any other mortgage banking activity in Nevada, and the property secured a loan that Sylver freely entered into and later defaulted upon. The arbitrator found that Regents' violation of the licensing statute was unintentional. Sylver does not assert that Regents' failure to obtain a license or exemption to record the deed of trust is in any way related to his failure to repay the loan. We conclude that the public policy of the licensing requirement does not clearly outweigh the interest in enforcing the loan.

Accordingly, Sylver has not overcome the very high hurdle for showing that the arbitrator, '' 'knowing the law and recognizing that the law required a particular result, simply disregarded the law.' '' *Clark Cnty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8 (quoting *Bohlmann*, 120 Nev. at 547, 96 P.3d at 1158).

*CONCLUSION*

NRS 38.241 provides for vacatur of arbitration awards procured by corruption, fraud, or undue means. We conclude that to vacate an arbitration award on a theory of ''undue means'' requires the challenging party to prove by clear and convincing evidence that the award was procured through intentionally misleading conduct. The appellant has not satisfied his burden. We further conclude that the arbitrator's refusal to void one of the loans was not a manifest disregard of the law.

For the reasons stated above, we affirm the district court's order confirming the arbitration award and judgment thereon.

HARDESTY and CHERRY, JJ., concur.

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CITY OF LAS VEGAS, APPELLANT, *v.*
KEVIN EVANS, RESPONDENT.

No. 59089

May 2, 2013 301 P.3d 844

Appeal from a district court order denying a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Firefighter filed a claim for workers' compensation benefits, asserting that his cancer was a compensable occupational disease caused by his work-related exposure to toxic chemicals and smoke. The City denied the claim, and firefighter appealed. Hearing officer affirmed the denial of the claim, and appeal was taken. The appeals officer reversed, and City appealed. The district court denied

City's petition for judicial review, and City appealed. The supreme court, SAITTA, J., held that: (1) when firefighter failed to qualify for the statutory presumption that his cancer was a compensable occupational disease, he lost the benefit of that rebuttable presumption, but he did not lose the opportunity to seek workers' compensation benefits for his cancer by satisfying statutory requirements for establishing a compensable occupational disease; and (2) evidence of firefighter's on-the-job exposure to carcinogens along with doctors' testimony satisfied statutory requirements for proving a compensable occupational disease.

**Affirmed.**

*Lewis Brisbois Bisgaard & Smith, LLP*, and *Daniel L. Schwartz*, Las Vegas, for Appellant.

*King, Gross & Sutcliffe, Ltd.*, and *Marvin S. Gross*, Las Vegas, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court reviews an administrative decision in the same manner as the district court.
2. APPEAL AND ERROR.
   Questions of law, such as statutory interpretation, are reviewed de novo.
3. STATUTES.
   When a statute is clear and unambiguous, the courts give effect to the plain and ordinary meaning of the words.
4. STATUTES.
   In assessing a statute's plain meaning, provisions are read as a whole with effect given to each word and phrase.
5. WORKERS' COMPENSATION.
   When firefighter failed to qualify for the statutory presumption that his cancer was a compensable occupational disease that arose out of and in the course of his employment, he lost the benefit of that rebuttable presumption, but he did not lose the opportunity to seek workers' compensation benefits for his cancer by satisfying statutory requirements for establishing a compensable occupational disease. NRS 617.440, 617.453.
6. ADMINISTRATIVE LAW AND PROCEDURE.
   When a party challenges a district court's decision to deny a petition for judicial review of an administrative agency's determination, the supreme court reviews the evidence presented to the agency and ascertains whether the agency abused its discretion by acting arbitrarily or capriciously.
7. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court must not substitute its judgment for that of the agency as to the weight of evidence on questions of fact.
8. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court defers to an agency's findings of fact as long as they are supported by substantial evidence.

9. Administrative Law and Procedure.
Substantial evidence exists to support agency decision if a reasonable person could find the evidence adequate to support the agency's conclusion.

10. Administrative Law and Procedure.
The supreme court is limited to the record that was before the agency. NRS 233B.135(1)(b).

11. Workers' Compensation.
In proving that one's employment caused his or her disease, workers' compensation claimant must show, with medical testimony, that it is more probable than not that the occupational environment was the cause of the acquired disease; claimant must show the probability of causation. NRS 617.440.

12. Workers' Compensation.
Evidence of firefighter's on-the-job exposure to carcinogens along with doctors' testimony satisfied statutory requirements for proving a compensable occupational disease. NRS 617.440.

Before Gibbons, Douglas and Saitta, JJ.

## OPINION

By the Court, Saitta, J.:

In this appeal, we resolve issues arising from a workers' compensation action brought by respondent Kevin Evans, a firefighter for appellant City of Las Vegas, who was diagnosed with cancer within four years from the commencement of his employment with the City. Evans filed a claim for workers' compensation benefits, asserting that his cancer was a compensable occupational disease that resulted from his work as a firefighter.

The salient issue that we address is the relationship between NRS 617.440—a statute that, in conjunction with NRS 617.358, delineates the requirements for establishing a compensable occupational disease—and NRS 617.453—a statute that provides for a qualified, rebuttable presumption that a firefighter's cancer constitutes a compensable occupational disease. As these statutes pertain to this matter, we address whether the appeals officer erred in determining that Evans could be awarded workers' compensation benefits upon satisfying NRS 617.440's requirements despite not qualifying for NRS 617.453's rebuttable presumption. We also address whether the appeals officer abused her discretion in determining that Evans' cancer was a compensable occupational disease under NRS 617.440.

Based upon the statutes' plain meaning, we conclude that the district court did not err in denying judicial review and upholding the appeals officer's determination that a firefighter, such as Evans,

who fails to qualify for NRS 617.453's rebuttable presumption can still seek workers' compensation benefits pursuant to NRS 617.440 by proving that his or her cancer is an occupational disease that arose out of and in the course of his or her employment. We further conclude that the appeals officer did not abuse her discretion in determining that Evans' cancer was a compensable occupational disease.

## *FACTS AND PROCEDURAL HISTORY*

Evans began his employment as a firefighter for the City in October 2004. In this capacity, he responded to over 100 fires, which repeatedly exposed him to fire, smoke, and combustion byproducts. Four years after beginning his employment as a firefighter, Evans experienced health problems which led him to undergo an MRI that revealed a brain tumor. Evans temporarily ceased working following the MRI. He underwent surgery to remove the tumor, which was diagnosed as cancerous, and started postoperative treatment. As a result of the aggressive nature of his cancer, he continued regular follow-up treatment, which included chemotherapy.

Evans filed a claim with the City for workers' compensation benefits asserting that his cancer was a compensable occupational disease caused by his work-related exposure to toxic chemicals and smoke. The City denied the claim.

Subsequently, Evans appealed the denial of his claim to the Department of Administration Hearings Division. The hearing officer determined that NRS 617.440, which states the requirements for proving a compensable occupational disease, did not apply to Evans' claim. She further concluded that only NRS 617.453 applied to his claim, which provides that a firefighter's cancer developed or manifested out of or in the course of employment is presumed to be a compensable occupational disease if he or she worked as a firefighter for five years or more and has met other conditions. The hearing officer affirmed the denial of the claim because Evans had not been employed as a firefighter for five years.

On appeal before an appeals officer, Dr. James Melius—a doctor who has studied cancer in firefighters for over thirty years—and Dr. Paul Michael—the doctor who treated Evans and who had nearly eight years of experience in treating brain cancer—provided testimony that supported Evans' contention that his cancer resulted from his employment, thereby constituting a compensable occupational disease. The appeals officer determined that despite Evans not qualifying for NRS 617.453's presumption, he could still seek workers' compensation benefits by satisfying NRS 617.440's requirements. Upon concluding that Evans satisfied NRS 617.440's requirements, the appeals officer reversed the hear-

ing officer's affirmation of the City's denial of Evans' claim and ordered the City to provide the appropriate benefits to Evans.

The City petitioned the district court for judicial review of the appeals officer's decision, which the district court denied. This appeal followed.

## *DISCUSSION*

The City argues that the appeals officer (1) erred in concluding that Evans could be awarded workers' compensation benefits pursuant to NRS 617.440 and (2) abused her discretion in determining that Evans' cancer was a compensable occupational disease. We disagree.

### *The appeals officer did not err in concluding that Evans could be awarded workers' compensation benefits by satisfying NRS 617.440's requirements*

The City argues that the appeals officer erroneously applied NRS 617.440 to Evans' claim because NRS 617.453 expressly precludes Evans from seeking compensation under NRS 617.440. We disagree.

[Headnotes 1, 2]

We review an administrative decision in the same manner as the district court. *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997). Hence, questions of law, such as statutory interpretation, are reviewed de novo. *Id.*; *see also Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006).

#### *The statutes' plain language*

[Headnotes 3, 4]

''When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words . . . .'' *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). In assessing a statute's plain meaning, provisions are read as a whole with effect given to each word and phrase. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011). In the context of Nevada workers' compensation laws, we have ''consistently upheld the plain meaning of the statutory scheme.'' *SIIS v. Prewitt*, 113 Nev. 616, 619, 939 P.2d 1053, 1055 (1997).

The plain language of the statutes at issue reveals the general requirements for establishing a compensable occupational disease, which are articulated by NRS 617.440 in conjunction with NRS 617.358, and an exception to these general requirements in the form of a rebuttable presumption under NRS 617.453.

NRS 617.440 and NRS 617.358 articulate the general requirements for proving a compensable occupational disease.

NRS 617.358(1) states that an employee cannot receive compensation for an occupational disease unless he or she ''establish[es] by a preponderance of the evidence that the employee's occupational disease arose out of and in the course of his or her employment.'' NRS 617.440 provides the requirements for proving that an occupational disease arose ''out of and in the course of [one's] employment.'' NRS 617.440(1)-(3); *see Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 674, 676, 838 P.2d 435, 435, 437 (1992).

