, Reno, for Respondents.

1. EASEMENTS.

   Adoption of the Restatement (Third) of Property section that permits a servient estate owner to unilaterally relocate an easement so long as the relocation does not substantially affect the dominant estate's rights, is warranted in those circumstances where the creating instrument does not define the easement through specific reference to its location or dimensions and the unilateral relocation will not materially inconvenience the dominant estate owner. Restatement (Third) of Property § 4.8.

2. DECLARATORY JUDGMENT.

   When the parties raise only legal issues on appeal from a district court order resolving a request for declaratory relief, the supreme court will review the district court's decision de novo.

3. COURTS.
   ''Dictum,'' a court's statement in a case when it is unnecessary to a determination of the questions involved, is not controlling as precedent in other cases.
4. EASEMENTS.
   Easement, under deed that gave a metes and bounds description of its specific location and was silent regarding any right to relocation by the servient estate, could not be unilaterally relocated by owner of servient estate, although the relocation might not materially inconvenience the dominant estate owners; deed granting the easement here defined its location.
5. EASEMENTS.
   The purpose of the Restatement (Third) of Property rule that permits a servient estate owner to unilaterally relocate an easement so long as the relocation does not substantially affect the dominant estate's rights, is to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder. Restatement (Third) of Property § 4.8.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we consider whether the servient estate owner has any authority to unilaterally relocate an easement burdening its property, provided that the relocation does not materially inconvenience the dominant estate owner.

To facilitate the development of its property into a planned community, appellant St. James Village, Inc., asked the dominant estate owners if St. James Village could relocate an easement that traversed across a portion of its property. The dominant estate owners refused to consent to the relocation. Accordingly, appellant filed a declaratory action in district court, seeking authorization to unilaterally relocate the easement, alleging that the relocation would not materially inconvenience the dominant estate owners. The district court denied appellant's requested relief, reasoning that *Swenson v. Strout Realty, Inc.*, 85 Nev. 236, 239, 452 P.2d 972, 974 (1969), mandates that the dominant estate owners consent to the relocation of the easement.

We are now asked to revisit a statement made in *Swenson*, that, in general, ''the location of an easement once selected, cannot be changed by either the landowner or the easement owner without the other's consent.'' 85 Nev. at 239, 452 P.2d at 974. In doing so, St. James Village invites us to adopt section 4.8 of the Restatement (Third) of Property, which permits a servient estate owner to uni-

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

laterally relocate an easement so long as the relocation does not substantially affect the dominant estate's rights.

[Headnote 1]

We conclude that the statement made in *Swenson* indicating that fixed easements cannot be moved is overbroad, and determine that adoption of section 4.8 of the Restatement (Third) of Property is warranted in those circumstances where the creating instrument does not define the easement through specific reference to its location or dimensions and the unilateral relocation will not materially inconvenience the dominant estate owner. Because the creating instrument in this case specifies the location and dimension of the easement, we conclude that the district court properly denied St. James Village's request for declaratory relief.

FACTS AND PROCEDURAL BACKGROUND

Respondents Jennifer A. Cunningham, Craig Cunningham, James H. Saladin, and Thelma L. Saladin (collectively, the Cunninghams) own two parcels of property located in Washoe County that are adjacent to 1,600 acres owned by St. James Village. In 1974, the Cunninghams' predecessors in interest obtained an easement across the land that now belongs to St. James Village. The Cunninghams' predecessors purchased an express easement for access to their property from a public road. The deed for the easement gives a metes and bounds description of its specific location but is silent regarding any right to relocation by the servient estate. The Cunninghams' predecessors' easement deed was recorded in 1974. The conveyance to the Cunninghams was recorded in 1997 and included the metes and bounds description of the easement.

After St. James Village acquired the servient property, it designed a master-planned gated community. The easement, as it currently exists, crosses 14 lots in the planned development, 2 of which have been approved and recorded and 12 of which have been approved. To allow development of those lots as proposed in St. James Village's master plan, St. James Village seeks a slight relocation of the easement by adding curves to the existent roadway.[2] St. James Village proposes to shift the easement and eventually incorporate it into the paved roads that will serve the subdivision and be maintained by the homeowners' association. St. James Village attempted to reach an agreement with the Cunninghams to relocate the easement but the Cunninghams refused to consent.

Upon failing to reach an agreement with the Cunninghams, St. James Village sought declaratory relief in the district court, contending that ''property owners can unilaterally relocate easements,

[2]Please see map in Appendix A to this opinion.

if such relocation does not materially inconvenience the easement holder, in order to allow the development of their property.'' The Cunninghams moved to dismiss St. James Village's complaint for declaratory relief, arguing that dismissal was warranted because under *Swenson v. Strout Realty, Inc.*, 85 Nev. 236, 239, 452 P.2d 972, 974 (1969), consent to relocate by the dominant estate owner is always required.[3] Despite St. James Village's contentions that the law is unsettled in Nevada and adoption of section 4.8 of the Restatement would be a sensible development in the law of easements, the district court denied St. James Village the declaratory relief it sought. The court found that, under *Swenson*, Nevada law requires the consent of both parties to move an easement.[4] This appeal followed.

DISCUSSION

On appeal, St. James Village argues that *Swenson* is not controlling on this issue, as the statement made in *Swenson* regarding unilateral relocation of easements is dictum. St. James Village then advocates for the adoption of section 4.8 of the Restatement (Third) of Property, governing unilateral relocation of easements, and this court's interpretation of that rule, which reads:

> *Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows*:
>
> (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
>
> (2) The dimensions are those reasonably necessary for enjoyment of the servitude.
>
> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to

[3]While the Cunninghams used summary judgment language in, and attached exhibits to, their motion, the district court considered the motion as one for seeking a dismissal under NRCP 12(b)(5) rather than summary judgment. Regardless, we treat the district court's order as one resolving a request for declaratory relief.

[4]The court summarily found:

> [T]he requirement of consent as stated in *Swenson*, *supra*, is currently the law in Nevada. The Court finds no statute, case, or other authority that has changed, modified, or overruled *Swenson*. It is not the place of the District Court to change the law or to determine what the Nevada Supreme Court should do.
>
> Because the Plaintiff has failed to plead a cognizable claim under Nevada law, the Court finds that Defendants have met the standard of dismissal by showing that Plaintiff is not entitled to relief under any set of facts that could be proved in support of its claim.

> make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

(Emphasis added.) According to St. James Village's reading of the Restatement rule, nothing in the introductory language limits the applicability of the rule. St. James Village claims that such language merely refers to the locations and dimensions of an easement that can be adjusted. Moreover, St. James Village contends that if the creating document fails to expressly prohibit relocation of the easement, like the deed in this case, the easement may be moved by the owner of the servient estate. Although the deed in this appeal contains a specific description and location of the easement, the deed is silent as to relocation.

The Cunninghams argue that *Swenson* is controlling law, which precludes St. James Village from unilaterally relocating the easement. The Cunninghams further argue that even if *Swenson* is not authoritative on this matter and this court adopts the Restatement rule, St. James Village cannot prevail. According to the Cunninghams, the language prefacing section 4.8 of the Restatement (Third) of Property unambiguously provides that an easement may be unilaterally relocated so long as the creating instrument does not specifically define the location or dimensions of the easement. Because the deed granting the easement in this case defines the easement by metes and bounds, the Cunninghams argue that section 4.8 of the Restatement precludes unilateral relocation by St. James Village.

In resolving this appeal, we must consider whether a statement made in *Swenson* is controlling or mere dictum. While we determine that the statement made in *Swenson* is authoritative, we conclude that it is overbroad and public policy would be significantly furthered by implementation of the modern Restatement rule concerning relocation of easements by the servient estate owner. In adopting the Restatement rule, we determine that the plain meaning of the rule's introductory language prohibits application of the rule when the creating instrument provides for an express location or dimensions of the easement. Thus, when the easement at issue has a location certain, the Restatement rule is not applicable and the easement cannot be unilaterally relocated. Only when the creating instrument is silent as to the location of the easement may a servient owner seeking to unilaterally relocate the easement avail himself or

herself of the Restatement rule. And, even then, the servient owner must establish that it meets the three-factor test set forth in subsections a through c of section 4.8(3) of the Restatement (Third) of Property.

Standard of review

[Headnote 2]

When the parties raise only legal issues on appeal from a district court order resolving a request for declaratory relief, this court will review the lower court's decision de novo. *Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. 138, 146, 179 P.3d 542, 548 (2008). In this case, the single issue presented is whether Nevada law permits servient estate owners to unilaterally relocate easements traversing across their property. Because this is purely a legal question, this court's standard of review is plenary. *See id.*

Swenson v. Strout Realty, Inc., is controlling

[Headnote 3]

In *Swenson v. Strout Realty, Inc.*, this court stated, ''It is a general rule of law that, in the absence of [a] statute to the contrary, the location of an easement once selected, cannot be changed by either the landowner or the easement owner without the other's consent.'' 85 Nev. 236, 239, 452 P.2d 972, 974 (1969). Dictum is not controlling. *See Camacho v. State*, 119 Nev. 395, 398 n.7, 75 P.3d 370, 373 n.7 (2003). A statement in a case is dictum when it is ''unnecessary to a determination of the questions involved.'' *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941). Thus, in order to determine whether the *Swenson* court's statement is dictum, this court must examine whether the issues involved in *Swenson* necessitated a determination of whether the location of an easement could be changed unilaterally.

In *Swenson*, a real estate broker sued Dorothy and Lester Swenson in order to recover a commission after the broker secured a viable buyer for property owned by the Swensons, but the Swensons refused to sign the escrow instruments, which rendered the sale incomplete. 85 Nev. at 237-38, 452 P.2d at 972-73. The Swensons countersued for damages arising out of a second transaction with the real estate broker wherein the Swensons asserted that the broker falsely represented that the Swensons could relocate an easement that traversed across the land that they purchased. *Id.* at 238, 452 P.2d at 973. The district court entered judgment in favor of the real estate broker, finding that the Swensons could not rely on the broker's legally incorrect statement that the easement could be relocated. *Id.* at 239, 452 P.2d at 974.

The *Swenson* court stated generally that ''the location of an easement once selected[ ] cannot be changed by either the landowner or

the easement owner without the other's consent.'' *Swenson*, 85 Nev. at 239, 452 P.2d at 974. The court further stated that the broker's advice to the Swensons had been an innocent misrepresentation of the law by a nonlawyer and that the Swensons had not alleged bad faith or fraud on the part of the broker. *Id*. at 239, 452 P.2d at 973-74. Although the *Swenson* court did not clearly enunciate the applicable rule of law, it appears that the court considered at least two elements required to establish the cause of action: (1) the statement was false, and (2) the purchasers could rely on the statement. *Id*. at 239-40, 452 P.2d at 974. Prior to determining the reliance element of the test, the *Swenson* court examined the falsity element and concluded that the broker's statement was legally incorrect. *Id*. at 239, 452 P.2d at 974. Although, arguably, the court could have resolved the viability of the Swensons' claim based on its conclusion that the Swensons' reliance on the broker's statement was unreasonable, the court declined to reach that question until it determined whether the broker's statement was false. *See id*. at 239-40, 452 P.2d at 974. Because the court necessarily considered the falsity of the statement, we determine that *Swenson* is controlling on the issue of whether this court has established that unilateral relocation of an easement is prohibited.

Although *Swenson* is authoritative, we nevertheless consider whether the rule stated in *Swenson*, which prohibits unilateral relocation of express easements is overbroad and whether significant public policy considerations warrant this court's adoption of the modern section 4.8 of the Restatement (Third) of Property, which permits unilateral relocation under certain circumstances.

Section 4.8 of the Restatement (Third) of Property

[Headnote 4]

St. James Village advocates for the adoption of the rule set forth in section 4.8 of the Restatement (Third) of Property because the rule's flexible approach is preferable to the rigid traditional rule, as it allows the owner of the servient estate to develop his or her property in any way that does not intrude upon the rights of the dominant estate. The Cunninghams argue against adoption of the Restatement rule, claiming that such a rule undermines the property rights and the bargained-for expectations of easement purchasers. After balancing public policy considerations, we adopt the Restatement rule.

[Headnote 5]

The purpose of the Restatement rule is to ''permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder.'' Restatement (Third) of Prop.: Servitudes § 4.8 cmt. f (2000). Moreover, the rule works to ''increase overall utility because it will increase the value of the servient estate without diminishing the value

of the dominant estate and it will encourage the use of easements and lower their price by decreasing the risk [that] the easements will unduly restrict future development of the servient estate.'' *Id.* Allowing the servient estate owner to move the location of the easement burdening his or her property provides a further benefit in the form of a ''fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate.'' *Id.*

Jurisdictions adopting the Restatement rule give the same or similar reasons: allowing full economic development of the servient estate, *see Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1236 (Colo. 2001) (noting that the rule ''maximizes the overall utility of the land'' and enables the owner of the servient estate to ''make the most economic use of her land, including uses unforeseen when the easement originated''); *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1058 (Mass. 2004) (''An easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose.''), granting the owner of the servient estate an equal right to develop his or her property as that of the dominant estate owner, *see Dwyer*, 809 N.E.2d at 1057 (noting that the owner of a dominant estate generally has the right to increase the use of her land, including uses unforeseen when the easement originated), and fairly balancing competing property interests, *see Roaring Fork Club*, 36 P.3d at 1234-36 (noting that Colorado jurisprudence in other areas of property law was appropriately shifting to accommodate owners' competing uses and that the Restatement rule best served that accommodation).

We acknowledge the negative concerns surrounding the adoption of the Restatement rule. One concern is that the rule will trigger increased litigation over the reasonableness of the servient estate owner's proposed relocation. *See Herren v. Pettengill*, 538 S.E.2d 735, 736 (Ga. 2000). Other concerns include that the Restatement rule undermines certainty in the property rights of dominant estate owners, *see id.* (noting that the majority rule ''provides certainty in land ownership''), and that it denies dominant estate owners the benefit of their bargain, *see id.* (''Allowing unilateral avoidance of the contract . . . not only would violate fairness principles, it also would create uncertainty in real property law by opening the door for increased litigation over 'reasonableness' issues based on today's conditions rather than those considered in the original bargain.'').

