assertion that it is the holder of the note and consequently had authority to negotiate the loan, it nevertheless was not the beneficiary of the deed of trust, and therefore, failed to demonstrate its authority to nonjudicially foreclose and to participate in the FMP mediation. Although the district court found that Bank of America had authority to negotiate the loan, that finding does not overcome the fact that Bank of America was not the beneficiary of the deed of trust at the time of mediation, based on the recorded assignment from MERS to HSBC. *Id.* at 520-21, 286 P.3d at 260 (recognizing that on appeal this court gives deference to the district court's factual findings and reviews its legal determinations anew). In this instance, no FMP certificate could validly issue, and sanctions were mandated. *Leyva*, 127 Nev. at 480, 255 P.3d at 1281; *see Holt*, 127 Nev. at 893, 266 P.3d at 607.

CONCLUSION

Because Bank of America was not the deed of trust beneficiary at the time of the FMP mediation, we conclude that it failed to satisfy NRS 107.086(4)'s attendance and participation requirement. Consequently, the district court erred when it denied Bergenfield's petition for judicial review. We therefore reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this opinion.[1]

GIBBONS and SAITTA, JJ., concur.

JOSEPH WILLIAMS, APPELLANT, *v.*
UNITED PARCEL SERVICES, RESPONDENT.

No. 59226

June 6, 2013 302 P.3d 1144

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

Claimant petitioned for judicial review of denial of workers' compensation claim. The district court denied petition. Claimant appealed. The supreme court, SAITTA, J., held that claimant who missed remainder of shift on day of injury was off work within meaning of workers' compensation statute.

Reversed and remanded.

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[1]Because we reverse on this basis, we do not address Bergenfield's argument that Bank of America's response to her petition for judicial review wrongfully revealed confidential information.

Benson, Bertoldo, Baker & Carter and *Javier A. Arguello*, Las Vegas, for Appellant.

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

1. Workers' Compensation.
   Where the reopening of a workers' compensation claim is subject to the statutory one-year limitations period, the failure to apply to reopen the claim within this period acts as a jurisdictional bar to the reopening of the claim. NRS 616C.390(5).
2. Workers' Compensation.
   Workers' compensation claimant missed the remainder of his work shift on the day of his injury, therefore claimant was ''off work'' as a result of his injury within meaning of workers' compensation statute and was not subject to statutory one-year limitation on the reopening of claims; statute expressly provided that an employee who was off work as a result of his or her injury was not precluded from reopening his or her claim after a year from the claim's closure, and statute did not condition employee's ability to reopen claim on amount of time employee was off work, rather statute conditioned employee's ability to reopen claim on either receiving permanent partial disability award or losing time from work and causal relationship between the injury and that time off work. NRS 616C.390(5).
3. Administrative Law and Procedure.
   The supreme court reviews an administrative decision in the same manner as the district court.
4. Administrative Law and Procedure.
   On review of an administrative decision, questions of law, such as statutory interpretation, are reviewed de novo.
5. Statutes.
   When a statute is clear and unambiguous, the supreme court gives effect to the plain and ordinary meaning of the words.
6. Statutes.
   Statutory provisions are read as a whole, with effect given to each word and phrase.
7. Statutes.
   When interpreting a statute, in the absence of an ambiguity, the supreme court does not resort to other sources, such as legislative history, in ascertaining that statute's meaning.
8. Constitutional Law; Statutes.
   The supreme court's duty in interpreting a statute is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.

Before Gibbons, Douglas and Saitta, JJ.

OPINION

By the Court, Saitta, J.:

NRS 616C.390(5) bars an employee from applying to reopen his or her workers' compensation claim after a year from its closure

if the employee ''was not off work as a result of the injury.'' Appellant Joseph Williams suffered a workplace injury in the course of his employment with respondent United Parcel Services (UPS) and, after receiving medical treatment, missed the remainder of his scheduled work shift pursuant to his treating physician's orders. More than one year after the closure of his workers' compensation claim, Williams sought to reopen that claim. UPS denied that request, and its decision was affirmed by an appeals officer. In reaching her conclusion, the appeals officer interpreted NRS 616C.390(5) as requiring that an injured employee miss five days of work as a result of the injury to be considered ''off work'' within the bounds of that statute. But NRS 616C.390(5) does not include any such requirement for an employee to be considered ''off work.'' We therefore conclude that the appeals officer erred in reading a minimum-time-off-work requirement into the statute and that, because Williams missed the remainder of his shift on the day of his injury, he was off work as a result of his injury and was therefore not subject to the one-year limit on the reopening of claims. Thus, we reverse the district court's denial of Williams' petition for judicial review and direct the district court to remand this matter to the appeals officer for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