Both NRS 617.358(3) and NRS 617.440(5) express that their respective requirements do not apply to claims filed under NRS 617.453, which provides for a qualified, rebuttable presumption that a firefighter's cancer is a compensable occupational disease. NRS 617.358(3) states that ''[t]he provisions of this section do not apply to any claim filed for an occupational disease described in NRS 617.453 . . . .'' Similarly, NRS 617.440(5) provides that ''[t]he requirements set forth in this section do not apply to claims filed pursuant to NRS 617.453 . . . .'' In stating their respective relationships to NRS 617.453, these statutes provide nothing more than the acknowledgement that one who seeks compensation under NRS 617.453 need not satisfy the requirements imposed by NRS 617.358 and NRS 617.440.

The plain language of NRS 617.453 creates an exception to NRS 617.358's and NRS 617.440's requirements by granting firefighters diagnosed with cancer who meet certain conditions a qualified, rebuttable presumption that their cancer is a compensable occupational disease that arose ''out of and in the course of the[ir] employment.'' NRS 617.453(1), (5). To qualify for this presumption, one must have been employed as a full-time firefighter for five or more years. NRS 617.453(1)(a)(1). If one qualifies for NRS 617.453's presumption, then his or her ''[d]isabling cancer is presumed to have developed or manifested itself out of and in the course of the employment . . . [and] [t]his rebuttable presumption must control the awarding of benefits pursuant to this section unless evidence to rebut the presumption is presented.'' NRS 617.453(5). Pursuant to NRS 617.358(3)'s and NRS 617.440(5)'s plain language, as addressed above, one who qualifies for NRS 617.453's rebuttable presumption need not satisfy the requirements under NRS 617.358 and NRS 617.440.

NRS 617.453's qualified, rebuttable presumption rests upon certain conditions, the absence of which only results in the loss of that presumption. *See* NRS 617.453(1), (2), (5). Contrary to the City's argument, NRS 617.358, NRS 617.440, and NRS 617.453 lack language communicating that a firefighter with cancer cannot seek recovery under the two former statutes as a result of not qualifying for the latter statute's presumption.

[Headnote 5]

Here, when Evans failed to qualify for the presumption under NRS 617.453, he lost the benefit of that presumption but did not lose the opportunity to seek workers' compensation benefits for his cancer by satisfying NRS 617.440's requirements for establishing a compensable occupational disease.

Accordingly, we conclude that the appeals officer did not err in determining that Evans could be awarded workers' compensation benefits under NRS 617.440, and thus, the district court did not err in denying judicial review on this issue. The plain meaning of the statutes reveals that NRS 617.453 affords a firefighter a qualified, rebuttable presumption that his or her cancer is a compensable occupational disease and a firefighter who fails to qualify for this presumption can still seek workers' compensation benefits for his or her cancer by satisfying the requirements under NRS 617.440, in conjunction with NRS 617.358.[1]

*The district court did not abuse its discretion in determining that Evans' cancer was a compensable occupational disease pursuant to NRS 617.440*

The City argues that substantial evidence does not support the appeals officer's conclusion that Evans' cancer constituted a compensable occupational disease. We disagree.

[Headnotes 6-10]

''When a party challenges a district court's decision to deny a petition for judicial review of an administrative agency's determination, . . . [we] review the evidence presented to the agency and ascertain whether the agency abused its discretion by

[1]The analysis above is congruent with our analysis in *Manwill v. Clark County*, 123 Nev. 238, 162 P.3d 876 (2007). In *Manwill*, we articulated the relationship between NRS 617.358, which implicates NRS 617.440, and NRS 617.457's conclusive presumption that a firefighter's heart disease is a compensable occupational disease. *Id.* at 242, 162 P.3d at 879. The language in NRS 617.358(3) and NRS 617.440(5) that bars the application of these statutes to claims under NRS 617.453 also pertains to claims under NRS 617.457. In *Manwill*, we stated that, generally, one seeking compensation for an occupational disease must prove that the disease ''arose out of and in the course of employment'' pursuant to NRS 617.358. 123 Nev. at 242, 162 P.3d at 879. We also provided that a firefighter who qualifies for NRS 617.457's presumption is relieved from the burden of satisfying NRS 617.358's requirements. *Id.* Thus, our analysis demonstrated that NRS 617.457 is a presumption that provides for an exception to the requirements under NRS 617.358 and, by implication, NRS 617.440. *See id.* Similarly, in this appeal we conclude that NRS 617.453's presumption is an exception to the general requirements under NRS 617.358 and NRS 617.440; this presumption does not serve as the exclusive means for a firefighter with cancer arising out of or in the course of employment to seek workers' compensation benefits.

acting arbitrarily or capriciously.'' *Father & Sons & a Daughter Too v. Transp. Servs. Auth. of Nev.*, 124 Nev. 254, 259, 182 P.3d 100, 103 (2008). We must not substitute our ''judgment for that of the agency as to the weight of evidence on questions of fact.'' *Schepcoff v. SIIS*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993). ''We defer to an agency's findings of fact as long as they are supported by substantial evidence.'' *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). ''Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion . . . .'' *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). Moreover, we are limited to the record that was before the agency. NRS 233B.135(1)(b); *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 520 (2009).

NRS 617.440 provides the requirements for determining whether a disease arose out of and in the course of employment so as to be deemed a compensable occupational disease. NRS 617.440(1) states:

> An occupational disease defined in this chapter shall be deemed to arise out of and in the course of the employment if:
>
> (a) There is a *direct causal connection* between the conditions under which the work is performed and the occupational disease;
>
> (b) It can be seen to have followed as a *natural incident* of the work as a result of the exposure occasioned by the nature of the employment;
>
> (c) It can be fairly traced to the employment as the *proximate cause*; and
>
> (d) It *does not come from* a hazard to which workers would have been equally exposed *outside of the employment*.

(Emphases added.)

[Headnote 11]

In proving that one's employment caused his or her disease, one ''must show, with medical testimony, that it is more probable than not that the occupational environment was the cause of the acquired disease.'' *Seaman v. McKesson Corp.*, 109 Nev. 8, 10, 846 P.2d 280, 282 (1993). Hence, one must show the probability of causation. *Id.*

NRS 617.440(2) clarifies that ''[t]he disease must be incidental to the character of the business and not independent of the relation of the employer and employee.'' NRS 617.440(3) further clarifies that ''[t]he disease need not have been foreseen or expected, but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence.''

[Headnote 12]

Here, the evidence of Evans' on-the-job exposure to carcinogens along with Doctor Melius's and Michael's testimony satisfied NRS 617.440's requirements for proving a compensable occupational disease. The evidence established a direct causal connection between Evans' cancer and his exposure to carcinogens at work. It also revealed that Evans' cancer arose as a natural incident of his exposure to carcinogens, that this exposure would not have otherwise occurred off the job, and that his cancer can be fairly linked to his job as the proximate cause.

Based on his knowledge, expertise, research, and examination of Evans' medical and work records, Dr. Melius testified that, in his medical opinion, Evans' work as a firefighter caused his cancer. He asserted that Evans, as a firefighter, exposed himself to carcinogens and that studies reveal that being exposed to these carcinogens creates a higher risk of developing brain cancer. He also stated that even one single encounter with such carcinogens can cause cancer if the encounter is of an intense nature. Based upon similar grounds, Dr. Michael testified that, in his medical opinion, Evans' activities as a firefighter caused his cancer. In light of Evans' work history, which included over 100 encounters with fire that entailed intense exposure to carcinogens, Doctor Melius's and Michael's testimony established a direct causal relationship between Evans' cancer and his work. *See* NRS 617.440(1)(a).

Dr. Melius further testified that a firefighter's brain cancer, such as that of Evans, can be a natural incident of a firefighter's job. He asserted that when fighting a fire, a firefighter unavoidably exposes himself or herself to the carcinogens that are present within smoke and a firefighter's use of protective gear does not eliminate such exposure. Together with the evidence of Evans' job-related contact with carcinogens, Dr. Melius's testimony showed that Evans' cancer resulted from his unavoidable exposure to carcinogens, which was a natural incident of working as a firefighter. *See* NRS 617.440(1)(b), (2), (3).

Finally, Dr. Melius's testimony provided that firefighters, such as Evans, have a higher risk of developing brain cancer than the general public due to the former's uniquely intense and frequent on-the-job exposure to cancer-causing carcinogens that are released in large amounts as a result of the combustion that occurs during a fire. Dr. Michael provided similar testimony. Doctor Melius's and Michael's testimony and the evidence of Evans' on-the-job exposure to carcinogens revealed that Evans' cancer resulted from his exposure to cancer-causing carcinogens as a result of firefighting and that Evans would not have been equally exposed to such carcinogens outside of his work. *See* NRS 617.440(1)(d).

The conclusion that Evans' work as a firefighter proximately caused his cancer is well supported by the cumulative effect of the

evidence and testimony. Further establishing proximate cause, Dr. Michael, who treated Evans and knew of his work and health history, expressed that, to a reasonable degree of certainty, Evans' cancer resulted from his exposure to carcinogens as a firefighter and not to other cancer-causing substances outside of his work. *See* NRS 617.440(1)(c).

Accordingly, we conclude that substantial evidence supports the appeals officer's conclusion that Evans' cancer was a compensable occupational disease.[2] *See* NRS 617.440(1)-(3).

## *CONCLUSION*

The appeals officer did not err in determining that Evans could be awarded workers' compensation benefits under NRS 617.440. The plain meaning of NRS 617.453 affords firefighters a qualified, rebuttable presumption that their cancer is a compensable occupational disease, and firefighters who fail to qualify for this presumption can seek workers' compensation benefits for their cancer by satisfying the requirements under NRS 617.440, in conjunction with NRS 617.358. Furthermore, the appeals officer did not abuse her discretion in concluding that Evans' cancer was a compensable occupational disease pursuant to NRS 617.440. Accordingly, we affirm the district court's denial of the City's petition for judicial review.