Although adoption of the Restatement rule might indeed increase litigation, we determine that, under appropriate circumstances, public policy that is furthered by adoption of the Restatement rule sig-

nificantly outweighs the potential for increased litigation. Further, we conclude that the dominant estate owner's property rights are not undermined by adoption of the Restatement rule because the rule permits only reasonable alterations to the easement's location. The easement must also continue to serve the purpose for which it was created. Thus, the value of the easement is not lost by a reasonable relocation. And, since the value of the easement is not lost, the dominant estate owner is not denied the benefit of the bargain.

While we recognize that Nevada law has generally favored fixed property rights, *see, e.g.*, *Boyd v. McDonald*, 81 Nev. 642, 650, 408 P.2d 717, 722 (1965), and we have strictly construed express easements, *see, e.g.*, *S.O.C., Inc. v. The Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.3d 243, 246-47 (2001), we determine that adoption of the Restatement rule is warranted because the modern approach that the Restatement rule conveys accommodates the development of the servient estate without unduly interfering with the dominant estate owner's rights, which are adequately safeguarded by the reasonableness limitations expressed in the Restatement rule. Therefore, in light of the practical realities of competing property uses and interests, we expressly adopt section 4.8 of the Restatement (Third) of Property to decide unilateral easement relocation cases.

Despite this court's adoption of the Restatement rule, the Cunninghams assert that, as applied to this case, St. James Village's proposed relocation is prohibited by the introductory language of the rule. Particularly, the Cunninghams argue that a plain reading of the prefatory language of section 4.8, which provides that the location and dimensions of an easement are determined by subsections 1 through 3 ''[e]xcept where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude,'' bars relocation when the creating instrument specifies a location or dimensions certain. And, because the Cunninghams' deed contains a metes and bounds description of the easement, the Cunninghams claim that St. James Village cannot avail itself of the Restatement rule to unilaterally relocate the Cunninghams' easement.

In reply, St. James Village argues that the introductory language of section 4.8 does not limit the applicability of its provisions because such a reading would render that language and the language of subsection 3 inconsistent with each other. Section 4.8(3) provides that an easement may be unilaterally relocated ''[u]nless expressly denied by the terms of an easement.'' Therefore, St. James Village contends, unilateral relocation is only prohibited when the creating instrument expressly prohibits relocation. We disagree.

The language prefacing section 4.8 unambiguously states that the rule's provisions apply ''[e]xcept where the location and dimensions are determined by the instrument or circumstances surrounding cre-

ation of a servitude.'' Interpreting this introductory language as meaning that section 4.8's provisions will govern the relocation of easements so long as the easement at issue does not have a location or dimensions certain is consistent with subsection 3. Subsection 3 does not have any bearing on the introductory language of the rule; rather, subsection 3 is another limitation. Under section 4.8(3), even if the easement does not have a location or dimensions certain, if the creating instrument prohibits relocation, then the servient estate owner may not avail himself or herself of the Restatement rule's unilateral relocation provision.

Construing the introductory language of the Restatement rule to prohibit unilateral relocation when the deed contains a certain location or dimensions is not only supported by a plain reading of the rule, but also a majority of jurisdictions' caselaw addressing the issue. *See, e.g.*, *Stanga v. Husman*, 694 N.W.2d 716, 718-20 (S.D. 2005) (applying the Restatement rule and permitting unilateral relocation by the servient estate owner because the creating instrument did not specifically define the location or dimensions of the easement); *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1236-37 (Colo. 2001) (adopting section 4.8(3) of the Restatement (Third) of Property but explaining that ''under the Restatement, a burdened estate owner may unilaterally move an easement (unless it is specified in deeds or otherwise to have a location certain)''); *Lewis v. Young*, 705 N.E.2d 649, 654 (N.Y. 1998) (permitting unilateral relocation after determining that the deed's lack of specificity in describing the easement implied that the original parties did not intend to fix the location).

Here, the Cunninghams' recorded deed expressly contains a metes and bounds description of the easement. Thus, since the deed's description indicates that the original parties intended to fix the location of the easement, St. James Village cannot avail itself of the Restatement rule and relocate the easement absent the Cunninghams' consent—even if the proposed relocation does not hinder the Cunninghams' interests. Accordingly, we affirm the district court's order dismissing St. James Village's complaint.

CONCLUSION

Because we determine that the *Swenson* court necessarily considered whether an easement can be relocated unilaterally, we conclude that the statement in *Swenson*—that once the location of an easement is determined it cannot be relocated without the dominant estate owner's consent—is not dictum and is therefore authoritative on the issue. Nevertheless, we determine that the rule in *Swenson* is overbroad and, in light of competing property interests, adoption of section 4.8 of the Restatement (Third) of Property is warranted.

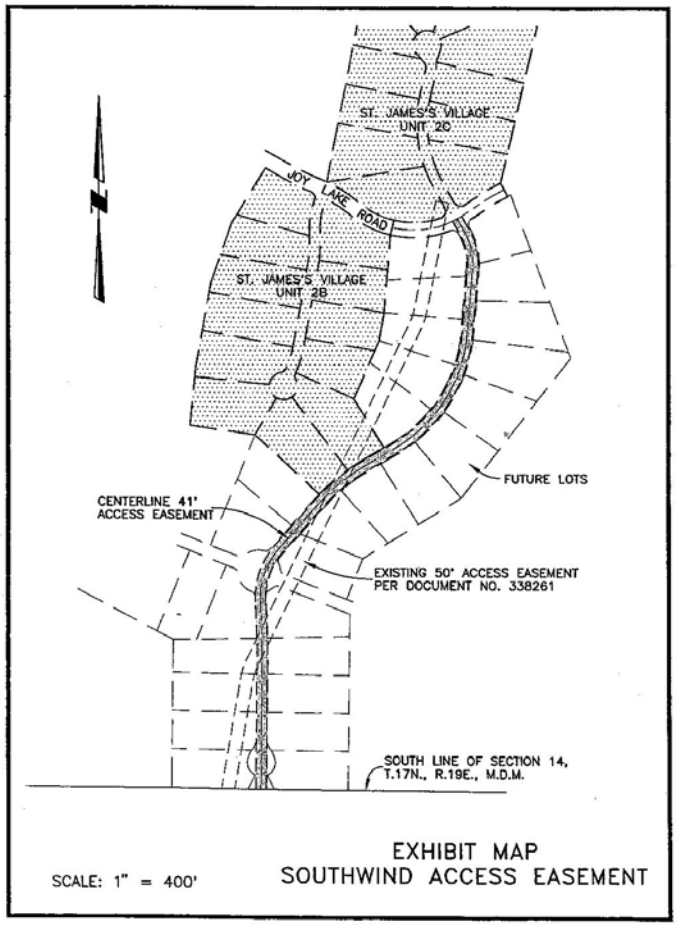
Adoption of this Restatement rule will accommodate the development of the servient estate while simultaneously protecting the dominant estate's interests under appropriate circumstances in which the Restatement rule applies. Accordingly, we expressly adopt section 4.8 of the Restatement (Third) of Property in unilateral easement relocation cases.

In adopting the Restatement rule, however, we further conclude that, based on a plain reading of the rule and considering other jurisdictions' interpretations of the rule, the introductory language of section 4.8 prohibits unilateral relocation when the creating instrument defines the easement through specific reference to its location or dimensions.

Therefore, because the Cunninghams' deed contained a metes and bounds description of the easement, we affirm the district court's order dismissing St. James Village's complaint as the district court reached the correct result, even though the district court relied on different grounds in reaching its decision. *See generally Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (holding that ''[i]f a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons'').

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

APPENDIX A


ST. JAMES'S VILLAGE UNIT 2C
JOY LAKE ROAD
ST. JAMES'S VILLAGE UNIT 2B
FUTURE LOTS
CENTERLINE 41' ACCESS EASEMENT
EXISTING 50' ACCESS EASEMENT PER DOCUMENT NO. 338261
SOUTH LINE OF SECTION 14, T.17N., R.19E., M.D.M.
SCALE: 1" = 400'
EXHIBIT MAP
SOUTHWIND ACCESS EASEMENT

MGM MIRAGE, A DELAWARE CORPORATION; AND STEEL ENGINEERS, INC., A NEVADA CORPORATION, APPELLANTS, *v.* NEVADA INSURANCE GUARANTY ASSOCIATION, A NONPROFIT UNINCORPORATED NEVADA ENTITY, RESPONDENT.

No. 49445

June 25, 2009 209 P.3d 766

Appeal from a district court order granting summary judgment in a workers' compensation insurance coverage matter. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Nevada Insurance Guaranty Association (NIGA) filed complaint seeking declaration regarding its obligations to reimburse self-insured employers for workers' compensation claims that should have been paid by employers' insolvent excess insurance carrier. The district court entered summary judgment, holding that self-insured employers under workers' compensation laws were precluded from seeking reimbursement from NIGA. Employers appealed. The supreme court, HARDESTY, C.J., held that self-insured employers were not ''insurers'' for purposes of NIGA Act, and thus were not barred from recovering payment from NIGA.

Reversed and remanded.

Kurth Law Office and *Robert O. Kurth, Jr.*, Las Vegas, for Appellant Steel Engineers.

S. Denise McCurry, Las Vegas; *Sandra Douglass Morgan*, Las Vegas, for Appellant MGM Mirage.

Hutchison & Steffen, LLC, and *Michael K. Wall* and *James H. Randall*, Las Vegas, for Respondent.

Catherine Cortez Masto, Attorney General, *Shane Chesney*, Senior Deputy Attorney General, and *Joanna N. Grigoriev*, Deputy Attorney General, Carson City, for Amicus Curiae Nevada State Insurance Commissioner.

Lemons, Grundy & Eisenberg and *Alice Campos Mercado*, Reno, for Amicus Curiae Property Casualty Insurers Association of America.

Scarpello & Huss, Ltd., and *Mark R. Forsberg*, Carson City, for Amicus Curiae Carson City.

1. APPEAL AND ERROR.
The construction of a statute is a question of law reviewed de novo.

2. INSURANCE.
   The purpose of the Nevada Insurance Guaranty Association Act (NIGA Act) is to provide limited protection for insureds in the event that their insurers become insolvent. NRS 687A.060.
3. STATUTES.
   When presented with an issue of statutory interpretation, the supreme court should give effect to the statute's plain meaning.
4. STATUTES.
   When the language of a statute is plain and unambiguous, such that it is capable of only one meaning, the supreme court should not construe that statute otherwise.
5. STATUTES.
   If following a statute's apparent plain meaning results in a meaning that runs counter to the ''spirit'' of the statute, the supreme court may look outside the statute's language.
6. WORKERS' COMPENSATION.
   Self-insured employers under workers' compensation laws were not ''insurers,'' for purposes of Nevada Insurance Guaranty Association Act (NIGA Act), precluded from seeking reimbursement from NIGA for workers' compensation claims that should have been paid by employers' insolvent excess insurance carrier. NRS 687A.033(2)(a).

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, C.J.:

In this appeal we must determine whether appellants, as self-insured employers under Nevada's Workers' Compensation Act, can seek reimbursement from the Nevada Insurance Guaranty Association (NIGA) for amounts that should have been paid by appellants' insolvent excess insurance carrier. Because we determine that appellants are not insurers for purposes of the Nevada Insurance Guaranty Association Act (NIGA Act), we conclude that self-insured employers under the Workers' Compensation Act, like MGM Mirage (MGM) and Steel Engineers, Inc. (SEI), are not barred from recovering payment from NIGA for their covered workers' compensation claims payable by their insolvent excess insurance carrier.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants MGM and SEI are both employers in the State of Nevada who operate as self-insured employers, as defined under Nevada's workers' compensation laws. In accordance with the re-

[1]THE HONORABLE JEROME POLAHA, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of THE HONORABLE KRISTINA PICKERING, Justice, who voluntarily recused herself from participation in the decision of this matter. Nev. Const. art. 6, § 4.

quirements set forth in the Workers' Compensation Act, MGM and SEI obtained excess workers' compensation insurance policies. Both employers contracted with Reliance National Insurance Company (Reliance) for their excess policies. The policies, entitled ''Specific Excess Workers' Compensation and Employers' Liability Policy,'' declare that MGM and SEI are ''insured[s]'' and Reliance is their insurer.

In October 2001, the Commonwealth Court of Pennsylvania declared Reliance Insurance Company, including Reliance, insolvent and entered an order of liquidation. MGM and SEI were required to pay workers' compensation funds to employees whose claims were pending at the time Reliance became insolvent. As a result of Reliance's insolvency, pursuant to NRS 687A.060, NIGA became responsible for claims that were covered under the Reliance policies and the NIGA Act.[2] In order to recover the expended funds, MGM and SEI requested reimbursement from NIGA.

NIGA concedes that it is responsible for paying insolvent insurers', like Reliance's, unpaid Nevada claims that are within NRS 687A.033's definition of ''covered claims.'' It further agrees that MGM and SEI could have recovered payment for some or all of the expended workers' compensation funds based on both entities' excess insurance policies with Reliance had Reliance remained solvent. However, NIGA refused to pay the claims because it was uncertain as to whether MGM and SEI fell within the NIGA Act's definition of ''insurer,'' which would place their claims outside the scope of ''covered claims'' under the NIGA Act, specifically NRS 687A.033(2)(a), and prohibit NIGA from paying the claims.

Because NIGA was uncertain about its statutory obligations towards MGM and SEI, NIGA filed a complaint in district court, seeking a declaration of the meaning of the term ''insurer'' under the NIGA Act. The district court granted summary judgment in favor of NIGA.

---

[2]NRS 687A.060(1) provides, in pertinent part:

> The Association:
>
> (a) Is obligated to the extent of the *covered claims* existing before the determination of insolvency and arising within 30 days after the determination of insolvency, or before the expiration date of the policy if that date is less than 30 days after the determination, or before the insured replaces the policy or on request cancels the policy if he does so within 30 days after the determination . . . .
>
> . . . .
>
> (b) Shall be deemed the insurer to the extent of its obligations on the *covered claims* and to that extent has any rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent. The rights include, without limitation, the right to seek and obtain any recoverable salvage and to subrogate a covered claim, to the extent that the Association has paid its obligation under the claim.

(Emphases added.)