On January 13, 2006, two hours into his shift, Williams was standing on a ladder that elevated him eight feet off the ground. He was working with live wires and received an electric shock, causing him to fall to the ground and land on his back. Within a half hour of the accident, Williams sought medical attention, and Dr. Allen Schwartz treated him. The C-4 form filled out by Dr. Schwartz reveals diagnoses including a left ankle/foot contusion, a lumbar abrasion, and electrical shock. Dr. Schwartz prohibited Williams from working on January 13 and 14. Subsequently, Williams missed the remainder of his scheduled shift on January 13. He was cleared to return to regular duty beginning January 15, and he returned to work on January 16. Williams was not scheduled to work on January 14 and 15, but he claimed to be on-call for these two days.

After his accident, the insurer for respondent UPS issued a notice of claim acceptance to Williams, identifying that it would provide compensation for Williams' injuries to his left ankle/foot, left lower leg, and left hand. The notice did not list any compensation for Williams' back. It provided that Williams could appeal the claim acceptance within 70 days of the date upon which the notice was mailed. Williams did not appeal the notice of claim acceptance. A few months later, UPS's insurer issued to Williams a

notice of intent to close his claim within 70 days from the notice's date and of Williams' right to appeal this determination within that period of time. Also, the notice informed Williams of the right to reopen his claim under NRS 616C.390. Williams did not exercise the option to appeal the notice's determination.

Two years after his claim's closure, Williams experienced back and muscle pain and fatigue in his legs. He underwent medical procedures that revealed damage to his back. As a result, Williams asked UPS's insurer to reopen his claim, attributing the cause of his back issues to his 2006 work-related accident. The insurer denied the request because it deemed that there was a lack of medical evidence to justify the claim's reopening.

Before a hearing officer, Williams challenged the denial of his request to reopen his claim. The hearing officer affirmed the denial. Williams appealed the hearing officer's decision to an appeals officer. After referencing NRS 616C.390's legislative history, the appeals officer interpreted the statute to mean that an employee was barred from applying to reopen his or her claim after a year from the claim's closure if the employee did not miss at least five days of work as a result of the injury and ''did not receive a permanent partial disability award.'' Because Williams did not satisfy these requirements, the appeals officer concluded that Williams ''was not 'off work' as contemplated by NRS 616C.390(5)'' and that NRS 616C.390(5) barred him from reopening his claim. Williams then sought judicial review of the appeals officer's decision, but the district court denied the petition, and this appeal followed.

DISCUSSION

This appeal presents the question of when an employee, who seeks to reopen a closed workers' compensation claim, is deemed to have been ''off work'' as a result of an industrial injury for the purpose of determining whether, under NRS 616C.390(5), the employee may reopen his or her claim when more than one year has passed since the claim's closure. NRS 616C.390(5) provides that:

> [a]n application to reopen a claim must be made in writing within 1 year after the date on which the claim was closed if:
>
> (a) The claimant was not *off work* as a result of the injury; and
>
> (b) The claimant did not receive benefits for a permanent partial disability.

(Emphasis added.) In interpreting and applying this statute to determine whether Williams could reopen his claim, even though it had been closed for more than one year, the appeals officer con-

cluded that an injured employee must have been off work for five or more days or have received a permanent partial disability award in order to be considered off work as a result of the injury. And because Williams was not off work for five days and did not receive any benefits, the appeals officer concluded that Williams was not entitled to reopen his claim.

On appeal, Williams challenges the appeals officer's interpretation of NRS 616C.390(5)'s off-work requirement. As we have not previously addressed this statute, we examine NRS 616C.390(5)'s role in Nevada's workers' compensation scheme before turning to the appeals officer's interpretation of NRS 616C.390(5).

The role of NRS 616C.390(5) in Nevada's workers' compensation scheme

NRS 616C.390(5) establishes a one-year time limit from the date of a claim's closure for certain workers' compensation claimants to apply to reopen their claims. Under the statute's terms, if the claimant was off work or received permanent partial disability benefits, then the one-year limitations period set forth in this statute does not apply to the reopening of the claim. *Id.* But if the claimant was not off work and did not receive benefits for a permanent partial disability, the application to reopen the claim must be brought within one year of the date of claim closure. *Id.*

[Headnote 1]