GIBBONS and DOUGLAS, JJ., concur.

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MIGUEL JACINTO, APPELLANT, *v.* PENNYMAC CORP.; AND CAL-WESTERN RECONVEYANCE CORPORATION, RESPONDENTS.

No. 59936

May 2, 2013 300 P.3d 724

Appeal from a district court order granting a petition for judicial review in a Foreclosure Mediation Program matter. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Deed of trust settlor petitioned for judicial review after second mediation in Foreclosure Mediation Program. The district court granted petition for judicial review, but denied loan modification and ordered beneficiary to pay $3,500 in attorney fees. Settlor appealed. The supreme court, DOUGLAS, J., held that: (1) settlor was

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[2]We have considered the City's remaining contentions and conclude that they are without merit.

aggrieved party with standing to appeal, and (2) denying the loan modification was not abuse of discretion.

**Affirmed.**

*Law Offices of Mitchell Posin, Chtd.*, and *Mitchell Posin*, Las Vegas, for Appellant.

*Pite Duncan, LLP*, and *Gregg A. Hubley* and *K. Alexandra Cavin*, Las Vegas, for Respondents.

1. Appeal and Error.
   A party has the right to appeal when the party is aggrieved by a final, appealable judgment or order. NRAP 3A(a), (b).
2. Alternative Dispute Resolution; Mortgages.
   An order granting or denying a petition for judicial review in Foreclosure Mediation Program matter is an appealable final judgment if it fully and finally resolves the matters as between all parties. NRAP 3A(a), (b).
3. Appeal and Error.
   To be aggrieved, a party seeking appeal must be adversely and substantially affected by the challenged judgment; a party is aggrieved when a judgment causes a substantial grievance, such as the denial of some personal or property right. NRAP 3A(a), (b).
4. Alternative Dispute Resolution; Mortgages.
   Denial of home loan modification request adversely and substantially affected homeowner's property rights such that he was aggrieved by the district court's decision regarding the imposition of sanctions and, thus, he had standing to appeal to challenge the amount and nature of the sanctions imposed, although the petition for judicial review in Foreclosure Mediation Program had been granted. NRAP 3A(a), (b).
5. Alternative Dispute Resolution; Mortgages.
   In reviewing a district court order granting or denying judicial review in Foreclosure Mediation Program matter, the supreme court gives deference to a district court's factual determinations and examines its legal determinations de novo.
6. Alternative Dispute Resolution; Mortgages.
   If the district court finds that the deed of trust beneficiary seeking Foreclosure Mediation Program (FMP) certificate fails to comply with statutory requirements on attending the mediation, participating in good faith, bringing required documents, and authorizing representative to modify the loan, the bare minimum sanction is that an FMP certificate must not issue; in the absence of factual or legal error, the choice of any further sanctions in addition to withholding the FMP certificate is committed to the district court's sound discretion. NRS 107.086(4), (5).
7. Alternative Dispute Resolution; Mortgages.
   Denying home loan modification and imposing sanction of $3,500 against deed of trust beneficiary to cover settlor's attorney fees was not abuse of discretion, although beneficiary failed to bring certified copies of the promissory note and deed of trust, failed to provide an appraisal, sent representative without sufficient authority to negotiate a modification, and participated in the Foreclosure Mediation Program process in bad faith. NRS 107.086(4).

Before GIBBONS, DOUGLAS and SAITTA, JJ.

## OPINION

By the Court, DOUGLAS, J.:

In this appeal, we address whether a homeowner whose petition for judicial review in a Foreclosure Mediation Program (FMP) matter was granted, but whose request for a judicially imposed loan modification was denied, is an aggrieved party with standing to appeal the amount and nature of sanctions. We conclude that when the district court grants a homeowner's petition for judicial review, the homeowner may appeal from that final determination under NRAP 3A(b)(1) and challenge the nature and amount of sanctions imposed, if the type or amount of sanctions imposed adversely and substantially affects the homeowner to the extent that the homeowner is aggrieved as contemplated under NRAP 3A(a). In this case, the homeowner was awarded monetary sanctions but his request for a judicially imposed loan modification was denied. Because the homeowner was denied the loan modification, the order adversely and substantially affects his property rights, and thus, the homeowner is aggrieved by the district court's order. He therefore has standing to challenge the order on appeal. Nevertheless, because we conclude that the district court acted within its discretion in determining sanctions, we affirm.

### *FACTS AND PROCEDURAL HISTORY*

Appellant Miguel Jacinto attended a first FMP mediation with Citimortgage, during which the parties reached an agreement to attempt a Home Affordable Modification Program (HAMP) loan modification based on Jacinto's prequalification for a modification. Pursuant to that agreement, Jacinto submitted financial documents for assessment. Citimortgage then sent Jacinto a letter stating that he could not be approved for a HAMP modification. After being denied the HAMP modification, Jacinto filed a petition for judicial review and sought sanctions against Citimortgage for failing to mediate in good faith. The district court ordered a second mediation but declined to impose additional sanctions.

Respondent PennyMac Corp. subsequently obtained beneficial interest in the deed of trust and promissory note through an assignment executed in its favor and recorded. Thus, PennyMac attended the second mediation, as it was now the beneficiary of the deed of trust.[1] At the second mediation, the mediator determined

[1]Respondent Cal-Western Reconveyance Corporation is the deed of trust trustee and did not attend the mediation. Our reference to PennyMac in this opinion includes Cal-Western.

that PennyMac failed to bring the promissory note, deed of trust, and a Broker's Price Opinion to the mediation. The mediator's statement further reported that PennyMac's representative lacked authority to negotiate.

Jacinto filed a second petition for judicial review, requesting monetary sanctions, attorney fees, and a judicially imposed loan modification. The district court granted the petition for judicial review and imposed monetary sanctions against PennyMac in the amount of the attorney fees sought by Jacinto. The district court declined to impose a loan modification or any additional monetary sanctions beyond the attorney fees. This appeal followed.

## *DISCUSSION*

### *Standing*

Before reaching the merits of this appeal, we must first address whether Jacinto has standing to appeal the district court's choice of sanctions imposed against PennyMac. Jacinto appeals from a final, appealable order granting his petition for judicial review. NRAP 3A(b)(1). PennyMac, however, contends that Jacinto is not an aggrieved party because the district court granted the petition for judicial review.

[Headnotes 1-3]

A party has the right to appeal when the party is aggrieved by a final, appealable judgment or order. NRAP 3A(a), (b); *Valley Bank v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994). An order granting or denying a petition for judicial review in an FMP matter is an appealable final judgment if it fully and finally resolves the matters as between all parties. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 474 n.3, 255 P.3d 1275, 1277 n.3 (2011) (resolving an appeal from a denial of a petition for judicial review). To be aggrieved, a party must be adversely and substantially affected by the challenged judgment. *Webb ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 617, 218 P.3d 1239, 1244 (2009). In other words, a party is aggrieved when a judgment causes a ''substantial grievance,'' such as the denial of some personal or property right. *Id.* (internal quotations omitted).

[Headnote 4]

Here, Jacinto is aggrieved by the district court order because the district court declined to modify Jacinto's home loan or to impose monetary sanctions beyond attorney fees. In creating the Foreclosure Mediation Program, the Nevada Legislature expressly created a right to seek a judicially imposed home loan modification. NRS 107.086(5). Thus, although Jacinto's petition for judicial review was granted, we conclude that the denial of his loan modification request adversely and substantially affected his property rights

such that he was aggrieved by the district court's decision regarding the imposition of sanctions. NRAP 3A(a); *Webb*, 125 Nev. at 617, 218 P.3d at 1244. Accordingly, Jacinto has standing to appeal from the order granting judicial review to challenge the amount and nature of the sanctions imposed against respondents.

*Sanctions*

As to the merits of his appeal, Jacinto argues that the monetary sanctions imposed by the district court were insufficient, and he requests that this matter be remanded with instructions to impose a judicial loan modification and to award additional monetary sanctions. PennyMac argues that any document-production errors on its part were inadvertent, that Jacinto was not prejudiced by PennyMac's decision not to offer a loan modification, and that it attempted to mitigate its failure to provide the proper documents by completing a loan modification review for Jacinto. For these reasons, PennyMac contends that the district court acted within its sound discretion in awarding Jacinto $3,500 in monetary damages, the amount of the attorney fees incurred in the second mediation and the petition for judicial review proceedings.

[Headnotes 5, 6]

In reviewing a district court order granting or denying judicial review in an FMP matter, this court gives deference to a district court's factual determinations and examines its legal determinations de novo. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 521-22, 286 P.3d 249, 260 (2012). A deed of trust beneficiary seeking an FMP certificate must attend the mediation, participate in good faith, bring the required documents, and if attending through a representative, the representative must have authority to modify the loan or have access at all times to such a person. NRS 107.086(4), (5); *Leyva*, 127 Nev. at 475, 255 P.3d at 1279. If the district court finds noncompliance with these requirements, the bare minimum sanction is that an FMP certificate must not issue. *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 893, 266 P.3d 602, 607 (2011). In the absence of factual or legal error, the choice of any further sanctions in addition to withholding the FMP certificate is committed to the district court's sound discretion. *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 468, 255 P.3d 1281, 1287 (2011).

[Headnote 7]

In *Pasillas*, we set forth a nonexhaustive list of factors for the district court to consider in weighing the appropriate sanctions to impose when a party has violated the FMP requirements. 127 Nev. at 470, 255 P.3d at 1287. Relevant to this matter is ''whether the

violations were intentional, the amount of prejudice to the nonviolating party, and the violating party's willingness to mitigate any harm by continuing meaningful negotiation.'' *Id*. Here, the district court found that PennyMac violated NRS 107.086(4) by failing to bring certified copies of the promissory note and deed of trust, although it did provide noncertified copies, and the district court found that PennyMac failed to provide an appraisal, violating FMR 11's document-production requirements. The court further concluded, consistent with the mediator's findings, that PennyMac's representative lacked sufficient authority to negotiate a modification. The district court found that PennyMac was a flagrant violator of the document-production requirements, and concluded that PennyMac had participated in the FMP process in bad faith. It therefore granted Jacinto's petition for judicial review, denied an FMP certificate, and imposed additional sanctions of $3,500, which represented the attorney fees incurred by Jacinto for the second mediation and hearing on the petition for judicial review, but the district court denied Jacinto's request for a loan modification.