In its order, the district court concluded that summary judgment was appropriate because there were no factual disputes and the sole issue presented was one of statutory construction. The court determined that the definition of ''insurer'' under NRS 616A.270 of the Workers' Compensation Act—which includes self-insured employers—must be read consistently with the NIGA Act. Because MGM's and SEI's claims were based on funds paid to employees as workers' compensation, the court determined that the Workers' Compensation Act's definition of ''insurer'' was applicable to the NIGA Act. And, because MGM and SEI did not dispute the fact that they were self-insured employers under the workers' compensation laws, and therefore, that they were insurers under the Workers' Compensation Act, the court concluded that MGM and SEI were insurers under the NIGA Act. As a result, the court held that MGM and SEI were precluded from seeking reimbursement from NIGA. MGM and SEI appeal.

DISCUSSION

On appeal, MGM and SEI argue that their claims are recoverable, maintaining that self-insured employers' excess workers' compensation claims fall within the NIGA Act's definition of ''covered claim'' because they do not engage in the business of insurance, although they are self-insured employers under workers' compensation laws.

NIGA, on the other hand, argues that the NIGA Act prohibits it from paying MGM's and SEI's claims because MGM and SEI are considered insurers under the Workers' Compensation Act, as they are self-insured employers. Because MGM and SEI are insurers under Nevada's workers' compensation laws, and the Workers' Compensation Act and the NIGA Act are connected, NIGA contends, MGM and SEI are likewise insurers under the NIGA Act.

In resolving this appeal, we will address whether a self-insured employer, as defined in the Workers' Compensation Act, qualifies as an insurer for purposes of the NIGA Act, thus precluding recovery from the NIGA fund.

Standard of review

[Headnote 1]

'' 'Summary judgment is . . . appropriate [only] when no genuine issues of material fact [exist] and the moving party is entitled to judgment as a matter of law.' '' *Stalk v. Mushkin*, 125 Nev. 21, 24-25, 199 P.3d 838, 840 (2009) (alterations in original) (quoting *Clark v. Robinson*, 113 Nev. 949, 950, 944 P.2d 788, 789 (1997)). The parties do not dispute the material facts of this case. Instead, they dispute the district court's legal conclusions regarding the construction of NRS 687A.033(2)(a). The construction of a statute is a question of law, which we review de novo. *In re Application*

of Shin, 125 Nev. 100, 102, 206 P.3d 91, 92 (2009). Because the single issue presented in this appeal is whether MGM and SEI, as self-insured employers, are deemed insurers for purposes of the NIGA Act—a legal question of statutory interpretation—this court's review of the district court's grant of summary judgment is plenary. *See id*.

Nevada's Insurance Guaranty Association Act and the Association

[Headnote 2]

In 1971, following the majority of other jurisdictions, the Legislature created an insurance guaranty act entitled the Nevada Insurance Guaranty Association Act (NIGA Act). 1971 Nev. Stat., ch. 661, § 21, at 1943; NRS 687A.010. The NIGA Act was codified at NRS Chapter 687A. 1971 Nev. Stat., ch. 661, § 21, at 1943. The purpose of the NIGA Act is to provide limited protection for insureds in the event that their insurers become insolvent. NRS 687A.060. The NIGA Act applies to all direct insurance (with exception to certain insurance that is not pertinent to this appeal). *See* NRS 687A.020.

The NIGA Act created the Nevada Insurance Guaranty Association (NIGA). *See* NRS 687A.040. NIGA is a nonprofit, unincorporated, legal entity that provides insurance benefits to individuals and entities whose insurers have become insolvent. *See* NRS 687A.040; NRS 687A.060. NIGA's duty is to accept responsibility for obligations existent at the time that an insurance company loses its solvency, meaning NIGA steps into the shoes of the insolvent insurer, as NIGA ''[s]hall be deemed the insurer to the extent of its obligations on the *covered claims* and to that extent has any rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.'' NRS 687A.060(1)(b) (emphasis added). ''Covered claims'' are unpaid claims that are within the coverage of a policy written by a now insolvent insurance company. NRS 687A.033(1). While the statute defining ''[c]overed claims'' generally provides that covered claims are those that are within the policy coverage, the statute specifically prescribes what types of claims are not covered, which, therefore, fall outside the purview of NIGA's duty to pay. Specifically, NRS 687A.033(2) excludes from coverage, in relevant part, ''[a]n amount that is directly or indirectly due a[n] . . . insurer.'' NRS 687A.033(2)(a). The NIGA Act does not define ''insurer.''

NIGA's general fund, from which it pays claims, is supplied by annual assessments of each insurer that is a member of NIGA. *See* NRS 687A.060; S.B. 74, Bill Summary, 70th Leg. (Nev. 1999). In order to transact business within Nevada, all insurers must be members of NIGA and must contribute to the fund. NRS 687A.040; NRS 687A.070(2). The NIGA Act defines these members as per-

sons or entities that ''[w]rite[ ] any kind of insurance'' and are ''licensed to transact insurance in this state.'' NRS 687A.037(1), (2).

Nevada's Workers' Compensation Act

Prior to 1980, the Nevada Industrial Commission was the sole provider of workers' compensation insurance in Nevada. Legislative Counsel Bureau, *Leg. Comm. on Workers' Compensation*, Bulletin No. 01-19 at 5, 71st Leg. (Nev., 2001). But, in 1979, recognizing that some employers could fund compensation benefits by themselves, the Legislature allowed employers to opt out of the state industrial insurance system and remain personally liable for the claims of their injured employees. *Id.*; *see generally* NRS Chapter 616B. Thus, the Legislature permitted those qualified employers to ''self-insure.'' *Id.*; NRS 616B.300. As self-insurers, these employers are exempt from the statutory requirement that employers purchase workers' compensation insurance. *See generally* NRS 616B.300.

However, in order to qualify as a ''self-insured employer,'' the employer must be certified by the Commissioner of Insurance, which requires the employer to prove that it is financially capable of assuming the responsibility to pay the claims of its injured workers. NRS 616A.305; *see also* NRS 616B.300(1). Additionally, the self-insured employer must obtain excess insurance in order to ''provide protection against a catastrophic loss.'' NRS 616B.300(5). The excess insurance policy protects the self-insured employer when the specific or total losses in a policy year exceed its deductible. 23 Eric Mills Holmes, *Appleman on Insurance* § 145.1, at 4 (2d ed., interim vol., 2003) (stating that ''excess coverage'' is a second layer of insurance coverage that is generally ''triggered on the exhaustion of the limits of the primary policy''). The Workers' Compensation Act defines ''insurer'' as including self-insured employers. NRS 616A.270(1).

Statutory interpretation of NRS 687A.033(2)(a)

NIGA argues that because MGM and SEI qualify as self-insured employers and, therefore, insurers under workers' compensation laws, MGM and SEI are insurers for purposes of the NIGA Act and cannot recover from NIGA. The issue of whether self-insured employers constitute insurers for NIGA Act purposes is an issue of first impression and requires this court to engage in statutory interpretation.

[Headnotes 3-5]

This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning. *Public Employees' Benefits Prog. v. LVMPD*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). Thus, when the language of a

statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise. *Nevada Power Co. v. Public Serv. Comm'n*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986). However, if following the statute's apparent plain meaning results in a meaning that runs counter to the ''spirit'' of the statute, this court may look outside the statute's language. *Public Employees' Benefits Prog.*, 124 Nev. at 147, 179 P.3d at 548; *see also Universal Electric v. Labor Comm'r*, 109 Nev. 127, 131, 847 P.2d 1372, 1374 (1993) (stating that this court will ''adhere to the rule of statutory construction that the intent of a statute will prevail over the literal sense of its words'').

MGM and SEI argue that a plain reading of the NIGA Act demonstrates that neither employer is an insurer and that NIGA is obligated to pay their claims as a result. In response, NIGA asserts that the term ''insurer,'' as used in the NIGA Act, is ambiguous and therefore requires this court to look outside the statutory scheme. It argues that because both the NIGA Act and the Workers' Compensation Act are inextricably intertwined, they must be read in conjunction with each other. Therefore, because the Workers' Compensation Act defines ''insurer'' to include self-insured employers, then, according to NIGA, self-insured employers are insurers under the NIGA Act as well.

Plain meaning of ''insurer'' under NRS 687A.033(2)(a)

[Headnote 6]

Despite the fact that NRS 687A.033(2)(a) of the NIGA Act excludes coverage for claims that are ''due an . . . insurer,'' the Legislature did not define ''insurer'' in the NIGA Act. Rather, the NIGA Act defines ''[i]nsolvent insurer,'' which includes the circumstances in which an insurer is to be considered insolvent so that its obligations will be met by the association, and ''member insurer,'' which describes the type of insurer that is required to be a member of NIGA. NRS 687A.035; NRS 687A.037. We are not persuaded that either of these definitions are instructive in this case because NRS 687A.033(a)(2) specifically uses the term ''insurer'' rather than ''insolvent insurer'' or ''member insurer.'' Nevertheless, we determine that the term ''insurer'' has a plain meaning and that MGM and SEI do not fall within a reasonable connotation of the term.

We determine that various statutory definitions of ''insurer'' throughout other chapters of the insurance title are instructive.[3] For example, the general provisions governing the insurance title

[3]NRS Chapters 679A through 697 comprise the Nevada Insurance Code (Title 57). *See* NRS 679A.010. The NIGA Act falls within this title and the general provisions governing Title 57 are contained in NRS Chapter 679A.

defines ''insurer'' as ''every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance.'' NRS 679A.100. Because this definition is included in the general provisions governing Title 57, which includes the NIGA Act, we conclude that NRS 679A.100's definition of ''insurer'' applies to the NIGA Act.

In response to this general statutory definition of ''insurer,'' NIGA argues that it is not authoritative because the Legislature used the word ''includes'' before ascribing NRS 679A.100 its definition—*i.e.*, '' 'Insurer' *includes* every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance.'' NRS 679A.100 (emphasis added). Based on this, NIGA claims that NRS 679A.100 does not define ''insurer,'' but that it is a list of insurers that is not all-inclusive. While NIGA is correct in its assertion that the term ''includes'' generally indicates something that is a part of the whole, *Merriam-Webster's Collegiate Dictionary* 629-30 (11th ed. 2007) (defining ''include'' as ''to take in or comprise as a part of a whole or group'' and that it ''suggests the containment of something as a constituent, component, or subordinate part of a larger whole''), and that NRS 679A.100's definition may not be ''all inclusive,'' we determine that several other statutes falling within Title 57 further demonstrate that ''insurer'' has the commonplace meaning that the Legislature prescribed in NRS 679A.100.

Other statutes in the insurance title define ''insurer'' as one that engages in the business of insurance, like NRS 679A.100. For example, NRS 692C.070 and NRS 696B.120 define ''insurer'' the same as NRS 679A.100, which includes ''every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance.''[4] Additionally, NRS 679B.540 and NRS 695H.040 provide that an ''insurer'' is ''any insurer . . . authorized pursuant to this title to conduct business in this state.'' Moreover, NRS 686B.1759 and NRS 695A.014 also define ''insurer'' as any person or entity that is engaged in the insurance business.[5] Although NRS 679A.100 employs the term ''includes'' when prefacing its definition of ''insurer,'' which indicates that the definition is not all-inclusive, we find it indicative of the meaning

[4]Specifically, NRS 692C.070 provides, in pertinent part, '' 'Insurer' has the meaning ascribed in NRS 679A.100.'' In addition, NRS 696B.120 provides the following definition: '' 'Insurer,' in addition to persons so defined under NRS 679A.100, includes also persons purporting to be insurers, or organizing or holding themselves out as organizing in this state for the purpose of becoming insurers.''

[5]NRS 686B.1759 defines ''Insurer'' as ''any private carrier authorized to provide industrial insurance in this state.'' Similarly, NRS 695A.014 provides, '' 'Insurer' includes every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance.''

of ''insurer'' under the NIGA Act, which we conclude excludes self-insured employers since they do not engage in the business of insurance.

Further, we note that self-insured employers are not defined as ''insurers'' anywhere in Nevada's insurance title. The only definition of ''insurer'' that includes self-insured employers is found in Nevada's Workers' Compensation Act under NRS 616A.270. Nevada's workers' compensation laws are located in a separate title, not the insurance title. *Compare* NRS Title 57 (which includes the NIGA Act (NRS Chapters 679A through 697)), *with* NRS Title 53 (which includes the Workers' Compensation Act, which, under NRS 616A.005, is technically referred to as the Nevada Industrial Insurance Act (NRS Chapters 616A through 616D)). Thus, we conclude that the Legislature's substantial use of ''insurer'' to describe persons or entities in the business of insurance militates in favor of concluding that the NIGA Act's reference to ''insurer'' plainly addresses an insurance company.[6]

Nevertheless, NIGA suggests that MGM and SEI are insurers even under the plain meaning of the term, arguing that, although they do not underwrite insurance policies as insurance companies do, as self-insured employers, they still insure the risk of their employees like insurance companies. We disagree.

Traditionally, the party who is the insurer obligates itself to become responsible for loss or damage for consideration in the form of premium payments from the insured. *See, e.g.*, *Black's Law Dictionary* 814 (8th ed. 2004) (defining ''insurance'' as ''[a] contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency'' and that ''[a]n insured party usu[ally] pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk'').

Here, although MGM and SEI are obligated to their employees to the extent that they must pay their employees' workers' compensation claims, the claims at issue in this case fall within MGM's and SEI's excess insurance policy with Reliance. MGM and SEI had in-

[6]Our conclusion that the plain meaning of the term ''insurer'' refers to an insurance company or a person engaged in the insurance business reflects the common lay and legal understanding of the term. *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* 649, 1365 (11th ed. 2007) (defining ''insurer'' as ''one that insures,'' especially as an insurance ''underwriter,'' which is ''one that underwrites a policy of insurance'' and ''set[s] one's name to (an insurance policy) for the purpose of thereby becoming answerable for a designated loss or damage on consideration of receiving a premium percent''); *Black's Law Dictionary* 823 (8th ed. 2004) (defining ''insurer'' as ''[o]ne who agrees, by contract, to assume the risk of another's loss and to compensate for that loss. — Also termed *underwriter*''); *A Dictionary of Modern Legal Usage* 457, 898 (2d ed. 1995) (defining ''insurer'' to mean an underwriter and defining ''underwriter'' as ''one that insures a risk'').

surance policies with Reliance where, in consideration for premiums paid, Reliance agreed to assume the risk of MGM's and SEI's employees' workers' compensation claims that reached an excess beyond the limits that they contractually agreed to. It was Reliance who paid into the NIGA Act fund as a member-insurer. Therefore, we conclude that Reliance, not MGM or SEI, was insuring the employees' risk of loss for those excess insurance claims. Consequently, the plain meaning of ''insurer,'' as applied to the NIGA Act, must exclude MGM and SEI because they are not in the business of insurance.