This court has consistently treated the time limitations set forth in Nevada's workers' compensation statutes as establishing a jurisdictional bar to further review when the required action is not taken within the time period delineated in those statutes. *See Seino v. Emp'rs Ins. Co. of Nev.*, 121 Nev. 146, 150, 111 P.3d 1107, 1110 (2005) (''Statutory periods for requesting administrative review of workers' compensation determinations are mandatory and jurisdictional.''); *Reno Sparks Convention Visitors Auth. v. Jackson*, 112 Nev. 62, 66-67, 910 P.2d 267, 270 (1996) (recognizing that the failure to appeal an administrative determination within the prescribed time period precluded consideration of the appeal). We see no reason to depart from this well-established approach, and thus, we likewise conclude that where the reopening of a claim is subject to the limitations period set forth in NRS 616C.390(5), the failure to apply to reopen the claim within this period acts as a jurisdictional bar to the reopening of the claim. *See, e.g.*, *Barnes v. Workers' Comp. Appeals Bd.*, 2 P.3d 1180, 1186 (Cal. 2000); *Budget Luxury Inns, Inc. v. Boston*, 407 So. 2d 997, 999 (Fla. Dist. Ct. App. 1981); *but see Ball v. Indus. Comm'n*, 503 P.2d 1040, 1042-43 (Colo. App. 1972) (concluding that a similar lim-

itation on the time for reopening claims constitutes a waivable defense rather than a jurisdictional bar), *overruled on other grounds by Kuckler v. Whisler*, 552 P.2d 18, 19 (Colo. 1976); *Gragg v. W. M. Harris & Son*, 284 S.E.2d 183, 186 (N.C. Ct. App. 1981) (same). With this conclusion in mind, we now address the appeals officer's interpretation of NRS 616C.390(5)'s off-work requirement and her conclusion that Williams was not off work and was therefore subject to the one-year time limit for applying to reopen his claim.

The plain meaning of NRS 616C.390(5) and its effect on Williams' application

[Headnote 2]

Williams asserts that NRS 616C.390(5) does not preclude an employee from applying to reopen his or her claim after a year from the claim's closure if the employee misses time from work as a result of his or her injury. He argues that the appeals officer erred in applying NRS 616C.390(5) as a bar to his application to reopen his claim, contending that he was off work under NRS 616C.390(5) because the treating physician prohibited him from working until two days after the accident.

UPS responds that the appeals officer correctly interpreted and applied NRS 616C.390(5). It argues that the appeals officer reasonably concluded, after referencing legislative history, that NRS 616C.390(5) barred employees, such as Williams, from applying to reopen their claims if they did not miss at least five days of work as a result of their injuries.

[Headnotes 3-8]

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). In that context, questions of law, such as statutory interpretation, are reviewed de novo. *Id.*; *see Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006). ''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). 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 absence of an ambiguity, we do not resort to other sources, such as legislative history, in ascertaining that statute's meaning. *See Cromer*, 126 Nev. at 109, 225 P.3d at 790; *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293-94, 995 P.2d 482, 485 (2000). Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying

the statutory language because such acts are the Legislature's function. *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 498, 915 P.2d 288, 290 (1996).

In attempting to determine the requirements for reopening a claim after a year from its closure, the appeal's officer erroneously relied upon unpersuasive legislative history regarding a bill that the 2001 Legislature was considering but never voted upon. A.B. 46, 71st Leg. (Nev. 2001). After reviewing this legislative history, the appeals officer concluded that an employee is able to reopen a claim after a year from its closure only if the employee missed at least five days of work as a result of the injury or received a permanent partial disability award; because Williams did not satisfy these requirements, the appeals officer determined that he could not reopen his claim. UPS relies on similar legislative history in advancing the same interpretation of NRS 616C.390(5).

The appeals officer erred in relying upon this legislative history because NRS 616C.390(5) lacks an ambiguity that requires looking beyond the statute's plain meaning. NRS 616C.390(5) provides that an employee who was off work as a result of his or her injury is not precluded from reopening his or her claim after a year from the claim's closure. The statute's language does not condition an employee's ability to reopen a claim on the amount of time the employee was off work. Rather, NRS 616C.390(5) conditions an employee's ability to reopen a claim on either receiving a permanent partial disability award or losing time from work and a causal relationship between the injury and that time off work.

Here, Williams lost time from work on the date of his accident and as a result of his injury. After diagnosing Williams' injuries, Dr. Schwartz noted on the C-4 form that he prohibited Williams from working the remainder of his shift. Williams missed the remaining time of his scheduled shift on the date of his accident pursuant to Dr. Schwartz's instruction not to work. Thus, Williams was off work as a result of his injury under the plain meaning of NRS 616C.390(5).