Having reviewed the record and considered the parties' arguments, we conclude that the district court made sufficient findings and conclusions, it properly considered the nonexhaustive *Pasillas* factors, and it acted within its sound discretion in determining the amount and nature of sanctions. *Pasillas*, 127 Nev. at 469-70, 255 P.3d at 1286-87. The district court found that PennyMac acted in bad faith and violated the document-production requirements. Based on those findings, it ordered the FMP certificate withheld as required, but it also imposed monetary sanctions against PennyMac, thus imposing more than the minimum sanction. *Holt*, 127 Nev. at 893, 266 P.3d at 607. We perceive no abuse of discretion with regard to the district court's decision to decline Jacinto's request for the imposition of a loan modification or with regard to the amount of monetary sanctions imposed against PennyMac. *Pasillas*, 127 Nev. at 469-70, 255 P.3d at 1286-87.

## *CONCLUSION*

Because the district court's order granting judicial review denied Jacinto's request for a loan modification, Jacinto is an aggrieved party with standing to appeal. Nevertheless, there is no basis for reversing the judgment of the district court because the court properly concluded that PennyMac violated NRS 107.086 and exercised its sound discretion in denying an FMP certificate and imposing monetary sanctions. We therefore affirm.

GIBBONS and SAITTA, JJ., concur.

JACK GALARDI, AN INDIVIDUAL; AND BIRDIE, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANTS, *v.* NAPLES POLARIS, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT.

No. 58261

May 16, 2013 301 P.3d 364

Appeal from a district court order granting summary judgment in a contract action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Assignee of lessee who held option to purchase property brought action against lessor seeking determination of which party was responsible for debt that was secured by property. The district court granted summary judgment in favor of assignee. Lessor appealed. The supreme court, PICKERING, C.J., held that: (1) option rendered lessor liable for debt, and (2) ambiguity was not required before the district court's consideration of trade usage evidence.

**Affirmed.**

[Rehearing denied June 10, 2013]

[En banc reconsideration denied July 18, 2013]

*Armstrong Teasdale LLP* and *Bruce A. Leslie* and *Bret F. Meich*, Las Vegas, for Appellants.

*Holland & Hart, LLP*, and *J. Stephen Peek, Timothy A. Lukas*, and *Tamara Reid*, Reno, for Respondent.

1. LANDLORD AND TENANT.
   Option to purchase in lease rendered lessor, rather than lessee, liable upon exercise of option for debt secured by property; there was expert testimony that, unless stated otherwise, real property was always given to the purchaser free and clear of any encumbrances or liens, and option did not expressly state that lessee was responsible for encumbrances or liens.
2. JUDGMENT.
   In the absence of ambiguity or other factual complexities, contract interpretation presents a question of law that the district court may decide on summary judgment.
3. APPEAL AND ERROR.
   A district court's interpretation of a contract on summary judgment is reviewed de novo.
4. CONTRACTS.
   Whether a contract is ambiguous presents a question of law.
5. CONTRACTS.
   A contract is ambiguous if its terms may reasonably be interpreted in more than one way.
6. CONTRACTS.
   Ambiguity does not arise simply because the parties disagree on how to interpret their contract.

7. CONTRACTS.
   An ambiguous contract is an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.
8. CONTRACTS.
   Contract interpretation strives to discern and give effect to the parties' intended meaning.
9. CONTRACTS; CUSTOMS AND USAGES.
   Contractual words derive meaning from usage and context.
10. CUSTOMS AND USAGES.
    Ambiguity was not required before evidence of trade usage could be used by the district court to ascertain or illuminate contract terms, and therefore the district court properly considered trade usage and industry custom in interpreting a purchase option provision contained in a lease agreement.
11. JUDGMENT.
    Summary judgment may be granted in a case requiring interpretation of an integrated written contract, if supported by admissible evidence of trade usage that is both persuasive and unrebutted. NRCP 56(e).
12. CUSTOMS AND USAGES; EVIDENCE.
    Allowing extrinsic evidence of objective facts such as industry usage and custom does not open the door to a party's subjective understanding of a contract's terms, when that understanding contradicts the contract's express terms.

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

## OPINION

By the Court, PICKERING, C.J.:

This dispute arises out of a written option contract. Under the contract, respondent Naples Polaris had the right to purchase Las Vegas real property from appellants Jack Galardi and Birdie, LLC (together, Galardi), for $8 million ''cash.'' The property was subject to a deed of trust securing approximately $1.3 million in debt. The question is whether Naples or Galardi must pay off the $1.3 million debt. Specifically, does the option contract require Galardi to deliver clear title, meaning Galardi must remove the $1.3 million encumbrance for a net $6.7 million option price? Or does it contemplate that Naples take title subject to preexisting encumbrances, so that Galardi receives the full $8 million option price?

The district court granted summary judgment to Naples. Galardi appeals and we affirm.

### I.

Naples acquired its option rights by assignment from Galardi's lessee, French Quarter, a nonparty. The deed of trust securing the $1.3 million debt predated the option. French Quarter was operating a topless club on the property but losing money and filed

for bankruptcy protection. We simplify the facts slightly, but what happened next is the bankruptcy trustee lined up a fourth party to acquire the property and Naples' option. The price was handsome—enough to pay off the $1.3 million encumbrance, to give Galardi the full $8 million option price he demanded, and to generate surplus funds for Naples and French Quarter's creditors.

Naples and Galardi welcomed the Bankruptcy court sale. But they could not agree on whether the $1.3 million needed to retire the preexisting encumbrance against the property should come out of Naples' or Galardi's share of the sale proceeds. They stipulated to let the sale close, with Galardi receiving $8 million and Naples reserving the right to sue Galardi in state court for the $1.3 million. This suit over the proper interpretation of the option contract followed, which the district court decided on cross-motions for summary judgment.

The option contract is in writing and includes an integration clause. The contract is silent as to preexisting encumbrances in general and the $1.3 million debt in particular. It says simply:

> Buyer [Naples] shall have an option to purchase the above described real estate for the sum of $8,000,000 (Eight Million Dollars) cash. . . . Buyer [Naples] shall pay all costs of transfer and closing whereby Seller [Galardi] shall receive full purchase price.

In their motions for summary judgment, both sides argued that the option contract, as written, unambiguously favored its position. Each focused on the phrase, ''Buyer shall pay all costs of transfer and closing whereby Seller shall receive full purchase price.'' Galardi argued that ''costs of transfer and closing'' encompasses preexisting indebtedness, so that he receives the $8 million ''full purchase price'' with no deductions. Naples countered that ''costs of transfer and closing'' refers to transaction costs such as recording fees and transfer taxes, not encumbrances. In Naples' view, if Galardi meant for Naples to take title subject to preexisting encumbrances, he needed to write the option contract to say so specifically.

Both Naples and Galardi supported their readings of the contract with testimonial evidence. Galardi offered excerpts from his deposition, in which he testified that he understood that the deal would net him $8 million; that French Quarter (later Naples, as French Quarter's assignee) would ''pick up the bank note, clean it up, send me $8 million and I'm gone.'' Naples offered an expert affidavit from Diane Erickson, past president and current certification chair for the Nevada Escrow Association with considerable Nevada real estate industry experience. Addressing the contract provision that ''Buyer shall pay all costs of transfer and closing,'' Ms. Erickson opined that in the real estate industry, ''[c]losing

costs are separate and apart from the purchase price and normally consist of the title policy fee, escrow fee, real property transfer tax, recording fees, etc.'' She further opined, based on her ''experience in the industry, that whenever real property is transferred, it is always given to the purchaser free and clear of any encumbrances or liens, unless the agreement specifically states that it is to be acquired 'subject to' the existing encumbrance, and the buyer specifically agrees to take over the payments of the existing loan.''

Galardi did not dispute the real-estate-industry usages and customs detailed in the Erickson affidavit. He argued instead that the district court could only consider the Erickson affidavit if it deemed the contract ambiguous and that, if the contract were ambiguous, it would take a trial to resolve the ambiguity. The district court disagreed. It deemed the contract unambiguous when considered in light of the trade usages described in the Erickson affidavit; it rejected the deposition testimony offered by Galardi as insufficient to create a genuine issue of material fact. The district court thus granted summary judgment to Naples and denied Galardi's cross-motion for summary judgment.

## II.

[Headnotes 1-7]

''[I]n the absence of ambiguity or other factual complexities,'' contract interpretation presents a question of law that the district court may decide on summary judgment, *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990), with de novo review to follow in this court. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Whether a contract is ambiguous likewise presents a question of law. *Margrave v. Dermody Props.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994). A contract is ambiguous if its terms may reasonably be interpreted in more than one way, *Anvui, L.L.C. v. G.L. Dragon, L.L.C.*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007), but ambiguity does not arise simply because the parties disagree on how to interpret their contract. *Parman v. Petricciani*, 70 Nev. 427, 430-32, 272 P.2d 492, 493-94 (1954) (concluding that summary judgment was appropriate because the interpretation offered by one party was unreasonable and, therefore, the contract contained no ambiguity), *abrogated on other grounds by Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). Rather, ''an ambiguous contract is 'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.' '' *Hampton v. Ford Motor Co.*, 561 F.3d 709, 714 (7th Cir. 2009) (quoting *Whiting Stoker Co. v. Chicago Stoker Corp.*, 171 F.2d 248, 251 (7th Cir. 1948)).