This conclusion is consistent with other jurisdictions' interpretations of statutes similar to NRS 687A.033(2)(a). Although every state has statutorily created insurance guaranty acts and associations, only a few states have considered the precise issue of whether self-insured employers are insurers under their Insurance Guaranty Association Acts. Notably, however, the majority of those states that have considered the issue hold that self-insurers are not insurers for Insurance Guaranty Association Act purposes. *See, e.g.*, *Doucette v. Pomes*, 724 A.2d 481, 489-91 (Conn. 1999) (holding that in light of the plain meaning of ''insurance'' and ''insurer,'' and the insurance title's definition of ''insurance,'' a self-insured employer under the workers' compensation laws was not an insurer for purposes of the guaranty act); *Stamp v. Dept. of Labor and Industries*, 859 P.2d 597, 599-601 (Wash. 1993) (deciding to follow other jurisdictions' interpretations of ''insurer'' in concluding that self-insured employers ''are not reinsurers, insurers, insurance pools or underwriting associations''); *In re Mission Ins. Co.*, 816 P.2d 502, 505 (N.M. 1991) (holding that self-insured employers' claims are ''covered claims'' under the guaranty act because the excess insurance policies at issue were direct insurance and not reinsurance); *Iowa Cont. Wkrs' Comp. v. Iowa Ins. Guar.*, 437 N.W.2d 909, 913-16 (Iowa 1989) (concluding that the self-insurer's excess workers' compensation insurance was direct insurance, rather than reinsurance, because the only insurance contract at issue was between the insolvent insurer and the group, as ''the insurer's relationship is with the employer or the group of employers, and not with the individual employees''); *Zinke-Smith, Inc. v. Florida Insurance Guar. Ass'n, Inc.*, 304 So. 2d 507, 509 (Fla. Dist. Ct. App. 1974) (holding that, under the insurance title's definition of ''insurer,'' self-insured employers are not insurers for guaranty act purposes as such insurance policies are not reinsurance, but rather, excess insurance).

Moreover, our conclusion that self-insured employers are not insurers under the NIGA Act is in harmony with Nevada's workers' compensation laws. As the term ''insurer'' is used in the NIGA Act, it is addressing an insurance company, which is evidenced by the

purpose of the NIGA Act—to cover claims of insolvent insurance companies. NRS 687A.060 limits NIGA's obligation to pay certain covered claims; however, NIGA's obligation with respect to workers' compensation claims is not limited, as the statute requires NIGA to pay ''[t]he entire amount of the claim.'' NRS 687A.060(1)(a)(1). Applying the Workers' Compensation Act's definition of ''insurer'' to the NIGA Act would run counter to NRS 687A.060(1)(a)(1), as the NIGA Act obligates NIGA to pay workers' compensation claims in full and NIGA's obligation would be excused if the claimant was a self-insured employer. Such a reading is contrary to the purpose of the NIGA Act.

Therefore, we join the majority of jurisdictions and hold that self-insured employers under Nevada's workers' compensation laws are not insurers for purposes of the NIGA Act. Consequently, we conclude that MGM's and SEI's claims that are ''[c]overed claim[s],'' as defined in NRS 687A.033(1), are recoverable.

CONCLUSION

We hold that, because the plain meaning of ''insurer'' necessarily denotes a person or entity that is in the insurance business, self-insured employers are not insurers under the NIGA Act. We therefore determine that appellants, as self-insured employers, may recover payment from NIGA for their workers' compensation claims that are ''[c]overed claims.'' This conclusion is supported by a majority of jurisdictions' interpretations of their guaranty acts and is in harmony with Nevada's workers' compensation laws. Thus, we reverse the district court's order and remand this matter to the district court for further proceedings consistent with this opinion.

PARRAGUIRRE, DOUGLAS, CHERRY, SAITTA, and GIBBONS, JJ., and POLAHA, D.J., concur.

V AND S RAILWAY, LLC, FKA V AND S RAILWAY, INC., APPELLANT, *v.* WHITE PINE COUNTY AND CITY OF ELY, RESPONDENTS.

No. 49351

July 16, 2009 211 P.3d 879

Appeal from a district court order granting summary judgment in an eminent domain action. Seventh Judicial District Court, White Pine County; Andrew J. Puccinelli, Judge.

Railroad company brought action seeking condemnation of railroad designated as surplus property by city department of water

and power almost simultaneously with offer by other city to purchase railroad. The district court granted summary judgment to other city, finding condemnation action was barred as soon as railroad was declared surplus government property. Railroad company appealed. The supreme court, SAITTA, J., held that: (1) statute that allowed city to circumvent other statutory proceedings when purchasing surplus governmental property was triggered by demonstration of intent of city and department to enter into contract for purchase of railroad, rather than declaration as surplus government property; but (2) genuine issue of material fact as to whether city and department expressed intent to enter into contract for purchase and sale of railroad precluded summary judgment.

Reversed and remanded.

Jones Vargas and *R. Douglas Kurdziel, Kirk B. Lenhard*, and *Tiffany J. Swanis*, Las Vegas, for Appellant.

Richard W. Sears, District Attorney, White Pine County, for Respondents.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of summary judgment de novo.
2. JUDGMENT.
   Summary judgment is only appropriate where the evidence does not present any genuine issues of material fact and the law requires judgment for the moving party.
3. APPEAL AND ERROR.
   In reviewing a district court's decision to grant or deny summary judgment, the supreme court construes the factual basis for the decision in favor of the nonmoving party.
4. APPEAL AND ERROR.
   The supreme court reviews issues of statutory construction de novo.
5. STATUTES.
   Words in a statute should be given their plain meaning unless this violates the spirit of the act; where a statute is clear on its face, a court may not go beyond the language of the statute in determining the Legislature's intent.
6. STATUTES.
   A statute must be construed as to give meaning to all of its parts and language, and the supreme court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation; further, a statute should not be read in a manner that renders a part of a statute meaningless or produces an absurd or unreasonable result.
7. EMINENT DOMAIN.
   Statute that allowed city to circumvent other statutory proceedings when purchasing railroad designated as governmental surplus property by department of water and power would have been triggered by city and department taking steps demonstrating their intent to enter into a contract for

the purchase and sale of railroad, rather than department's designation of railroad as surplus governmental property. NRS 334.030.

8. JUDGMENT.

Genuine issue of material fact as to whether city and department of water and power expressed intent to enter into a contract for the purchase and sale of railroad that department had declared surplus governmental property precluded summary judgment in railroad company's condemnation action. NRS 37.230, 334.030.

Before the Court EN BANC.[1]

OPINION

By the Court, SAITTA, J.:

NRS 334.030 facilitates the purchase of surplus governmental property by a governmental entity from another governmental entity. Specifically, NRS 334.030(2), (3), and (4) set forth special provisions for governmental entities entering into contracts for such purchases. NRS 334.030(5) suspends any law that is inconsistent with the other NRS 334.030 provisions.

In this appeal, we consider the scope of NRS 334.030. Here, there are two parties, one that is a governmental entity and one that is not, each contesting which of them may purchase surplus governmental property from another governmental entity. The property in question is a railroad that the Los Angeles Department of Water and Power (LADWP), a governmental entity, designated as surplus property. The LADWP sought bids on the railroad, and respondent City of Ely[2] offered to purchase the railroad for $750,000. The LADWP accepted Ely's offer, and Ely placed $250,000 in escrow. Nearly simultaneously, appellant V and S Railway, LLC (V & S Railway), a private company, sought to condemn the railroad pursuant to NRS 37.230, a statute that gives railroad companies that right. Subsequently, White Pine County and Ely brought a motion for summary judgment, claiming that NRS 334.030(5) precluded V & S Railway's ability to pursue its condemnation action under NRS 37.230, which the district court granted. The district court found that V & S Railway's condemnation action was barred because as soon as the LADWP designated the railroad as surplus governmental property, NRS 334.030(5) was triggered, thereby suspending NRS 37.230.

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

[2]Respondent White Pine County, another governmental entity, intervened at a later point in the proceedings.

On appeal, V & S Railway argues that the district court erred when it granted White Pine County and Ely's motion for summary judgment. Primarily, V & S Railway contends that the district court incorrectly found that, pursuant to NRS 334.030(5), NRS 334.030 superseded NRS 37.230.

We conclude that the district court incorrectly decided that NRS 334.030 was triggered by the LADWP designating the railroad as surplus governmental property. According to the plain language of NRS 334.030, the statute is triggered when governmental entities take steps demonstrating their intent to enter into a contract for the purchase and sale of surplus governmental property. NRS 334.030(5) then suspends any action brought pursuant to a law that is inconsistent with facilitating these purchases.

Therefore, we reverse and remand to the district court to determine whether the LADWP and Ely had taken steps showing their intent to enter into a contract for the purchase and sale of the railroad when V & S Railway brought its condemnation action pursuant to NRS 37.230. If the district court finds that the LADWP and Ely had taken the necessary actions to trigger NRS 334.030, then it should again conclude that NRS 334.030(5) precluded V & S Railway's ability to pursue its condemnation action.

FACTUAL AND PROCEDURAL HISTORY

In 1987, the LADWP purchased the Northern Nevada Railway, a 128-mile railroad between Cobre, Nevada, and McGill Junction, Nevada. By 2002, the railroad was no longer used, and the LADWP designated the railroad as surplus property. Prior to offering the railroad for sale to the general public, the LADWP offered the railroad to governmental entities, including Ely.

On November 6, 2003, Ely offered to purchase the railroad for $750,000. The offer invited the LADWP to negotiate a purchase and sale agreement and proposed that Ely would place $250,000 in escrow to be applied toward the purchase. The escrow monies were designated as fully refundable. On December 9, 2003, the LADWP sent Ely a letter indicating, in pertinent part, that: (1) Ely needed to send the LADWP a payment in the amount of $250,000 in order to proceed with the purchase and sale agreement; (2) so long as there were no other interested parties during the 60-day notification period, the LADWP would proceed with negotiations with Ely; and (3) the $250,000 would be returned if the purchase and sale agreement was not finalized. On December 17, 2003, the LADWP received Ely's $250,000 deposit.

Two separate condemnation actions regarding the railroad were subsequently filed. One was filed by V & S Railway, which wanted to obtain the railroad under NRS 37.230. The other was filed by

Ely, when contract negotiations between itself and the LADWP soured.

V & S Railway's condemnation action

The same day that the LADWP sent Ely the letter indicating its acceptance of Ely's offer, V & S Railway brought a condemnation action against the LADWP, seeking to acquire the railroad pursuant to NRS 37.230.[3] V & S Railway later moved for immediate occupancy of the railroad, a temporary restraining order,[4] and a preliminary injunction to prevent the LADWP from selling the railroad to Ely. White Pine County and Ely intervened in the action, arguing that they had an economic interest in the railroad. The district court denied V & S Railway's motions.

Ely and White Pine County together moved for, in part, summary judgment on V & S Railway's condemnation action.[5] Ely and White Pine County argued that NRS 334.030(5) precluded V & S Railway's ability to pursue its condemnation action under NRS 37.230. The district court initially denied the motion for summary judgment, stating that it was untimely, and granted a continuance for further discovery.

Ely's condemnation action

Following the district court's denial of its summary judgment motion in V & S Railway's condemnation action, Ely filed a condemnation action against the LADWP, primarily arguing that the LADWP had failed to ratify the contract that they had negotiated and was attempting to increase the purchase price. In this action, Ely did not name V & S Railway as a party. Ely moved for immediate occupancy of the railroad, which the district court granted, contingent upon Ely's deposit of $500,000 with the district court. The $500,000 was added to the $250,000 Ely had already placed in escrow, totaling $750,000 paid toward acquiring the railroad.

The LADWP and Ely ultimately entered into an asset-purchase-and-settlement agreement. The agreement specifically noted that it was intended to resolve the condemnation action that Ely had filed

[3]The condemnation action was also brought against BHP Nevada Railway Company; White Pine Historical Railroad Foundation, Inc.; Robinson Mining Limited Partnership; Doe individuals; and Roe corporations or business entities. Because these parties do not raise issues on appeal, their involvement in the underlying lawsuits is not discussed herein.

[4]V & S Railway later conceded that the temporary restraining order was unnecessary.

[5]Ely moved for intervention before the district court denied V & S Railway's motion for immediate occupancy, but its intervention motion was not granted until after V & S Railway's motion was denied.

against the LADWP. According to the agreement, the purchase price was $1,500,000, minus the $750,000 already paid.

Pursuant to the settlement agreement between the LADWP and Ely, the district court entered an order approving the parties' stipulated settlement. The order stated that it resolved all issues among the parties related to the railroad's acquisition but noted that it was not admissible in any other case for any other purpose. The same day, the district court also entered a judgment of condemnation in Ely's favor and dismissed the case.

Motion for summary judgment in V & S Railway's condemnation action

Following the district court's entry of a judgment of condemnation in Ely's favor in its condemnation action, White Pine County and Ely supplemented their original motion for summary judgment in V & S Railway's condemnation action. The district court granted summary judgment in favor of White Pine County and Ely.

In granting summary judgment, the district court found no genuine issue of material fact as to whether V & S Railway was entitled to pursue its condemnation action. Further, the district court found that White Pine County and Ely were entitled to judgment as a matter of law because NRS 334.030(5) suspends NRS 37.230 and any other statutes that interfere with a governmental entity purchasing surplus property from another governmental entity.

The district court stated that NRS 334.030 was triggered when the LADWP, itself a governmental entity, designated the railroad as surplus property. The district court noted that NRS 334.030(5) states that any provision of law that is inconsistent with NRS 334.030 is suspended. Thus, any action brought pursuant to NRS 37.230, or any statute that would interfere with a governmental entity's purchase of surplus property from another governmental entity, was superseded by the LADWP designating the railroad as surplus. Further, the district court stated that V & S Railway's argument that, by purchasing the railroad Ely was merely stepping into the LADWP's shoes in its condemnation action, failed because it was contrary to NRS 334.030. Accordingly, the district court granted summary judgment, finding that White Pine County and Ely were entitled to judgment as a matter of law. V & S Railway has appealed from that order.

DISCUSSION

Standard of review

[Headnotes 1-3]

''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 only appropriate where the evidence does not present any genuine issues of material fact and the law requires judgment for the moving party. *Id*. In reviewing a district court's decision to grant or deny summary judgment, this court construes the factual basis for the decision in favor of the non-moving party. *Id*.

Scope of NRS 334.030

[Headnotes 4-6]

''This court reviews issues of statutory construction de novo.'' *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 641, 81 P.3d 532, 534 (2003). In Nevada, ''words in a statute should be given their plain meaning unless this violates the spirit of the act.'' *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). ''Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the [L]egislature's intent.'' *Id*. A statute must be construed as to '' 'give meaning to all of [its] parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.' '' *Harris Assocs.*, 119 Nev. at 642, 81 P.3d at 534 (quoting *Coast Hotels v. State, Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001)). Further, a statute should not be read in a manner that renders a part of a statute meaningless or produces an absurd or unreasonable result. *Id*.

[Headnotes 7, 8]

NRS 334.030 facilitates the purchase of surplus governmental property by governmental entities. These transactions are eased by the provisions in NRS 334.030 that allow governmental entities to circumvent other statutory proceedings.[6] *See* NRS 334.030(2), (5). By looking at the plain meaning of the statute's words, we conclude that the statute is triggered by two governmental entities taking steps demonstrating their intent to enter into a contract for the purchase and sale of surplus governmental property. NRS 334.030(2)-(4). Specifically, NRS 334.030(2) states that ''[a]ny governmental entity may *enter* into any *contract* with any other governmental entity for the purchase of any . . . property.'' (Emphases added.) The plain meaning of ''enter into'' is ''to participate in; engage in.'' *Random*

[6]In its entirety, NRS 334.030 states:

> 1. The purpose of this section is to permit any governmental entity to take full advantage of the available surplus properties of any other governmental entity.
>
> 2. Any governmental entity may enter into any contract with any other governmental entity for the purchase of any equipment, supplies, materials or other property, real or personal, without regard to provisions of law which require:

House Webster's College Dictionary 435 (2d ed. 1997). Thus, NRS 334.030(2) clearly contemplates that the relevant act for the statute's implication is when governmental entities begin to participate in or engage in the steps necessary to form a contract. NRS 334.030(3) goes on to state that in *making* the contract, governmental entities are authorized to accept statutory conditions as part of the contract. Accordingly, the statute's words demonstrate that the Legislature intended the statute to be triggered when the entities took steps toward entering into a contract for the purchase of surplus governmental property. Finally, as further evidence that the statute does not require the actual formation of a contract, NRS 334.030(4) discusses the bidding process. As the bidding process necessarily precedes the contract being formed, the language of NRS 334.030(4) indicates that the statute applies as soon as entities begin engaging in steps that show their intent to form a contract.

NRS 334.030(5) is central to resolution of this case. The district court primarily relied upon this provision when it found that V & S Railway was barred from pursuing its condemnation action under NRS 37.230. NRS 334.030(5) suspends *any* portion of *any* law that is inconsistent with allowing governmental entities to take full advantage of purchasing surplus property from other governmental entities. Once NRS 334.030 is triggered, no other action may interfere with the surplus property purchase.[7]

Further, V & S Railway's argument that such a reading would render NRS 334.030(2) through (4) mere surplusage is not persua-

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(a) The posting of notices or public advertising for bids or of expenditures.

(b) The inviting or receiving of competitive bids.

(c) The delivery of purchases before payment, and without regard to any provision of law which would, if observed, defeat the purpose of this section.

3. In making any such contract or purchase the purchaser is authorized to accept any condition imposed pursuant to federal, state or local law as a part of the contract.

4. The governing body or executive authority, as the case may be, of any governmental entity may designate by appropriate resolution or order any officeholder or employee of its own to enter a bid or bids in its behalf at any sale of any equipment, supplies, material or other personal property, owned by any other governmental entity and may authorize that person to make any down payment or payment in full required in connection with such bidding.

5. Any provisions of any law, charter, ordinance, resolution, by-laws, rule or regulation which are inconsistent with the provisions of this section are suspended to the extent such provisions are inconsistent herewith.

[7]We note that legislative history supports our conclusion that the plain meaning of NRS 334.030(5) is that the provision suspends any law inconsistent with

sive. Applying the plain meaning of NRS 334.030(5) does not render any other section of NRS 334.030 nugatory because the provisions of NRS 334.030 do not contradict each other. Each provision is written in furtherance of the statute's intent: facilitating the purchase and sale of surplus property between governmental entities. NRS 334.030(1) states the statute's purpose; NRS 334.030(2) permits governmental entities to circumvent certain provisions of the law that might otherwise hinder their surplus property transactions; NRS 334.030(3) allows the purchasing governmental entities to accept any contractual condition imposed pursuant to law; and NRS 334.030(4) gives governmental entities the authority to designate an agent to enter bids and make payments on its behalf when purchasing surplus governmental property. Therefore, because NRS 334.030(1) through (4) promote the purpose of NRS 334.030 and are thus not inconsistent with each other, NRS 334.030(5) does not suspend any of them.

Based upon the plain meaning of NRS 334.030, we conclude that condemnation actions like V & S Railway's are suspended pursuant to NRS 334.030(5) once two governmental entities take steps demonstrating their intent to enter into a contract for the purchase and sale of surplus governmental property. While NRS 37.230 gives authority to ''[a]ny company incorporated under the laws of this state, or constructing or operating a railway in this state,'' to acquire property for use as a railroad by condemnation, allowing a private entity to condemn surplus governmental property once two governmental entities have taken steps toward the formation of a contract for that property's sale is contrary to NRS 334.030(1)'s stated purpose. NRS 334.030(5) suspends a private entity's ability to condemn surplus governmental property once governmental entities have demonstrated their intent to enter into a contract for that property's sale.

We conclude that NRS 334.030 does not support the district court's finding that the LADWP's designation of the railroad as surplus governmental property triggered NRS 334.030. Rather, as noted above, NRS 334.030 is triggered when governmental entities take steps showing their intent to enter into a contract for the purchase and sale of surplus governmental property. Therefore, on remand, the district court must determine whether the LADWP and Ely had already taken such steps when V & S Railway brought its condem-

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the statute. When the statute was originally adopted in 1945, its purpose was to ''permit state and local governmental units to take full advantage of available federal surplus properties.'' 1945 Nev. Stat., ch. 43, § 3, at 53. In 1979, the statute was amended to include any government-to-government purchase, as opposed to only purchases from the federal government. 1979 Nev. Stat., ch. 77, § 1, at 98-99. This amendment did not affect the language of subsection 5.

nation action.[8] If the district court concludes that the LADWP and Ely had taken the steps necessary to make NRS 334.030 applicable when V & S Railway brought its condemnation action under NRS 37.230, then the district court should once again conclude that NRS 334.030(5) barred V & S Railway's condemnation action. NRS 37.230 is inconsistent with allowing White Pine County and Ely to take full advantage of the LADWP's sale of the surplus governmental property. Moreover, if the district court finds that NRS 334.030(5) precludes V & S Railway's condemnation action, then White Pine County and Ely do not replace the LADWP in V & S Railway's condemnation action, as V & S Railway suggests. Such an interpretation would undermine the statute's express purpose of allowing governmental entities to take full advantage of available surplus governmental property.

Conversely, if the district court concludes that NRS 334.030 had not been triggered when V & S Railway brought its condemnation action, then the district court must reverse its grant of summary judgment in favor of White Pine County and Ely and permit V & S Railway to pursue its condemnation action against the LADWP. NRS 334.030 does not give governmental entities a priority right to acquire surplus governmental property absent prior evidence indicating their intent to enter into a contract for the purchase of such property.

Because the district court incorrectly based its conclusion on its determination that NRS 334.030 was triggered by the LADWP designating the railroad as surplus governmental property, we reverse the district court's order and remand this matter to the district court for proceedings consistent with this opinion.

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

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[8]Facts that the district court should consider in making this determination are: (1) on November 6, 2003, Ely offered to purchase the railroad; (2) on December 9, 2003, the LADWP sent Ely a letter indicating its tentative acceptance of Ely's offer; and (3) on December 17, 2003, the LADWP received Ely's $250,000 deposit.

ROBERT LEE MCCONNELL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 49722

July 23, 2009 212 P.3d 307

Appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

The supreme court held that: (1) a claim challenging the constitutionality of Nevada's lethal injection protocol is not cognizable in a post-conviction petition for a writ of habeas corpus; (2) defendant knowingly and voluntarily entered a guilty plea to first-degree murder, sexual assault, and first-degree kidnapping; (3) defendant did not have a constitutional right to the effective assistance of standby counsel; (4) defendant did not show that standby counsel was ineffective for allowing him to plead guilty while a discovery request was pending; (5) defendant did not show that appellate counsel was ineffective on direct appeal; and (6) certain claims asserted by defendant in his habeas petition were procedurally barred.

Affirmed.

[Rehearing denied October 6, 2009]

Scott W. Edwards, Reno; *Law Office of Thomas L. Qualls, Ltd.*, and *Thomas L. Qualls*, Reno, for Appellant.

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

1. STATUTES.
   When interpreting a statute, the supreme court's goal is to determine the Legislature's intent in enacting the statute.
2. STATUTES.
   When interpreting a statute, the supreme court must focus on the statute's plain language.
3. HABEAS CORPUS.
   A claim challenging the constitutionality of Nevada's lethal injection protocol is not cognizable in a post-conviction petition for a writ of habeas corpus; the claim involves a challenge to the manner in which the death sentence will be carried out rather than the validity of the judgment of conviction or sentence. NRS 34.720, 34.724(2)(b), 176.355(1), (2)(b).
4. CRIMINAL LAW.
   A guilty plea is presumptively valid.
5. CRIMINAL LAW.
   In determining the validity of a guilty plea, a trial court must look to the totality of the circumstances.

6. CRIMINAL LAW.
   Failure to utter talismanic phrases will not invalidate a guilty plea where a totality of the circumstances demonstrates that the plea was freely, knowingly, and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea.
7. CRIMINAL LAW.
   Defendant knowingly and voluntarily entered a guilty plea to first-degree murder, sexual assault, and first-degree kidnapping, even though defendant was not advised that lifetime supervision would be a direct consequence of his guilty plea to sexual assault; events at the *Faretta* canvass that preceded the plea canvass demonstrated defendant's intelligence and awareness of the proceedings, his understanding of his constitutional rights, and that he was adamant about pleading guilty, trial court sufficiently advised defendant of his constitutional rights during the plea canvass, and defendant was advised that he faced a life sentence for the sexual assault.
8. CRIMINAL LAW.
   A claim that counsel provided constitutionally inadequate representation is subject to the two-part *Strickland* test. U.S. CONST. amend. 6.
9. CRIMINAL LAW.
   To prevail on a claim of ineffective assistance of trial or appellate counsel, a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. U.S. CONST. amend. 6.
10. CRIMINAL LAW.
    A court need not consider both prongs of the *Strickland* test if a defendant makes an insufficient showing on either prong. U.S. CONST. amend. 6.
11. CRIMINAL LAW.
    A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review. U.S. CONST. amend. 6.
12. CRIMINAL LAW.
    To establish *Strickland* prejudice resulting from trial counsel's inaction or omission, a defendant who pleaded guilty must demonstrate a reasonable probability that he or she would not have pleaded guilty and would have insisted on going to trial. U.S. CONST. amend. 6.
13. CRIMINAL LAW.
    A defendant asserting a claim of ineffective assistance of counsel carries the affirmative burden of establishing prejudice. U.S. CONST. amend. 6.
14. CRIMINAL LAW.
    Defendant did not have a constitutional right to the effective assistance of standby counsel in a prosecution for first-degree murder, where defendant waived his right to counsel and chose to represent himself. U.S. CONST. amend. 6.
15. ATTORNEY AND CLIENT.
    Counsel does not have the authority to override a defendant's decision to plead guilty; that decision is reserved to the client. RPC 1.2.
16. CRIMINAL LAW.
    Defendant did not show that he was prejudiced by standby counsel's alleged error in allowing him to plead guilty to first-degree murder and other offenses while a discovery request was pending, and thus, defendant did not establish ineffective assistance of counsel; defendant did not specify what discovery was outstanding and how that discovery would have convinced him not to plead guilty and proceed to trial, and moreover, during

defendant's *Faretta* canvass, he complimented his attorneys' performance. U.S. CONST. amend. 6.

17. CRIMINAL LAW.
To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. U.S. CONST. amend. 6.

18. CRIMINAL LAW.
In the context of a claim of ineffective assistance, appellate counsel is not required to raise every nonfrivolous issue on appeal. U.S. CONST. amend. 6.

19. SENTENCING AND PUNISHMENT.
When considering whether the death penalty is excessive, the supreme court looks to whether various objective factors are present, such as whether alcohol or drugs influenced the crime, the treatment of codefendants, and the defendant's mental state, prior history of violence, and age; in other words, the supreme court considers the totality of the circumstances surrounding the defendant and the crime in making a determination of excessiveness. NRS 177.055(2).

20. CRIMINAL LAW.
Defendant did not show that appellate counsel rendered ineffective assistance in a death penalty direct appeal by failing to argue that it was prejudicial to have elected judges and justices preside over defendant's trial and appellate review on the ground that elected judges were beholden to the electorate and therefore could not be impartial; defendant failed to substantiate his claim with any specific factual allegations demonstrating actual judicial bias, and the claim was unpersuasive and would not have had a reasonable probability of success on appeal. U.S. CONST. amend. 6.

21. HABEAS CORPUS.
Certain claims asserted by defendant in a post-conviction petition for a writ of habeas corpus were procedurally barred, so as to allow trial court to dismiss the claims without an evidentiary hearing; the claims should have been raised on direct appeal, defendant did not attempt to demonstrate good cause for not doing so, and defendant failed to demonstrate that dismissal of the claims resulted in prejudice. NRS 34.810.