Citing *Dickenson v. State, Dep't of Wildlife*, Galardi argues that the district court erred in considering Naples' expert evidence of

trade usage and industry custom because it did not first declare the option contract ambiguous. 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994) (''If there is an ambiguity requiring extrinsic evidence to discern the parties' intent, summary judgment is improper. However, if no ambiguity exists, the words of the contract must be taken in their usual and ordinary signification.'' (internal citation omitted)). Galardi argues that the district court compounded its error, adding insult to injury, when it deemed the deposition excerpts he submitted about how he understood the deal terms insufficient to generate a genuine issue of material fact. *But see Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (when an integrated written contract is unambiguous, ''parol evidence may not be used to contradict [its] terms'').

Galardi's arguments track the former common-law rule that trade usage and industry ''custom can only supply incidents to a contract when the contract is ambiguous on the point to which the party seeks to apply the custom.'' 12 Richard A. Lord, *Williston on Contracts* § 34:7 (4th ed. 2012). But this rule has lost adherents over time. *Id.* Modernly, courts consult trade usage and custom not only to determine the meaning of an ambiguous provision, but also to determine whether a contract provision is ambiguous in the first place.[1] *See, e.g.*, Restatement (Second) of Contracts § 220 cmt. d (1981) (''[U]sage relevant to interpretation is treated as part of the context of an agreement in determining whether there is ambiguity or contradiction . . . . There is no requirement that an ambiguity be shown before usage can be shown . . . .''); 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.13, at 121 (rev. ed. 1998) (''Seldom should the court hold that the written words of a contract exclude evidence of the custom, since even what are often called 'plain' meanings are shown to be incorrect when all the circumstances of the transaction are known; and usages and customs are a part of those circumstances by which the meaning of words is to be judged.'').

[Headnotes 8-10]

Contract interpretation strives to discern and give effect to the parties' intended meaning. *Id.* at 118-19. Words derive meaning from usage and context. ''It would be passing odd to forbid people to look up words in dictionaries, or to consult explanatory commentaries that, like trade usage, are in the nature of specialized

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[1]Although the Uniform Commercial Code (U.C.C.) does not control this real-property-based dispute, we note that the U.C.C. expressly allows evidence of '' 'usage of trade' '' to explain an agreement's terms. *United Servs. Auto Ass'n v. Schlang*, 111 Nev. 486, 493, 894 P.2d 967, 971 (1995) (quoting NRS 104.2202(1)); *see Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 536-38 (9th Cir. 2011) (applying Nevada U.C.C. and citing *Schlang*).

dictionaries'' in interpreting a written contract. *Matter of Envirodyne Indus.*, 29 F.3d 301, 305 (7th Cir. 1994). We thus conclude, as other modern courts have, that ''[a]mbiguity is not required before evidence of trade usage . . . can be used to ascertain'' or illuminate contract terms. *Puget Sound Fin., L.L.C. v. Unisearch, Inc.*, 47 P.3d 940, 943 (Wash. 2002); *accord Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999) (''Trade practice and custom illuminate the context for the parties' contract. . . . Before an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises.''); *Hickman v. Groves*, 71 P.3d 256, 260 (Wyo. 2003) (''[E]vidence of usage may be admissible to give meaning to apparently unambiguous terms of a contract'' even ''where other parol evidence,'' such as ''the parties' statements of what they intended the contract to mean[,] are not admissible.'' (internal quotations omitted)); *Intersport, Inc. v. NCAA*, 885 N.E.2d 532, 539 (Ill. App. 2008) (''contract terms need not be found to be ambiguous before evidence of the custom and usage of the terms in the parties' trade or practice can be considered''); *cf. Warrington v. Empey*, 95 Nev. 136, 139, 590 P.2d 1162, 1164 (1979) (''custom and usage may be used to establish the terms of a contract'' (dictum)).

[Headnote 11]

We recognize that, ordinarily, ''[t]he existence and scope of a usage of trade are to be determined as questions of fact.'' Restatement (Second) of Contracts § 222(2) (1981). To illustrate: If Galardi had presented admissible evidence to contradict Ms. Erickson's statements about the Nevada real estate industry's conventions and usages, a genuine issue of material fact may have arisen that would defeat summary judgment. *Compare Den Norske Bank AS v. First Nat'l Bank of Boston*, 75 F.3d 49, 58-59 (1st Cir. 1996) (describing usage evidence held sufficient to create a genuine issue of material fact and defeat summary judgment in a contract interpretation case), *with Simon Wrecking Co. v. AIU Ins. Co.*, 530 F. Supp. 2d 706, 716 (E.D. Pa. 2008) (holding that party adequately defeated opposing party's trade usage argument with proof the usage claimed either did not exist or differed from that argued). But NRCP 56(e) provides that, when a properly supported ''motion for summary judgment is made,'' the adverse party ''must set forth specific facts showing that there is a genuine issue for trial'' or ''summary judgment, if appropriate, shall be entered.'' Thus, summary judgment may be granted in a case requiring interpretation of an integrated written contract, if supported by admissible evidence of trade usage that is both ''persuasive'' and ''unrebutted.'' *Puget Sound Fin., L.L.C.*, 47 P.3d at 943; *see* Restate-

ment (Second) of Contracts § 212(2) (1981) (''A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.''); *see Intersport*, 885 N.E.2d at 538-40 (consulting industry usages in interpreting an integrated written contract and affirming judgment on the pleadings); 5 *Corbin on Contracts*, *supra*, § 24.30, at 327.

The district court properly deemed the Erickson opinion admissible and the option contract unambiguous in light of the trade usage Ms. Erickson's affidavit established. ''A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement.'' Restatement (Second) of Contracts § 222(1) (1981).[2] In this case, Galardi did not challenge Ms. Erickson's qualifications or the legitimacy and relevance of her opinions. Ms. Erickson opined that unless otherwise expressly stated, real property is ''always given to the purchaser free and clear of any encumbrances or liens.'' *See* NRS 111.170(1)(b) (Nevada grant, bargain and sale deeds, ''unless restrained by [contrary] express terms,'' include a covenant that the property conveyed is ''free from encumbrances''). She further opined that, in the escrow setting, the phrase ''costs of transfer and closing'' signifies costs ''separate and apart from the purchase price and normally consist[ing] of the title policy fee, escrow fee, real property transfer tax, recording fees, etc.''

Ms. Erickson's expert opinions comport with the language of the option contract and make sense in light of both common law and Nevada statutes. To credit Galardi's contrary reading that ''costs of transfer and closing'' encompasses preexisting encumbrances would mean that Galardi could have increased the option price at will just by borrowing against the property and passing the debt along to the optionee, which is unreasonable. The phrase ''costs of transfer and closing'' thus does not carry a double meaning that renders the option contract ambiguous. *See Parman*, 70 Nev. at 430-31, 272 P.2d at 493-94. Nor does the reference to ''full purchase price'' render the contract ambiguous, particularly when read in light of the industry usages detailed in the Erickson affidavit.

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[2]Galardi, French Quarter, and Naples had counsel or commercial real estate experience or both. Thus, Galardi makes no argument that he did not know or have reason to know of the Nevada real estate industry usages that the Erickson affidavit addressed. *See* Restatement (Second) of Contracts § 222(3) (1981) (''[A] usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.'').

[Headnote 12]

The deposition testimony Galardi offered that he (and perhaps French Quarter) understood the deal terms to require the optionee to take subject to existing encumbrances would, if admitted, contradict the option contract's express terms. It thus was inadmissible under the parol evidence rule. *Daly v. Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980) (''The parol evidence rule forbids the reception of evidence which would vary or contradict the contract, since all prior negotiations and agreements are deemed to have been merged therein.''). Allowing extrinsic evidence of objective facts such as industry usage and custom does not open the door to a party's subjective understanding of a contract's terms, when that understanding contradicts the contract's express terms. *Cf. AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 575 (7th Cir. 1995) (discussing the admissibility of objective evidence as distinguished from the subjective testimony by the parties as to what they believe the contract means in the related context of construing ambiguous contracts); *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (parties to a written contract are bound by its terms regardless of their subjective beliefs at the time the agreement was signed). The extrinsic evidence with which Galardi opposed Naples' properly supported summary judgment motion was either inadmissible or irrelevant or both, and thus insufficient to generate a genuine issue of material fact or to establish his entitlement to judgment as a matter of law.

III.

The district court properly considered trade usage and industry custom in interpreting the option contract, even though it also found that the contract was unambiguous. For the option contract to require the optionee to take the property subject to existing indebtedness, it needed to so state. We therefore agree with the district court that the contract placed responsibility for the $1.3 million debt on Galardi's side of the ledger and affirm.

HARDESTY and SAITTA, JJ., concur.

GEORGE P. CHAPMAN, JR.; AND BRENDA J. GULLY CHAPMAN, APPELLANTS, *v.* DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, A GERMAN NATIONAL CORPORATION; NATIONAL DEFAULT SERVICING CORPORATION, AN ARIZONA CORPORATION; AND HOMEQ SERVICING CORPORATION, A CALIFORNIA CORPORATION, RESPONDENTS.

No. 58664

May 30, 2013 302 P.3d 1103

Certified questions under NRAP 5 concerning whether Nevada law characterizes quiet title actions and unlawful detainer actions as proceedings in personam, in rem, or quasi in rem. United States Court of Appeals for the Ninth Circuit; Ronald M. Gould and Milan D. Smith, Jr., Circuit Judges, and Amy J. St. Eve, United States District Judge.

Lender who purchased property at trustee's sale initiated forcible entry and detainer action in the justice court. Borrowers brought action to quiet title in property. Quiet title action was removed to federal court. The United States District Court for the District of Nevada denied borrowers' motion to remand and granted lender's motion to dismiss. Borrowers appealed. The United States Court of Appeals, 651 F.3d 1039 (9th Cir. 2011), certified questions whether quiet title and forcible entry and detainer actions were in rem, quasi in rem, or in personam. The supreme court, PICKERING, C.J., held that: (1) quiet title action was in rem, and (2) forcible entry and detainer action to evict borrowers from subject real property that lender purchased at trustee's sale was action in rem or quasi in rem.