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

OPINION

Per Curiam:

The primary issue in this appeal is whether the constitutionality of Nevada's lethal injection protocol may be challenged in a post-conviction petition for a writ of habeas corpus. We hold that the claim is not cognizable in a post-conviction petition for a writ of habeas corpus under NRS Chapter 34 because it involves a challenge to the manner in which the death sentence will be carried out rather than the validity of the judgment of conviction or sentence.

FACTS AND PROCEDURAL HISTORY

Appellant Robert Lee McConnell pleaded guilty to first-degree murder with the use of a deadly weapon, sexual assault, and first-degree kidnapping. In doing so, he admitted that he shot and killed his ex-girlfriend's fiancé, Brian Pierce, and threatened his ex-girlfriend, April Robinson, with a knife, handcuffed her, sexually assaulted her, and kidnapped her, forcing her to drive to California. In a subsequent penalty hearing, the jury found three aggravators—the murder was committed during the course of a burglary and a robbery and involved mutilation—and determined that the aggravators were not outweighed by any mitigating circumstances. The jury returned a death sentence for the first-degree murder charge. On direct appeal, this court held that an aggravator cannot be based on the same felony used to establish felony murder but concluded that McConnell was not entitled to relief because he clearly pleaded guilty to willful, deliberate, and premeditated murder rather than felony murder. *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005).

McConnell then filed a timely post-conviction petition for a writ of habeas corpus in the district court alleging several claims for relief. The district court dismissed the petition without conducting an evidentiary hearing. McConnell challenges the district court's decision to deny his petition without conducting an evidentiary hearing on his claims.

DISCUSSION

This court has held that a post-conviction habeas petitioner ''is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief.'' *Mann v. State*, 118 Nev. 351, 353, 46 P.3d 1228, 1229 (2002); *see Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). For the reasons below, we conclude that the district court did not err by dismissing McConnell's post-conviction petition without conducting an evidentiary hearing.

Claim that Nevada's lethal injection protocol is unconstitutional

Relying on the United States Supreme Court's recent decision in *Baze v. Rees*, McConnell argues that Nevada's lethal injection protocol violates the Eighth Amendment to the United States Constitution because it does not sufficiently safeguard against a '' 'substantial risk of serious harm.' '' 553 U.S. 35, 50 (2008) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). In this, McConnell draws distinctions between the Kentucky protocol upheld in *Baze* and the protocol used in Nevada. The district court, however, rejected the

claim without an evidentiary hearing after concluding that a post-conviction petition for a writ of habeas corpus is not the proper forum to raise a challenge to Nevada's lethal injection protocol because ''by law this type of petition is used solely to attack a judgment or sentence.''[1]

[Headnotes 1, 2]

Whether a claim challenging the constitutionality of Nevada's lethal injection protocol is cognizable in a post-conviction habeas petition is an issue of first impression for this court. Because a post-conviction petition for a writ of habeas corpus filed pursuant to NRS Chapter 34 is a creature of statute, *see Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980), our resolution of the issue involves statutory interpretation. When interpreting a statute, this court's goal is to determine the Legislature's intent in enacting the statute. *Moore v. State*, 117 Nev. 659, 661, 27 P.3d 447, 449 (2001). Because ''we presume that the statute's language reflects the Legislature's intent,'' we must focus on the statute's plain language. *Id.*

As is evident from Nevada's statutory scheme, a post-conviction petition for a writ of habeas corpus is limited in scope. Under NRS 34.720, a post-conviction petition for a writ of habeas corpus is available to address two types of claims: (1) ''[r]equests [for] relief from a judgment of conviction or sentence in a criminal case'' and (2) ''[c]hallenges [to] the computation of time that [the petitioner] has served pursuant to a judgment of conviction.'' As a challenge to the lethal injection protocol does not implicate the computation of time served, only the first category is at issue. If a claim falls within that category, meaning that it seeks relief from a conviction or sentence, then a post-conviction petition for a writ of habeas corpus is the exclusive remedy.[2] NRS 34.724(2)(b) (providing that a

[1]The district court further denied this claim as barred by the law-of-the-case doctrine, stating that on direct appeal this court found the death penalty constitutional as applied to McConnell. However, on direct appeal we rejected an argument that Nevada's use of lethal injection is unconstitutional due to the absence of detailed codified guidelines setting forth a protocol for lethal injection. *McConnell*, 120 Nev. at 1054-57, 102 P.3d at 615-16. McConnell did not challenge, and this court did not address, the constitutionality of the specific protocol used in Nevada. As a result, the district court was incorrect in its conclusion that the claim was barred by the law-of-the-case doctrine.

[2]There are two exceptions to this rule of exclusivity: a post-conviction petition for a writ of habeas corpus ''[i]s not a substitute for and does not affect [1] any remedies which are incident to the proceedings in the trial court or [2] the remedy of direct review of the sentence or conviction.'' NRS 34.724(2)(a). Under the first exception, this court has recognized four remedies that are incident to the proceedings in the trial court: (1) a motion to correct an illegal sentence, (2) a motion to modify a sentence, (3) a post-conviction motion to withdraw a guilty plea, and (4) a motion for a new trial based on newly discovered evidence. *Hart v. State*, 116 Nev. 558, 562-63 & n.4, 1 P.3d 969, 971-72 & n.4 (2000); *Edwards v. State*, 112 Nev. 704, 707, 918 P.2d 321, 323-24 (1996).

post-conviction petition for a writ of habeas corpus ''[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them'').

This court has addressed the scope of post-conviction habeas relief in other contexts that provide some guidance. For example, in *Bowen v. Warden*, this court explained that it has ''repeatedly held that a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof.'' 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). Accordingly, we have previously determined that challenges to the conditions of confinement, such as placement in punitive segregation, are not cognizable in a post-conviction habeas petition. *Id.* Consistent with NRS 34.720, the import of *Bowen* is that a claim that is cognizable in a post-conviction habeas petition must challenge the *validity* of the conviction or sentence. The claim at issue in this case (the constitutionality of the lethal injection protocol) clearly does not involve a challenge to the validity of the conviction. Therefore, we focus on whether the claim challenges the validity of the sentence.

The United States Supreme Court has considered a similar question in holding that a challenge to a lethal injection protocol that is not statutorily mandated may be filed in a federal action under 42 U.S.C. § 1983. In *Hill v. McDonough*, 547 U.S. 573, 579 (2006), the Court reasoned that a protocol challenge is more akin to a challenge to the conditions of confinement, which may be brought under § 1983, than a challenge to the lawfulness of confinement or its duration, which must be brought in a habeas petition under 28 U.S.C. § 2254. The Court explained that the petitioner's challenge to the lethal injection protocol would ''leave the State free to use an alternative lethal injection procedure'' because state law did not require use of the challenged procedure. *Id.* at 580-81. As a result, the Court concluded that the claim could proceed under § 1983 because ''granting relief would not imply the unlawfulness of the lethal injection sentence.'' *Id.* at 580. The *Hill* Court, however, did not directly address whether the same challenge would also be cognizable in a federal habeas petition.

[Headnote 3]

In answering that question for purposes of a state habeas petition under NRS Chapter 34, we conclude that a challenge to the lethal injection protocol in Nevada does not implicate the validity of a death sentence because it does not challenge the death sentence itself but seeks to invalidate a particular procedure for carrying out the sentence. In Nevada, the method of execution—''injection of a lethal drug''—is mandated by statute. NRS 176.355(1). But the

manner in which the lethal injection is carried out—the lethal injection protocol—is left by statute to the Director of the Department of Corrections. NRS 176.355(2)(b) (providing that the Director shall ''[s]elect the drug or combination of drugs to be used for the execution after consulting with the State Health Officer''). Because the lethal injection protocol is not mandated by statute, granting relief on a claim that a specific protocol is unconstitutional would not implicate the legal validity of the death sentence itself. Rather, while granting relief on such a claim would preclude the Director from using the particular protocol found to be unconstitutional, the Director would be free to use some other protocol to carry out the death sentence.[3] Because McConnell's challenge to the lethal injection protocol would not preclude his execution under current law using another protocol, we conclude that the challenge to the lethal injection protocol does not implicate the validity of the death sentence and therefore falls outside the scope of a post-conviction petition for a writ of habeas corpus.[4] *Accord Ex parte Alba*, 256 S.W.3d 682, 685-86 (Tex. Crim. App. 2008) (reasoning that because the specific mixture used for lethal injection is not mandated by statute in Texas and any challenge to the current protocol would not eliminate the petitioner's death sentence, challenge to lethal injection protocol was not cognizable in state habeas petition).[5] Accordingly, the district court did not err in rejecting this claim without conducting an evidentiary hearing.

Claims that challenged the validity of the guilty plea

McConnell argues that the district court erred by dismissing his claims that his guilty plea was not entered knowingly and voluntarily. In particular, McConnell claims that his plea was invalid because he was not advised that he was waiving several constitutional rights, that he would be subject to lifetime supervision as a result of the sexual assault conviction, that he was ineligible for probation, and that he would be assessed fees and restitution and because the dis-

[3]As the Supreme Court's decision in *Baze* demonstrates, there is at least one protocol available that clearly meets constitutional requirements.

[4]We are further convinced of this conclusion by two practical considerations. First, a challenge to the lethal injection protocol necessarily seeks injunctive relief against use of the specific protocol, and it is not entirely clear that injunctive relief is available in a post-conviction habeas proceeding under NRS Chapter 34. Second, if the claim is cognizable in a post-conviction petition under NRS Chapter 34, then that is the only remedy available, NRS 34.724(2)(b), and the claim could be procedurally barred for some prisoners under NRS 34.726, NRS 34.800, or NRS 34.810.

[5]Our decision today does not leave McConnell without a remedy. For example, as the Supreme Court's decision in *Hill* makes clear, a challenge to the lethal injection protocol may be brought in an action under 42 U.S.C. § 1983.

trict court failed to inquire whether he was under the influence of drugs during the plea canvass.[6]

[Headnotes 4-6]

A guilty plea is presumptively valid, and McConnell had the burden of establishing that the plea was not entered knowingly and intelligently. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *see also Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). In determining the validity of a guilty plea, the district court must look to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Bryant*, 102 Nev. at 272, 721 P.2d at 368. Thus, ''the failure to utter talismanic phrases will not invalidate a plea where a totality of the circumstances demonstrates that the plea was freely, knowingly and voluntarily made,'' *Freese*, 116 Nev. at 1104, 13 P.3d at 447, and that the defendant understood the nature of the offense and the consequences of the plea. *See Kidder v. State*, 113 Nev. 341, 344, 934 P.2d 254, 256 (1997), *overruled on other grounds by Freese*, 116 Nev. at 1106 n.7, 13 P.3d at 448 n.7. This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. *Hubbard*, 110 Nev. at 675, 877 P.2d at 521.

[Headnote 7]

The record in this case demonstrates that McConnell's guilty plea was entered knowingly and voluntarily and, therefore, the district court did not abuse its discretion in denying McConnell's challenge to his guilty plea. First, events at the *Faretta* canvass[7] that preceded the plea canvass demonstrate McConnell's intelligence and awareness of the proceedings, his understanding of his constitutional rights, and that he was adamant about pleading guilty. Second,

[6]McConnell also claims that his plea was not entered knowingly and voluntarily because the district court did not advise him during the plea canvass that it had discretionary authority to impose concurrent or consecutive sentences and that a presentence report including his criminal history and hearsay evidence would be prepared before he was sentenced on the kidnapping and sexual assault counts. We conclude that the district court did not abuse its discretion in rejecting these claims as McConnell failed to adequately explain how these omissions rendered his guilty plea involuntary, particularly considering that he faced the death penalty as a result of the plea.

McConnell further claims that the plea was invalid under NRS 174.035(7) because it was not memorialized in a written plea agreement. We conclude that this claim lacks merit and therefore the district court did not abuse its discretion in rejecting it. NRS 174.035(7) does not apply here because McConnell's guilty plea was not entered ''pursuant to a plea bargain.'' Instead, McConnell pleaded guilty to all of the charges without the benefit of plea negotiations with the State, informing the district court that he was pleading guilty, over his prior counsel's objections, because of the overwhelming evidence the State possessed and because he wanted to accept responsibility.

[7]The district court canvassed McConnell pursuant to *Faretta v. California*, 422 U.S. 806 (1975), before granting his request to represent himself.

the district court sufficiently advised McConnell of his constitutional rights during the plea canvass, addressing the right to a jury trial on the issue of guilt, the right to confrontation, the right to cross-examine witnesses, the right to subpoena witnesses, and the right against self-incrimination and also addressing the deadlines for McConnell to pursue an appeal. Third, although McConnell was not advised that lifetime supervision would be a direct consequence of his guilty plea to sexual assault, *see Palmer v. State*, 118 Nev. 823, 831, 59 P.3d 1192, 1197 (2002), we conclude that the omission did not render the plea invalid given that McConnell was advised that he faced a life sentence for the sexual assault and he therefore was aware that he faced a maximum sentence that was greater than or equal to lifetime supervision plus the sentence imposed, *see id.* at 829 n.17, 59 P.3d at 1195 n.17; *Avery v. State*, 122 Nev. 278, 284, 129 P.3d 664, 668 (2006). Fourth, although the district court did not inform McConnell during the plea canvass that he was ineligible for probation,[8] it is apparent from the totality of the circumstances that McConnell was aware that probation was not a sentencing option. *See Avery*, 122 Nev. at 284-85, 129 P.3d at 668 (concluding that guilty plea was voluntary although district court did not specifically inform defendant of minimum term where district court advised defendant that maximum punishment was life in prison with possibility of parole after 20 years). In particular, McConnell was aware that he faced a death sentence. Fifth, although the district court did not inform McConnell during the plea canvass that he would be assessed fees and restitution as a consequence of his guilty plea,[9] we conclude that this omission did not render the plea unknowing or involuntary given the totality of the circumstances demonstrating that McConnell understood the consequences of his guilty plea. And sixth, although the district court did not ask McConnell during the plea canvass whether he was under the influence of drugs, the totality of the circumstances demonstrate that McConnell was not under the influence of drugs at the time. In particular, the plea canvass followed a thorough *Faretta* canvass during which McConnell informed the district court that he was not taking any medication and was not under the influence of drugs or alcohol. Given the totality of the circum-

[8]This court's prior decisions require that when an offense does not allow for probation, '' 'the district judge has a duty to insure that the record discloses that the defendant is aware of that fact.' '' *Riker v. State*, 111 Nev. 1316, 1322-23, 905 P.2d 706, 710 (1995) (quoting *Meyer v. State*, 95 Nev. 885, 887, 603 P.2d 1066, 1067 (1979), *overruled on other grounds by Little v. Warden*, 117 Nev. 845, 34 P.3d 540 (2001)).