**Questions answered.**

*Terry J. Thomas*, Reno; *Geoffrey L. Giles*, Reno, for Appellants.

*Houser & Allison, APC*, and *Jeffrey S. Allison*, Irvine, California, for Respondents.

1. COURTS.

   The prior-exclusive-jurisdiction doctrine holds that when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res.

2. COURTS.

   If actions brought in federal and state court are strictly in personam, no prior-exclusive-jurisdiction problem arises, because both a federal court and a state court having concurrent in personam jurisdiction may proceed with the litigation; similarly, if only one of the causes of action is in rem or quasi in rem, both cases may proceed side by side.

3. COURTS.
   Under the prior-exclusive-jurisdiction doctrine, if two suits are in rem or quasi in rem, requiring that the court or its officer have possession or control of the property that is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other court.
4. ACTION.
   When an action is in rem, the resulting judgment applies against the whole world, whereas an in personam judgment acts upon the persons who are parties to the suit; quasi in rem proceedings are between in rem and in personam jurisdiction because the action is not against the property but rather is used to determine rights in certain property.
5. QUIETING TITLE.
   Borrowers' action against lender to quiet title after lender purchased property at nonjudicial foreclosure sale was proceeding in rem, where borrowers sought to revest title in themselves based on alleged defects in foreclosure and nature of claim did not change simply because borrowers also sought monetary damages. NRS 107.080.
6. QUIETING TITLE.
   A plea to quiet title does not require any particular elements, but each party must plead and prove his or her own claim to the property in question, and a plaintiff's right to relief therefore depends on superiority of title. NRS 40.010.
7. QUIETING TITLE.
   An action to quiet title affects property, and thus is in rem or quasi in rem. NRS 40.010.
8. MORTGAGES.
   Lender's forcible entry and detainer action to evict borrowers from subject real property that lender purchased at trustee's sale was action in rem or quasi in rem, where it determined parties' right of possession of property, and therefore, was action that affected parties' interest in thing, namely real property. NRS 40.255.
9. FORCIBLE ENTRY AND DETAINER.
   The primary purpose of an unlawful detainer action is to restore the possession of property to one from whom it has been forcibly taken or to give possession to one from whom it is unlawfully being withheld. NRS 40.255.
10. MORTGAGES.
    A person who obtains title to property at a trustee's sale may remove holdover tenants by means of an unlawful detainer action. NRS 40.255(1)(c).
11. FORCIBLE ENTRY AND DETAINER.
    The proceedings in a forcible entry and detainer action are summary and their scope limited; typically, the issues are whether the plaintiff gave the statutorily required notice, and who, as between the plaintiff and the defendant, has a superior right to possession. NRS 40.255.
12. FORCIBLE ENTRY AND DETAINER.
    In a forcible entry and detainer action, a party's superior right to possession over real property does not require proof of title, although title can be evidence of the right to possession. NRS 40.255.
13. PROPERTY.
    Although possession of property differs from ownership of property, possession is nonetheless a type of property interest.

Before the Court EN BANC.

## OPINION

By the Court, PICKERING, C.J.:

The United States Court of Appeals for the Ninth Circuit has certified the following questions to this court:

> 1. Is a quiet title action under Nevada Revised Statutes § 40.010, which is premised on an allegedly invalid trustee's sale under Nevada Revised Statutes § 107.080(5)(a), properly characterized under Nevada law as a proceeding *in personam*, *in rem*, or *quasi in rem*?
>
> 2. Is an unlawful detainer action under Nevada Revised Statutes § 40.255(1)(c) properly characterized under Nevada law as a proceeding *in personam*, *in rem*, or *quasi in rem*?

*Chapman v. Deutsche Bank Nat'l Trust Co.*, 651 F.3d 1039, 1048 (9th Cir. 2011).

### I.

This dispute arises out of a nonjudicial foreclosure proceeding that respondent Deutsche Bank National Trust Company initiated against a home owned by appellants George P. Chapman, Jr., and Brenda J. Gully Chapman. Deutsche Bank purchased the home by credit bid at the trustee's sale. When the Chapmans did not vacate, Deutsche Bank filed an unlawful detainer action in Reno justice court, seeking to have them removed. The Chapmans countered by filing a complaint in Nevada district court seeking to quiet title to the property. They alleged that Deutsche Bank did not own the promissory note or deed of trust and had foreclosed without proper notice under NRS 107.080, invalidating the trustee's sale.

The Chapmans moved the justice court to transfer the unlawful detainer proceeding to district court so it could be consolidated with the quiet title action. But before the justice court could decide the Chapmans' motion, Deutsche Bank removed the quiet title action from state to federal district court and filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). A few days later, the Chapmans moved to remand the quiet title action back to state court on the basis that the unlawful detainer action gave the state court exclusive jurisdiction over the real property at issue in both suits. The federal court denied the Chapmans' motion to remand and granted Deutsche Bank's motion to dismiss.

The Chapmans appealed to the Ninth Circuit Court of Appeals. They argued that the federal district court should not have ruled on

the motion to dismiss because the prior-exclusive-jurisdiction doctrine required the federal court to abstain in favor of the earlier-filed unlawful detainer action. The Ninth Circuit agreed with the Chapmans that, ''if both the Quiet Title Action and the Unlawful Detainer Action are characterized as *in rem* or *quasi in rem*, then the prior exclusive jurisdiction doctrine requires us to vacate the District Court's dismissal of the Quiet Title Action.'' *Chapman*, 651 F.3d at 1048.

Existing Nevada law does not specify whether quiet title and unlawful detainer actions are in personam, in rem, or quasi in rem, so the Ninth Circuit certified questions concerning their proper characterization to this court.

## II.

[Headnotes 1-3]

The prior-exclusive-jurisdiction doctrine holds that, ''when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.'' *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). If Deutsche Bank's unlawful detainer action and the Chapman's quiet title action are ''strictly in personam,'' no prior-exclusive-jurisdiction problem arises because ''both a state court and a federal court having concurrent [in personam] jurisdiction may proceed with the litigation.'' *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935). Similarly, if only one of the causes of action is in rem or quasi in rem, ''both cases may proceed side by side.'' *United States v. $79,123.49 in U.S. Cash & Currency*, 830 F.2d 94, 97 (7th Cir. 1987). ''But if the two suits are *in rem* or quasi *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other.'' *Penn Gen. Cas. Co.*, 294 U.S. at 195.

The character of the parties' competing quiet title and unlawful detainer actions thus is determinative of the Chapmans' federal appeal. Of note, we do not need to decide whether quiet title and unlawful detainer actions are in personam *or* in rem *or* quasi in rem. The prior exclusive jurisdiction doctrine applies whether the actions are in rem or quasi in rem, just not if they are in personam. *See Seitz v. Fed. Nat'l Mortg. Ass'n*, No. 3:12CV633, 2012 WL 5523078, at *2, 8 (E.D. Va. Nov. 14, 2012) (declining to determine whether quiet title actions are in rem or quasi in rem because the distinction does not impact the prior exclusive jurisdiction rule in a case ''strikingly similar'' to *Chapman*).

Since current Nevada law does not resolve the questions certified to us by the Ninth Circuit, we exercise our discretion under

NRAP 5 and accept them. *See Volvo Cars of N. Am. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006). We reframe the questions, however, to ask whether the quiet title and unlawful detainer actions are in personam, on the one hand, or quasi in rem or in rem, on the other hand. This obviates the need to debate the exiguous distinction between in rem and quasi in rem jurisdiction, which was historically significant but now is of questionable importance. Restatement (Second) of Judgments § 6 cmt. a (1982); *see Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72, 206 P.3d 81, 85 (2009) (this court may exercise its discretion to reframe certified questions).

## III.

[Headnote 4]

''[A] proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants . . . .'' *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877), *overturned in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186, 205-06 (1977). In other words, when an action is in rem, the resulting judgment applies against the whole world. Restatement (Second) of Judgments §§ 6, 30 (1982). By comparison, an in personam judgment acts upon the persons who are parties to the suit. *Shaffer*, 433 U.S. at 199; *see also State v. Cent. Pac. R.R. Co.*, 10 Nev. 47, 80 (1875) (explaining that actions in personam seek personal judgments and are directed against specific persons), *overruled on other grounds by State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 626, 188 P.3d 1092, 1101-02 (2008); Restatement (Second) of Judgments § 5 (1982). Quasi in rem proceedings are ''a halfway house between in rem and in personam jurisdiction,'' because the ''action is not really against the property'' but rather is used ''to determine rights in certain property.'' 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1070 (3d ed. 2002).

### A.

[Headnotes 5, 6]

A Nevada quiet title action is predominantly in rem or quasi in rem. NRS 40.010 governs Nevada quiet title actions and provides: ''An action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim.'' A plea to quiet title does not require any particular elements, but ''each party must plead and prove his or her own claim to the property in question'' and a ''plaintiff's right to relief therefore depends on superiority of title.'' *Yokeno v. Mafnas*, 973

F.2d 803, 808 (9th Cir. 1992); *see also Hodges Transp., Inc. v. Nevada*, 562 F. Supp. 521, 522 (D. Nev. 1983).

[Headnote 7]

In *Robinson v. Kind*, this court held that a proceeding is substantially in rem where its ''direct object is to reach and dispose of the property of the parties described in the complaint.'' 23 Nev. 330, 343, 47 P. 977, 978-79 (1897). After rejecting the argument that an action to quiet title necessarily invokes in personam jurisdiction because it seeks an equitable remedy and equity normally acts upon the person, this court explained that these precepts do not apply when the state has provided by statute for the adjudication of titles to real estate within its boundaries, which it deemed to be an in rem proceeding. *Id.* at 340-42, 47 P. at 978. Although we decided *Robinson* more than 100 years ago, its holding that quiet title affects property and thus is in rem (or quasi in rem) remains good law. *See Cent. Pac. R.R. Co.*, 10 Nev. at 80 (''A judgment *in rem* is founded on a proceeding not as against the person as such, but against the thing or subject-matter itself whose state or condition is to be determined.'' (internal quotations omitted)).