[9]This court's prior decisions indicate that restitution is a direct consequence of a guilty plea and therefore a defendant must be informed of the possibility of restitution to ensure that the defendant understands the consequences of the plea. *See Lee v. State*, 115 Nev. 207, 209-10, 985 P.2d 164, 166 (1999); *Cruzado v. State*, 110 Nev. 745, 747, 879 P.2d 1195, 1196 (1994), *overruled on other grounds by Lee*, 115 Nev. 207, 985 P.2d 164.

stances demonstrating a knowing and voluntary plea, the district court did not abuse its discretion in rejecting McConnell's challenges to the validity of his guilty plea.[10]

Claims of ineffective assistance of counsel

[Headnotes 8-11]

McConnell contends that the district court erred in dismissing his claims that trial and appellate counsel provided ineffective assistance of counsel. A claim that counsel provided constitutionally inadequate representation is subject to the two-part test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of trial or appellate counsel, a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Id.* at 687. A court need not consider both prongs of the *Strickland* test if a defendant makes an insufficient showing on either prong. *Id.* at 697. ''A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.'' *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

Ineffective assistance of trial counsel

[Headnotes 12, 13]

McConnell contends that his standby defense counsel provided ineffective assistance by permitting him to plead ''straight-up'' while a discovery request was pending, demonstrating that standby counsel had not properly investigated and was not prepared. To establish prejudice resulting from trial counsel's inaction or omission, a defendant who pleaded guilty must demonstrate a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). ''The defendant carries the affirmative burden of establishing prejudice.'' *Riley v. State*, 110 Nev. 638, 646, 878 P.2d 272, 278 (1994). We conclude that McConnell's claim has no merit for three reasons.

[Headnote 14]

First, McConnell waived his right to counsel and chose to represent himself. Therefore, he did not have a constitutional right to the effective assistance of standby counsel. *See Harris v. State*, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (holding that defendant does not have right to advisory counsel); *see also Faretta v. California*,

[10]To the extent that McConnell claims that appellate counsel was ineffective for failing to challenge the validity of his guilty plea on appeal, this claim lacks merit because he cannot do so. *See Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 367-68 (1986).

422 U.S. 806, 835 (1975) (''When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.'').

[Headnote 15]

Second, McConnell stated during the plea canvass that he was pleading guilty against the advice of counsel. Although counsel certainly owes a duty to advise his client whether to plead guilty, counsel does not have the authority to override a defendant's decision to plead guilty. That decision is reserved to the client. RPC 1.2 (providing that ''[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered'').

[Headnote 16]

Third, McConnell did not specify in his petition what discovery was outstanding and how that discovery would have convinced him not to plead guilty and proceed to trial. And during McConnell's *Faretta* canvass, he complimented his attorneys' performance, stating that ''they're great attorneys, all of them. And I have to say I am impressed . . . these people actually care. And they're against the death penalty, and they believe in something.'' Under the circumstances, McConnell cannot meet his affirmative burden of establishing prejudice—that but for standby counsel's alleged error in allowing him to plead guilty while a discovery request was pending, he would not have pleaded guilty and would have insisted on going to trial.

Ineffective assistance of appellate counsel

[Headnotes 17, 18]

McConnell argues that the district court erred in dismissing his claim that appellate counsel was ineffective for failing to raise several issues. To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1113-14. Appellate counsel is not required to raise every nonfrivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, this court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Jury instruction on weighing aggravating and mitigating factors

McConnell argues that the district court erred in rejecting his ineffective-assistance claim based on appellate counsel's failure to

argue that the district court should have instructed the sentencing jury that the aggravating factors had to outweigh the mitigating factors beyond a reasonable doubt before it could impose death. We conclude that this ineffective-assistance claim lacks merit because the underlying legal argument would not have had a reasonable probability of success on appeal.

Nevada statutes do not impose the burden suggested by McConnell's claim. Two specific provisions are relevant. First, NRS 200.030(4)(a), which outlines the range of punishment for a first-degree murder conviction, provides that death can be imposed ''only if . . . any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.'' Second, NRS 175.554(3), which addresses jury instructions, determinations, findings, and the verdict, states that ''[t]he jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.'' Nothing in the plain language of these provisions requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty.

Similarly, this court has imposed no such requirement. In *DePasquale v. State*, we rejected an invitation to overturn previously established caselaw and require the State to prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. 106 Nev. 843, 852, 803 P.2d 218, 223 (1990); *accord Harris v. Pulley*, 692 F.2d 1189, 1195 (9th Cir. 1982) (noting that United States Supreme Court has never stated that beyond-a-reasonable-doubt standard is required when determining whether death penalty is imposed), *rev'd on other grounds*, 465 U.S. 37 (1984); *Gerlaugh v. Lewis*, 898 F. Supp. 1388, 1421 (D. Ariz. 1995) (holding that jury '' 'need not be instructed how to weigh any particular fact in the capital sentencing decision' '' (quoting *Tuilaepa v. California*, 512 U.S. 967, 979 (1994)). As the United States Supreme Court has stated, the jury's decision whether to impose a sentence of death is a moral decision that is not susceptible to proof. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 901 (1983)).

Because McConnell failed to demonstrate that this jury-instruction issue would have had a reasonable probability of success on appeal, we conclude that the district court did not err in rejecting McConnell's ineffective-assistance claim without conducting an evidentiary hearing.

Mandatory review of death sentences

McConnell contends that the district court erred in rejecting his ineffective-assistance claim based on appellate counsel's failure to argue that this court has not articulated any standards for its mandatory review of death sentences pursuant to NRS 177.055(2).[11] Citing *Dennis v. State*, 116 Nev. 1075, 13 P.3d 434 (2000), McConnell claims that the only guidance this court uses is the following question: ''[A]re the crime and defendant before us on appeal of the class or kind that warrants the imposition of death?'' *Id.* at 1085, 13 P.3d at 440. McConnell argues that without standards, he was unable to litigate on direct appeal the issue of whether his sentence was excessive and that that deprivation prejudiced him because he was unable to show that his case was no more egregious than cases in which the death penalty was not imposed.

[Headnote 19]

In *Dennis*, this court explained that, although we no longer conduct proportionality review of death sentences,[12] our consideration of the death sentences of ''similarly situated defendants may serve as a frame of reference for determining the crucial issue in the excessiveness analysis'' under NRS 177.055(2). 116 Nev. at 1085, 13 P.3d at 440. When considering whether the death penalty is excessive, this court looks to whether various other objective factors are present, such as whether alcohol or drugs influenced the crime, the treatment of codefendants, and the defendant's mental state, prior history of violence, and age. *Rhyne v. State*, 118 Nev. 1, 16, 38 P.3d 163, 173 (2002). In other words, this court considers ''the totality of the circumstances surrounding the defendant and the crime in making a determination of excessiveness.'' *Id.*

McConnell fails to specify how he would have benefited by more specific standards applied by this court in determining whether his sentence was excessive or that this court improperly concluded that his death sentence was not excessive. In particular, we observed

[11]NRS 177.055(2) provides, in pertinent part, that this court must review every death sentence and consider:

> (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

[12]A prior version of NRS 177.055(2) required this court to conduct a proportionality review of death sentences. 1985 Nev. Stat., ch. 527, § 1, at 1597-98. The Legislature repealed that requirement in 1985. *See, e.g., Thomas v. State*, 114 Nev. 1127, 1148, 967 P.2d 1111, 1125 (1998); *Guy v. State*, 108 Nev. 770, 784, 839 P.2d 578, 587 (1992).

in McConnell's direct appeal that he murdered Pierce ''with a shocking degree of deliberation and premeditation and without any comprehensible provocation'' and that ''[h]e presented no compelling mitigating evidence.'' *McConnell v. State*, 120 Nev. 1043, 1073, 102 P.3d 606, 627 (2004). We thoroughly considered whether McConnell's character and the crime warranted the imposition of death. Therefore, we conclude that McConnell failed to demonstrate that this claim had a reasonable probability of success on appeal and, as a result, the district court did not err in rejecting this ineffective-assistance claim without conducting an evidentiary hearing.

Elected judges

[Headnote 20]

McConnell contends that the district court erred in rejecting his ineffective-assistance claim based on appellate counsel's failure to argue that it was prejudicial to have elected judges and justices preside over his trial and appellate review because elected judges are beholden to the electorate and therefore cannot be impartial. We conclude that this claim fails for two reasons. First, McConnell failed to substantiate this claim with any specific factual allegations demonstrating actual judicial bias. Second, we conclude that his argument is unpersuasive and would not have had a reasonable probability of success on appeal. *See Nevius v. Warden*, 113 Nev. 1085, 1086-87, 944 P.2d 858, 859 (1997) (denying disqualification of supreme court justice where justice commented during election campaign that he favored death penalty in appropriate cases and had voted to uphold death penalty 76 times). Because this omitted issue had no reasonable probability of success on appeal, McConnell cannot demonstrate that appellate counsel provided ineffective assistance in this respect. The district court therefore did not err in rejecting this ineffective-assistance claim without conducting an evidentiary hearing.

Death-qualified jury

McConnell next argues that the district court erred in rejecting his ineffective-assistance claim based on appellate counsel's failure to argue that jury selection was unfairly limited to those jurors who were ''death qualified.''[13] Even assuming that the jurors identified by McConnell were dismissed because they were unwilling to impose a death sentence, there was no error. This court and the United States

[13]We note that McConnell provided only partial transcripts of the voir dire. The burden is on the appellant to provide this court with an adequate record enabling this court to review assignments of error. *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *Lee v. Sheriff*, 85 Nev. 379, 380, 455 P.2d 623, 624 (1969).

Supreme Court have determined that death qualification of a jury is not an unconstitutional practice. *See, e.g.*, *Buchanan v. Kentucky*, 483 U.S. 402, 416, 420 (1987); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986); *Aesoph v. State*, 102 Nev. 316, 317-19, 721 P.2d 379, 380-81 (1986); *McKenna v. State*, 101 Nev. 338, 342-44, 705 P.2d 614, 617-18 (1985). Additionally, since McConnell's jury was chosen only for the penalty hearing, the jury was required to be death qualified to ensure that they could follow the law and perform their duty as jurors. *See Buchanan*, 483 U.S. at 415-16. Because there was no error in death qualifying the jury, McConnell cannot demonstrate that appellate counsel was ineffective for failing to raise the issue. Thus, the district court did not err in rejecting this ineffective-assistance claim without conducting an evidentiary hearing.

Application of the McConnell rule

McConnell next claims the district court erred in dismissing his ineffective-assistance claim based on appellate counsel's failure to argue that two of the aggravating circumstances were improperly based upon the predicate felony alleged in support of the State's felony-murder theory. This claim is belied by the record in that appellate counsel did raise this issue on direct appeal—it was the focus of this court's decision in the direct appeal. *See McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004). Because the claim is belied by the record, the district court properly rejected it without conducting an evidentiary hearing.

McConnell nonetheless argues that this court should review this claim because it is ''warranted.'' In particular, McConnell argues that this court's holding in his direct appeal was erroneous because he did not make any factual admissions when he entered his guilty plea that would support the conclusion that he pleaded guilty to willful, deliberate, and premeditated murder rather than felony murder, and this court erred by basing its contrary conclusion in part on his testimony during the penalty hearing. Relying on *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004), McConnell argues that ''admissions which come later in time than the entry of the plea are not sufficient to cure a deficiency with the plea itself.''[14] But unlike in *Means*, the issue we considered in McConnell's direct appeal did not involve the validity of the guilty plea but rather the theory upon which the first-degree murder con-

[14]In *Means*, we held that because Means had signed his plea agreement three months after his plea canvass and the district court failed to inform him during the plea canvass that lifetime supervision was a consequence of his guilty plea, the record did not belie Means's claim that he was unaware that lifetime supervision was a direct consequence of his plea. 120 Nev. at 1017-18, 103 P.3d at 36. We therefore concluded that the district court erred by denying Means's claim that his plea was invalid without conducting an evidentiary hearing.

viction was based. McConnell has not cited any relevant legal authority to undermine our analysis on direct appeal. We therefore are not persuaded to revisit the law of the case on this matter, as established on direct appeal.[15] *See Pellegrini v. State*, 117 Nev. 860, 885, 34 P.3d 519, 535-36 (2001) (indicating that despite law-of-the-case doctrine, appellate court has ''limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted'').

Direct appeal claims

[Headnote 21]

McConnell contends that the district court erred in dismissing the following claims without conducting an evidentiary hearing: (1) the jury should have been instructed that it had to find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt before it could return with a sentence of death, (2) this court has not articulated standards for its mandatory excessiveness review, (3) it was prejudicial to have elected judges and justices preside over his penalty hearing and appellate review, (4) the aggravating circumstances were improperly based upon the predicate felony alleged in support of the State's felony-murder theory, (5) the jury selection was unfairly limited to those jurors who were ''death qualified,'' (6) the district court erred in allowing venire members to be dismissed on the basis that they had reservations regarding the death penalty, (7) the death penalty is unconstitutional,[16] and (8) the death sentence is invalid because he may become incompetent to be executed. These claims should have been raised on direct appeal and thus are procedurally barred under NRS 34.810 absent a showing of good cause and prejudice. McConnell did not attempt to demonstrate good cause, and he failed to demonstrate that dismissal of these claims resulted in prejudice. Thus, we conclude that the district court did not err in dismissing these claims.

[15]The State in its brief on appeal argues that *McConnell* was wrongly decided and should be overturned. This court considered and rejected the same challenges to *McConnell* in *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008), *cert. denied*, 556 U.S. ___, 129 S. Ct. 2431 (2009). We decline to revisit the issue.

[16]McConnell argues that the death penalty is unconstitutional on the grounds that it (1) is a wanton and arbitrary infliction of pain, (2) is unacceptable under current American standards of human decency, (3) deprives persons of the fundamental right to life without a compelling justification, (4) is cruel and unusual, (5) violates international law, (6) presents the risk of executing an innocent person, (7) undermines the underlying goals of the capital sanction by executing a rehabilitated person, and (8) allows district attorneys to select capital defendants and therefore results in arbitrary, inconsistent, and discriminatory selections.

Cumulative error

McConnell claims that all the alleged errors raised in this appeal considered cumulatively rendered his conviction and sentence unfair. McConnell uses the cumulative-error standard that this court applies on direct appeal from a judgment of conviction. *See, e.g.*, *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) (''The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.''). We are not convinced that that is the correct standard, but assuming that it is, McConnell has not asserted any meritorious claims of error and therefore there is nothing to cumulate.[17] We therefore conclude that the district court did not err in dismissing this claim.

CONCLUSION

The district court did not err in dismissing McConnell's post-conviction petition without conducting an evidentiary hearing. With respect to the constitutional challenge to Nevada's lethal injection protocol, we agree with the district court that such a challenge is not cognizable in a post-conviction petition for a writ of habeas corpus under NRS Chapter 34 because it does not implicate the validity of the death sentence itself. Accordingly, we affirm the judgment of the district court.

[17]We acknowledge that some courts have taken an approach similar to cumulative error in addressing ineffective-assistance claims, holding that multiple deficiencies in counsel's performance may be cumulated for purposes of the prejudice prong of the *Strickland* test when the individual deficiencies otherwise would not meet the prejudice prong. *See, e.g.*, *Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (stating that '' 'prejudice may result from the cumulative impact of multiple deficiencies' '' (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978))); *Schofield v. Holsey*, 642 S.E.2d 56, 60 n.1 (Ga. 2007), *cert. denied*, 552 U.S. 1070 (2007); *State v. Thiel*, 665 N.W.2d 305, 323 (Wis. 2003) (stating that it ''need not look at the prejudice of each deficient act or omission in isolation, because we conclude that the cumulative effect undermines our confidence in the outcome of the trial''). *But see Lee v. Lockhart*, 754 F.2d 277, 279 (8th Cir. 1985) (reasoning that ''[e]ach claim of a constitutional deprivation asserted in a petition for federal habeas corpus must stand on its own, or, as here, fall on its own''); *Byrd v. Armontrout*, 686 F. Supp. 743, 784 (E.D. Mo. 1988) (same). Assuming that multiple claims of constitutionally deficient counsel may be cumulated to demonstrate prejudice, we conclude that McConnell still would not be entitled to relief.

SAMAJA FUNDERBURK, AKA SAMAJA ELVIS FUNDERBURK, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 49198

July 30, 2009 212 P.3d 337

Appeal from a judgment of conviction, upon a jury verdict, of two counts of burglary while in possession of a deadly weapon, two counts of conspiracy to commit robbery, and four counts of robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The supreme court, HARDESTY, C.J., held that definitions in deadly weapon enhancement statute were instructive in determining what constituted a deadly weapon for purposes of burglary-while-in-possession-of-a-deadly-weapon statute.

Affirmed.

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

Catherine Cortez Masto, Attorney General, Carson City; *David J. Roger*, District Attorney, *Steven S. Owens* and *Nancy A. Becker*, Chief Deputy District Attorneys, and *Danielle K. Pieper*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   The supreme court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error; however, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo.
2. STATUTES.
   When a statute or one of its provisions is uncertain, the supreme court will look to the intent of the Legislature; moreover, it will construe the statute in a manner which avoids unreasonable results.
3. BURGLARY.
   Legislature intended the term ''deadly weapon'' to have broad applicability when it drafted statute governing burglary while in possession of a deadly weapon, and thus, definitions in deadly weapon enhancement statute were instructive to determine what constituted a deadly weapon in burglary statute; Legislature did not define ''deadly weapon'' in amendments to burglary statute. NRS 193.165(6), 205.060(4).
4. BURGLARY.
   BB gun was a ''deadly weapon'' within meaning of burglary-while-in-possession-of-a-deadly-weapon statute. NRS 193.165(6)(c), 202.265(5)(b), 205.060(4).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we address an issue of first impression: whether the definitions of ''deadly weapon'' set forth in NRS 193.165(6) are instructive on what constitutes a ''deadly weapon'' for burglary while in possession of a deadly weapon under NRS 205.060(4). Because the Legislature intended the definition of ''deadly weapon'' to be broad for purposes of NRS 205.060(4), we conclude that NRS 193.165(6)'s definitions are instructive for determining whether a weapon is a ''deadly weapon'' for purposes of NRS 205.060(4). Therefore, we determine that the district court did not err by instructing the jury that a BB gun constitutes a ''firearm,'' as defined in NRS 202.265(5)(b),[1] a statute referenced in NRS 193.165(6)(c).

FACTS AND PROCEDURAL HISTORY

On the evening of December 20, 2005, Samaja Funderburk and his co-assailant, Tucker Allen, entered a Burger King wearing hooded sweatshirts and masks over their faces. At least one of the men was carrying a gun—which was later determined to be a BB gun. After taking all of the cash and coin out of the safe, Funderburk and Allen instructed the employees to enter the walk-in refrigerator. After waiting for the assailants to leave, the employees exited the walk-in refrigerator and contacted the police.

On the evening of December 30, 2005, Funderburk and Allen, dressed in heavy winter clothing and ski masks, entered a McDonald's with a BB gun. Allen pointed the gun at the employees and said, ''You know what this is''—meaning a robbery. After Funderburk and Allen emptied the registers and the safe, they left the establishment. The police were waiting outside and took both men into custody.

Funderburk and Allen were subsequently tried. On the final day of trial, the district court instructed the jury on Funderburk's robbery-with-the-use-of-a-deadly-weapon and burglary-while-in-possession-of-a-deadly-weapon charges. Jury Instruction No. 10 addressed the definition of a deadly weapon under the robbery and burglary charges:

> You are instructed that . . . ''Firearm'' includes:
>
> . . . .

[1]NRS 202.265(5)(b) defines ''firearm'' as ''includ[ing] any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.''

> 3. Any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

See NRS 202.265(5)(b). The jury convicted Funderburk of various charges, including two counts of burglary while in possession of a deadly weapon under NRS 205.060(4). Funderburk challenges the deadly weapon element of his burglary-while-in-possession-of-a-deadly-weapon convictions.

DISCUSSION

Funderburk contends that the district court erred by applying one of NRS 193.165(6)'s definitions of ''deadly weapon'' to his burglary-while-in-possession-of-a-deadly-weapon charges.[2] Specifically, Funderburk claims that applying NRS 193.165(6)'s definitions to his burglary charges contradicts the Legislature's intent because burglary, unlike other crimes such as robbery or murder, is not referenced in NRS 193.165, and the burglary statute instead has its own provision in NRS 205.060(4) that allows for an increased sentence when a person possesses a deadly weapon during the commission of a burglary.[3] We disagree and conclude that the Legislature intended the definition of ''deadly weapon'' to be broad for purposes of determining whether a defendant committed burglary while in possession of a deadly weapon under NRS 205.060(4). As a result, we are convinced that the district court did not err by instructing the jury on a definition set forth in NRS 193.165(6)(c) for Funderburk's burglary-while-in-possession-of-a-deadly-weapon charges.[4]

---

[2]NRS 193.165(6) provides:

> As used in this section, ''deadly weapon'' means:
>
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or
>
> (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

[3]NRS 205.060(4) provides:

> A person convicted of burglary who has in his possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure or upon leaving the structure, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $10,000.

[4]Funderburk also asserts that NRS 193.165(6)'s definitions of ''deadly weapon'' are not applicable to his burglary charges because NRS 193.165 provides that its provisions (including its definitions) are not applicable to crimes

Standard of review

[Headnote 1]

This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error, *Brooks v. State*, 124 Nev. 203, 206, 180 P.3d 657, 658-59 (2008); however, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

[Headnote 2]

This court has stated that ''a criminal statute must be strictly construed against the imposition of a penalty when it is uncertain or ambiguous.'' *Zgombic v. State*, 106 Nev. 571, 575, 798 P.2d 548, 551 (1990), *superseded by statute*, 1995 Nev. Stat., ch. 455, § 1, at 1431, *as recognized in Steese v. State*, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998). When a statute or one of its provisions is uncertain, this court will look to the intent of the Legislature. *Id*. Moreover, this court will construe the statute ''in a manner which avoids unreasonable results.'' *Id*.

Legislative intent

[Headnote 3]

When the Legislature drafted NRS 205.060 in 1967, it did not include a deadly weapon enhancement provision. *See* 1967 Nev. Stat., ch. 211, § 138, at 494. Nonetheless, lower courts began enhancing burglary sentences under NRS 193.165 when the defendant possessed a deadly weapon during the commission of the burglary. *See Carr v. Sheriff*, 95 Nev. 688, 601 P.2d 422 (1979); *see also Frost v. Sheriff*, 95 Nev. 781, 602 P.2d 193 (1979). In response, this court addressed whether burglary sentences could be enhanced under NRS 193.165 for a defendant's use of a deadly weapon. In *Carr*, this court noted that NRS 193.165 authorizes a sentence enhancement if the defendant '' 'uses a . . . deadly weapon in the commission of a crime.' '' 95 Nev. at 690 n.2, 601 P.2d at 424 n.2 (quoting NRS 193.165(1)). This court concluded that because ''[t]he offense of burglary is complete when the house or other building is entered with the specific intent designated in the statute[,] . . . [the] commission of the burglary . . . could not have been perpetrated with the *use* of a deadly weapon as contemplated by NRS 193.165.'' *Id*. at 689-90, 601 P.2d at 423-24 (citations omitted); *see also Frost*, 95 Nev. at 782, 602 P.2d at 194 (because burglary is complete upon

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that require a deadly weapon as an element of the crime. Moreover, according to Funderburk, the district court's use of NRS 202.265(5)(b)'s definition of ''firearm'' was error because NRS 202.265(5) specifically states that its definitions relate only to the term as used in that statute. After careful consideration, we conclude that these claims are without merit.

entry of the dwelling, appellant could not have ''used [the weapon] in the commission of the burglary''). Thus, under these holdings, a defendant's burglary sentence could not be enhanced if the defendant possessed a deadly weapon during the commission of the crime.

Nearly a decade after this court established that burglary sentences could not be enhanced under NRS 193.165, this court addressed what constituted a ''deadly weapon'' under NRS 193.165. *Clem v. State*, 104 Nev. 351, 760 P.2d 103 (1988), *overruled by Zgombic*, 106 Nev. 571, 789 P.2d 548. In *Clem v. State*, this court adopted the broadly applicable functional test for determining whether an instrument constituted a deadly weapon under NRS 193.165. *Id*. at 357, 760 P.2d at 106-07. Under the functional test, this court would look to ''how an instrument is used and the facts and circumstances of its use.'' *Id*. at 357, 760 P.2d at 106.

After this court determined that burglary sentences could not be enhanced under NRS 193.165, *see Carr*, 95 Nev. at 689-90, 601 P.2d at 423-24, and shortly after this court adopted the broad functional test, the Legislature amended NRS 205.060 to include an increased sentencing range when a person has possession or gains possession of a ''deadly weapon'' during a burglary. 1989 Nev. Stat., ch. 568, § 1, at 1207. The Legislature, however, failed to define that term in the statute. *See id*. Additionally, there was no discussion during consideration of the amendment as to what constituted a ''deadly weapon'' for purposes of the increased sentencing range. *See, e.g.*, Hearing on A.B. 592 Before the Assembly Comm. on Judiciary, 65th Leg. (Nev., April 25, 1989); Hearing on A.B. 592 Before the Senate Comm. on Judiciary, 65th Leg. (Nev., June 13, 1989). Yet, the caselaw existent at the time that the Legislature amended NRS 205.060 demonstrates that the Legislature intended the new armed burglary provision to have broad applicability in terms of what constitutes a ''deadly weapon.''

Although the applicability of NRS 193.165(6)'s definitions was not at issue during the 1989 drafting of the armed burglary provision (because the Legislature did not add those definitions to NRS 193.165 until 1995, *see* 1995 Nev. Stat., ch. 455, § 1, at 1431), we determine that the existence of the *Clem* decision had considerable influence on the Legislature's enactment of the 1989 statute. *Clem*'s functional test was the applicable law to determine whether an instrument was a ''deadly weapon'' at the time that the Legislature adopted the armed burglary provision. Therefore, because the *Clem* functional test was the test for determining what constituted a ''deadly weapon,'' we must assume that the Legislature drafted the armed burglary provision with that broad definition in mind. *Studebaker Co. v. Witcher*, 44 Nev. 442, 450, 195 P. 334, 336 (1921) (''It must be presumed that the [L]egislature of this state, when it

enacted the statute . . . had knowledge of the state of the law in regard to the subject-matter involved.''). And, because the Legislature did not define ''deadly weapon'' in its amendments to NRS 205.060, we conclude that the Legislature intended the term to have broad applicability.

[Headnote 4]

As a result, we conclude that, based on the Legislature's intent, the definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a ''deadly weapon'' under NRS 205.060(4). Therefore, we determine that the district court did not err by instructing the jury that a BB gun is a deadly weapon as it constitutes a ''firearm'' under NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c).[5]

CONCLUSION

We conclude that NRS 193.165(6)'s definitions are instructive for determining what constitutes a deadly weapon for enhancement purposes under NRS 205.060(4). Further, we determine that the district court did not err by instructing the jury on the definition of a ''firearm,'' as defined in NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c). Accordingly, we affirm the judgment of conviction.

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

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[5]Additionally, Funderburk alleges that the State failed to present sufficient evidence to support his conviction of robbery with the use of a deadly weapon regarding count 10. Having carefully reviewed this contention, we conclude that it does not warrant reversal. *See Brooks v. State*, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008) (stating that a defendant uses a deadly weapon and is subject to an additional sentence when (1) the defendant is liable as a principal for the offense, (2) another principal used a deadly weapon during the commission of the crime, and (3) the defendant knew that the other used a deadly weapon).