By their complaint, the Chapmans seek to revest title in themselves based on Deutsche Bank's alleged violation of NRS 107.080. Even though a judgment quieting title vests title in a particular claimant, and to that extent affects the interests of persons, *see* Restatement (Second) of Judgments § 6 cmt. a (1982), its essential purpose is to establish superiority of title in property. *Arndt v. Griggs*, 134 U.S. 316, 321 (1890). This is quintessentially a manifestation of an in rem or quasi in rem proceeding. *See Seitz*, 2012 WL 5523078, at *11 (holding that a suit to quiet title is either in rem or quasi in rem); *1st Nat'l Credit Corp. v. Von Hake*, 511 F. Supp. 634, 641-42 (D. Utah 1981) (commenting on the semantic differences between in rem and quasi-in-rem labels and holding that the Utah statutory action to quiet title is an action in rem, or quasi in rem); *see also 40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 589 (9th Cir. 1992) (''A quiet title action is a proceeding *in rem*.''); *Neagle v. Brooks*, 373 F.2d 40, 43 (10th Cir. 1967) (quiet title is ''purely an in rem action''); Restatement (Second) of Judgments § 30 cmt. a (1982) (actions ''to quiet or remove a cloud on title'' are quasi in rem because the judgments they produce determine interests in property); Restatement (Second) of Conflict of Laws § 95 cmt. f (Supp. 1989) (deeming quiet title actions quasi in rem because judgments rendered in them affect the interests of particular persons in property).

Deutsche Bank nonetheless insists that the Chapmans' action is in personam because it does not seek to quiet title so much as to establish breach of contract and incorporated foreclosure statutes.

As support, Deutsche Bank points to the Chapmans' allegations of loan-servicing irregularities and improper foreclosure notices and their prayer for compensatory damages. We disagree. The Chapmans' claim is in rem or quasi in rem because they seek to establish title to property. The nature of their claim does not change because they request monetary damages in addition to the central relief—quiet title—that they request. Here, as in *Seitz*, the Chapmans' quiet title claim ''is *quasi in rem* or *in rem*, [and] it does not lose that nature simply because [they] seek[ ] monetary damages in addition to title to property.'' *Seitz*, 2012 WL 5523078, at *11.

B.

[Headnotes 8-10]

The primary purpose of an unlawful detainer action is to restore the possession of property to one from whom it has been forcibly taken or to give possession to one from whom it is unlawfully being withheld. *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 708, 262 P.3d 1135, 1140 (2011); *Seitz*, 2012 WL 5523078, at *4 (citing *Shorter v. Shelton*, 33 S.E.2d 643, 647 (Va. 1945)). Consistent with this purpose, a person who obtains title to property at a trustee's sale may remove holdover tenants by means of an unlawful detainer action under NRS 40.255(1)(c).

To initiate an action under NRS 40.255, the would-be plaintiff must serve the property's occupants with a notice to quit. If the occupants do not vacate the property within the time set by the notice, the owner may file a written complaint for unlawful detainer, seeking restitution of the premises. NRS 40.300. The plaintiff must serve the complaint with summons on the occupants, *id.*, and provide the court with proof of service of the notice to quit as required by NRS 40.280(3) or (4).

[Headnotes 11, 12]

Thereafter, a trial may ensue if the parties' pleadings demonstrate an issue of fact. NRS 40.310. But the proceedings are summary and their scope limited. *See G.C. Wallace*, 127 Nev. at 708, 262 P.3d at 1140 (explaining that evidence extrinsic to the issue of immediate possession cannot be introduced at trial). Typically, the issues are whether the plaintiff gave the statutorily required notice, *Davidsohn v. Doyle*, 108 Nev. 145, 150, 825 P.2d 1227, 1230 (1992), and who as between the plaintiff and the defendant has a superior right to possession. NRS 40.320; *Lachman v. Barnett*, 18 Nev. 269, 274, 3 P. 38, 41-42 (1884) (holding that unlawful detainer does not adjudicate title or an *absolute* right to possession of property because ''[t]he object of the [unlawful detainer] statute was not to try titles, but to preserve the peace and prevent violence''); *Seitz*, 2012 WL 5523078, at *7 (unlawful detainer action

limits court to determining possession between plaintiff and defendant). Notably, a superior right to possession does not require proof of title, although title can be evidence of the right to possession. *Yori v. Phenix*, 38 Nev. 277, 282, 149 P. 180, 180-81 (1915) (''[I]t has universally been held that title to property cannot be an issue in such actions . . . even though such pleading and proof may incidentally involve the question of title.''). If after a trial, the court determines that the occupant has no legal defense to the alleged unlawful detainer, it will issue a summary order for restitution of the premises. NRS 40.360(1).

[Headnote 13]

Although possession of property differs from ownership of property, possession is nonetheless a type of property interest. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (''Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' '' (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945))); *Seitz*, 2012 WL 5523078, at *5. In his *Commentaries on the Laws of England*, Blackstone instructed that ''there are four 'degrees' of title: (1) 'naked possession,' (2) 'right of possession,' (3) 'mere right of property,' and (4) 'complete title.' '' *Seitz*, 2012 WL 5523078, at *5 (quoting 2 William Blackstone, Commentaries *195-99). Unlawful detainer actions fall into the second ''degree'' of title in a property, ''right of possession,'' and accordingly, are actions that affect interests in a thing—real property. As such, unlawful detainer is in rem or quasi in rem. *See G.C. Wallace*, 127 Nev. at 708-09, 262 P.3d at 1140-41 (explaining in the analogous summary eviction setting that the key elements and defenses of unlawful detainer center on possession and property rights, rather than personal rights or obligations); *Seitz*, 2012 WL 5523078, at *8; *see also Hepburn & Dundas' Heirs v. Dunlop & Co.*, 14 U.S. 179, 203 n.d (1816) (describing ejectment as a proceeding in rem); *Scherbenske v. Wachovia Mortg., FSB*, 626 F. Supp. 2d 1052, 1057 (E.D. Cal. 2009) (holding that the unlawful detainer action plaintiff sought to enjoin was a quasi-in-rem action).

Thus, in response to the Ninth Circuit's questions, we answer that quiet title and unlawful detainer proceedings pertain to interests in a thing and are, thus, ''in rem'' or ''quasi in rem'' in nature. We decline the parties' invitation to expound on the federal prior-exclusive-jurisdiction doctrine, as those questions were not certified to us and are best left to the court of origin.

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

ROBERT CUCINOTTA, AN INDIVIDUAL; AND KARIM MASKATIYA, AN INDIVIDUAL, APPELLANTS, *v.* DELOITTE & TOUCHE, LLP, A DELAWARE CORPORATION; AND LARRY KRAUSE, AN INDIVIDUAL, RESPONDENTS.

No. 58727

May 30, 2013 302 P.3d 1099

Appeal from a district court order granting summary judgment in a defamation action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Former corporate officers brought action against accounting firm and accountant for defamation and tortious interference. The district court granted defendants summary judgment. Officers appealed. The supreme court, CHERRY, J., held that in a matter of first impression, firm's communications with corporation's audit committee regarding alleged illegal activity of corporate officers, which were made according to federal securities law, were subject to an absolute privilege.

**Affirmed.**

*Cooper Levenson April Niedelman & Wagenheim, P.A.*, and *Jerry S. Busby*, Las Vegas; *Beus Gilbert PLLC* and *Scot Stirling* and *Leo Beus*, Scottsdale, Arizona, for Appellants.

*Morris Law Group* and *Rosa Solis-Rainey*, Las Vegas; *Paul, Weiss, Rifkind, Wharton & Garrison LLP* and *Charles E. Davidow*, Washington, D.C.; *Paul, Weiss, Rifkind, Wharton & Garrison LLP* and *Brad S. Karp* and *Andrew J. Ehrlich*, New York, New York, for Respondents.

1. APPEAL AND ERROR.
   The supreme court reviews the applicability of an absolute privilege de novo.
2. LIBEL AND SLANDER.
   One who is required by law to publish defamatory matter is absolutely privileged to publish it provided that the communications be made pursuant to a lawful process and the communications be made to a qualified person. Restatement (Second) of Torts § 592A.
3. LIBEL AND SLANDER.
   Accounting firm's communications with corporation's audit committee regarding alleged illegal activity of corporate officers were subject to an absolute privilege, precluding officers' defamation claims; Securities Exchange Act required firm to report alleged illegal activity contained in an FBI intelligence bulletin regarding the officers to the appropriate level of corporate management. Securities Exchange Act of 1934, § 10A, 15 U.S.C. § 78j-1.

Before the Court EN BANC.[1]

## OPINION

By the Court, CHERRY, J.:

In this opinion, we consider whether information divulged by a registered accounting firm in accordance with the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995, is subject to an absolute privilege in a defamation action. We conclude that an accounting firm should be encouraged to freely disseminate information concerning alleged illegal acts as long as the disclosure is made pursuant to federal securities law and made to the appropriate level of management. In recognition of the reporting responsibilities delegated to accounting firms to protect the investing public, we adopt the rule set forth in the Restatement (Second) of Torts section 592A (1977), and consequently, we conclude that one who is required by law to publish defamatory matter is absolutely privileged to publish it. Accordingly, we affirm the district court's summary judgment albeit on different grounds.

### *FACTS*

In 2007, respondent Deloitte & Touche, LLP, a registered public accounting firm, performed a third-quarter financial audit for Global Cash Access Holdings, Inc. (GCA), a publicly traded company providing cash access services to the gaming industry. Respondent Larry Krause, a certified public accountant employed by Deloitte, served as an independent auditor for many clients in the gaming industry, including GCA. During the course of a financial audit for another gaming client, Krause obtained an intelligence bulletin authored by the Federal Bureau of Investigation (FBI) that contained information about alleged illegal acts committed by GCA and two members of its board of directors, appellants Robert Cucinotta and Karim Maskatiya. Due to the serious allegations in the intelligence bulletin, Deloitte's senior management and in-house counsel contacted the FBI and the Department of Justice (DOJ) to confirm the validity of the document. Although the DOJ advised against further dissemination of the document, Deloitte believed it had a duty under federal securities law to disclose the allegations within the intelligence bulletin to GCA's Audit

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

Committee, which is a subcommittee of GCA's Board of Directors. Deloitte's in-house counsel prepared a script summarizing the allegations in the intelligence bulletin. Krause, along with a senior Deloitte auditor, subsequently communicated the allegations in the intelligence bulletin[2] to the Audit Committee via conference call.

The script stated, in part, that Deloitte had ''learned from a credible, confidential source that serious allegations have been made regarding transactions and conduct involving Global Cash Access and its principals.'' Deloitte listed the allegations, all of which were serious in nature. Deloitte requested that the Audit Committee conduct an independent investigation.

GCA issued a press release announcing that it would delay filing its third-quarter report pending the conclusion of an internal investigation. The investigation performed by a national law firm with experience in regulatory and compliance issues revealed no evidence of misconduct on the part of GCA, Cucinotta, or Maskatiya. GCA accepted the findings and issued a delayed third-quarter report. GCA's stock price significantly declined as a result of the delay in reporting. Soon thereafter, Cucinotta and Maskatiya resigned from GCA's Board of Directors.

Subsequently, Cucinotta and Maskatiya filed a complaint for defamation and tortious interference against Deloitte and Krause.[3] They alleged that Deloitte published defamatory statements to the Audit Committee and knowingly interfered with their contractual relationships and prospective economic advantage with GCA as a result of the defamatory statements. Upon the completion of limited pre-answer discovery, Deloitte filed a motion for summary judgment, arguing that both the defamation and tortious interference claims failed as a matter of law because its communications with the Audit Committee were absolutely or conditionally privileged. The district court granted Deloitte's motion for summary judgment, concluding that Deloitte's communications to the Audit Committee were protected by a conditional privilege as Cucinotta and Maskatiya did not present evidence that would permit a reasonable jury to conclude that Deloitte acted with actual malice. The district court further concluded that Deloitte's communications were also privileged for purposes of the tortious interference claim. Although the district court found that Deloitte had a duty under federal securities law to disclose the allegations to the Audit Committee in order for the Audit Committee to investigate the allegations, the district court found it unnecessary to reach a con-

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[2]A New York state court later ordered Deloitte to provide Cucinotta with a copy of the intelligence bulletin.

[3]For the sake of clarity, we refer to respondents collectively as Deloitte.

clusion as to whether Deloitte's statements were absolutely privileged. This appeal followed.

*DISCUSSION*

At the turn of the twentieth century, Lawrence R. Dicksee, Professor of Accounting at the University of Birmingham and Lecturer at the London School of Economics, advocated that auditors ought to be granted absolute privilege in their reporting obligations. Lawrence R. Dicksee, *Auditing: A Practical Manual for Auditors* (Robert H. Montgomery ed., American ed. 1905). He proffered that ''[i]f the Auditor is of the opinion that something which has been done by the Directors, or by any outside persons, calls for the attention of stockholders, he should . . . feel no hesitation in expressing his view.'' *Id.* at 269.

[Headnote 1]

Dicksee's theory of candid and forthright disclosure in the auditing profession is now being encouraged by Deloitte who argued below and continues to argue on appeal that this court should adopt an absolute privilege for individuals required by law to publish defamatory statements as articulated by the Restatement (Second) of Torts section 592A (1977). The Restatement provides that ''[o]ne who is required by law to publish defamatory matter is absolutely privileged to publish it.'' *Id.* We review the applicability of an absolute privilege de novo. *See Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009). Although the district court did not reach a conclusion as to whether Deloitte's communications to the Audit Committee were absolutely privileged, we have the discretion to address Deloitte's contention. *See Garff v. J.R. Bradley Co.*, 84 Nev. 79, 81-83, 436 P.2d 428, 430-31 (1968) (resolving an issue that the district court did not reach).

Certain communications, although defamatory, should not serve as a basis for liability in a defamation action and are entitled to an absolute privilege because ''the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.'' *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983) (discussing the absolute privilege created by NRS 612.265(7) for communications from an employer to the Employment Security Department). While we have long recognized the existence of an absolute privilege for defamatory statements made during the course of judicial or quasi-judicial proceedings, *Fink v. Oshins*, 118 Nev. 428, 433-34, 49 P.3d 640, 644 (2002); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev.

212, 218, 984 P.2d 164, 167 (1999); *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983); *Nickovich v. Mollart*, 51 Nev. 306, 313, 274 P. 809, 810 (1929), we have yet to consider whether an absolute privilege is warranted for communications published under the law.[4]

Restatement (Second) of Torts section 592A ''rests upon the principle that one who is required by law to do an act does not incur any liability for doing it.'' Restatement (Second) of Torts § 592A cmt. a (1977). Originally developed to be applied to radio and television stations, which were required by the Federal Communications Act to provide political candidates with equal opportunity to be heard without any ability to control what the candidates said, section 592A now applies ''whenever the one who publishes the defamatory matter acts under legal compulsion in so doing.'' Restatement (Second) of Torts § 592A cmt. b (1977). Jurisdictions throughout the country have adopted its rationale in cases where a party was compelled by law to publish defamatory information. *See, e.g.*, *Hill v. Ky. Lottery Corp.*, 327 S.W.3d 412, 425 (Ky. 2010) (those responsible for complying with Kentucky's Open Records Act should not be held liable for releasing embarrassing or humiliating information prepared in the regular course of business and placed in the appropriate file); *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982) (those mandated by Minnesota's Data Privacy Act to disclose defamatory statements should be afforded an absolute privilege when exercising due care in the execution of the law); *Crowley v. FDIC*, 841 F. Supp. 33, 39-40 (D.N.H. 1993) (banks should be provided with absolute immunity from a defamation action when they obey federal financial law by reporting criminal activity).

[Headnote 2]

We agree with our sister jurisdictions that those who are required by law to publish defamatory statements should be absolutely privileged in making such statements. However, we are concerned that unfiltered speech to unintended persons could instigate malicious conduct that would go unpunished. Therefore, we affirmatively adopt the Restatement (Second) of Torts section 592A, but require that (1) the communications be made pursuant to a lawful process, and (2) the communications be made to a qualified person. The class of absolutely privileged communications recognized by this court remains narrow and is limited to those communications made in judicial or quasi-judicial proceedings and communications made in the discharge of a duty under express authority of law.

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[4]The Nevada Attorney General opined that the Restatement approach ''appears to . . . be sound legal policy likely to be adopted and followed in Nevada.'' 86-7 Op. Att'y Gen. 20, 25 (1986).

[Headnote 3]

We now determine whether Deloitte's communication to the Audit Committee should be subject to an absolute privilege. Registered public accounting firms are required by federal securities law, specifically the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995, to take certain actions when, during the course of a financial audit, the firm ''becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred.'' 15 U.S.C. § 78j-1(b)(1) (2006); *see* Thomas L. Riesenberg, *Trying to Hear the Whistle Blowing: The Widely Misunderstood ''Illegal Act'' Reporting Requirements of Exchange Act Section 10A*, 56 Bus. Law. 1417, 1417 (2001) (by enacting section 10A of the Securities Exchange Act codified at 15 U.S.C. § 78j-1 Congress ''intended to require auditors to blow the whistle on the fraudulent activities of their clients''); Larry Catà Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 Mich. St. L. Rev. 327, 388 (2004) (section 10A ''imposed a duty on a reporting company's outside auditors to investigate and report to corporate management information indicating that an illegal act had taken place or might occur''). When an accounting firm becomes aware of information that an illegal act has occurred or may occur, then it must adequately inform the appropriate level of management of the issuer—in this case, GCA's Audit Committee—about the detected illegal acts as soon as practicable. 15 U.S.C. § 78j-1(b)(1)(B) (2010).

Here, Deloitte summarized allegations of illegal acts contained in an FBI intelligence bulletin to the Audit Committee in accordance with federal securities law. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002) (defamation occurs when a person publishes a false statement of fact). Because Deloitte discharged its duty pursuant to the lawful process set forth in 15 U.S.C. § 78j-1 and its announcement of allegedly defamatory information was made to GCA's Audit Committee, a qualified entity, we conclude that Deloitte's communications are subject to an absolute privilege, precluding appellants' defamation claim. In that regard, we also conclude that appellants' tortious interference claim is precluded because Deloitte's communications and conduct therein is afforded an absolute privilege. *Wichinsky v. Mosa*, 109 Nev. 84, 87-88, 847 P.2d 727, 729-30 (1993) (''absence of privilege or justification'' is a necessary element to a tortious interference claim); *Las Vegas-Tonopah-Reno Stage Lines, Inc. v. Gray Line Tours of S. Nev.*, 106 Nev. 283, 287, 792 P.2d 386, 388 (1990) (same). As no genuine issues of fact remain, we find no error in the district court's grant of summary judgment in Deloitte's favor. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d

1026, 1029 (2005) (explaining that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law).

*CONCLUSION*

We adopt the Restatement (Second) of Torts section 592A and hold that one who is required by law to publish defamatory matter is absolutely privileged to publish it when (1) the communication is made pursuant to a lawful process, and (2) the communication is made to a qualified person. Deloitte's statement to GCA's Audit Committee is therefore absolutely privileged as a matter of law because Deloitte communicated information about alleged illegal acts in accordance with federal securities law. We therefore affirm the district court's summary judgment, albeit for different reasons. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012).

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