We acknowledge UPS's concern that the interpretation of NRS 616C.390(5) adopted here may allow an employee to apply to reopen his or her claim after a year from the claim's closure if the employee missed any amount of time from work as a result of the injury. Regardless, our task is to interpret NRS 616C.390(5) based on its plain meaning; we cannot expand or modify the statutory language by imposing the requirements that the Legislature contemplated in A.B. 46 but did not add to the statute, nor is the appeals officer in a position to read language into a statute. *See Washoe Med. Ctr., Inc.*, 112 Nev. at 498, 915 P.2d at 290. If UPS or other employers believe that the statute must include more re-

quirements to limit an employee's ability to reopen a claim after a year from the claim's closure, this effort to alter the statute must be taken up with the Legislature and not this court. *See id.*

Accordingly, we conclude that the plain meaning of NRS 616C.390(5) does not bar an employee from applying to reopen his or her claim after a year from its closure if the employee missed time from work as a result of his injury. The statute does not condition this right to apply to reopen one's claim on losing a certain amount of time from work. Thus, NRS 616C.390(5) does not bar Williams' application to reopen his claim because Williams was off work as a result of his injury when he followed the treating physician's order to not work the remainder of his shift on the date of his accident.[1] But for his fall and injuries, Williams would not have lost this time from work.

CONCLUSION

In light of our conclusions above, we reverse the district court's denial of the petition for judicial review and remand this matter to the district court. Upon remand, the district court shall instruct the appeals officer to reexamine Williams' claim, considering the appropriate evidence in light of NRS 616C.390(1).[2]

GIBBONS and DOUGLAS, JJ., concur.

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[1]Though the parties raise arguments as to whether Williams proffered enough evidence to reopen his claim under NRS 616C.390(1), the appeals officer did not reach this issue upon concluding that NRS 616C.390(5) barred Williams' application to reopen his claim. As a result, we do not reach this issue, which must first be addressed by the appeals officer. *See Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 206-07, 955 P.2d 188, 190 (1998) (recognizing that this court's role in reviewing an administrative decision is to determine the propriety of the agency's decision in light of the evidence presented to the agency); *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (noting that ''an appellate court is not an appropriate forum in which to resolve disputed questions of fact'').

[2]We have considered the remaining contentions on appeal and conclude that they lack merit.

HALCROW, INC., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND PACIFIC COAST STEEL; AND CENTURY STEEL, INC., REAL PARTIES IN INTEREST.

No. 60194

June 27, 2013 302 P.3d 1148

Original petition for a writ of mandamus challenging a district court order granting real parties in interest's motions for leave to amend their third- and fourth-party complaints in order to plead claims for negligent misrepresentation, indemnity, contribution, and apportionment.

General contractor sued developer for failure to make timely payments on contract for construction of high-rise. Developer counterclaimed for alleged defects in steel installation and reinforcement and other nonconforming work. Contractor then filed third-party claims against steel installation subcontractors for indemnity. Steel subcontractor and its successor-in-interest in turn filed claims against structural engineer/designer and others. The district court granted subcontractor's and successor's requests for leave to amend third- and fourth-party complaints to add claim against engineer/designer for negligent misrepresentation. Petition for writ of mandamus was filed. As a matter of first impression, the supreme court, SAITTA, J., held that economic loss doctrine applied to bar claims by steel installation subcontractor and successor for negligent misrepresentation against engineer/designer in context of construction project.

Petition granted.

Backus Carranza & Burden and *Leland Eugene Backus* and *Shea A. Backus*, Las Vegas; *Lloyd, Gray, Whitehead & Monroe, P.C.*, and *E. Britton Monroe* and *Burns L. Logan*, Birmingham, Alabama, for Petitioner.

Gordon & Rees, LLP, and *Robert E. Schumacher*, Las Vegas; *Procopio, Cory, Hargreaves & Savitch, LLP*, and *Scott R. Omohundro, Craig A. Ramseyer*, and *Timothy E. Salter*, San Diego, California, for Real Party in Interest Pacific Coast Steel.

Hutchison & Steffen, LLC, and *Michael K. Wall, James H. Randall, L. Kristopher Rath*, and *Cynthia G. Milanowski*, Las Vegas; *Koeller, Nebeker, Carlson & Haluck, LLP*, and *Megan K. Dorsey* and *Robert C. Carlson*, Las Vegas, for Real Party in Interest Century Steel, Inc.

Watt, Tieder, Hoffar & Fitzgerald, LLP, and *David R. Johnson* and *Jared M. Sechrist*, Las Vegas, for Amicus Curiae Tishman Construction Corporation of Nevada.

1. MANDAMUS.
   Mandamus relief may be proper to control an arbitrary or capricious exercise of discretion.
2. MANDAMUS.
   Mandamus is an extraordinary remedy, and the supreme court has full discretion to determine whether a petition will be considered. NRS 34.160.
3. MANDAMUS.
   Whether a future appeal is sufficiently adequate and speedy so as to preclude mandamus relief, necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit the supreme court to meaningfully review the issues presented. NRS 34.160.
4. PLEADING.
   Leave to amend a pleading should not be granted if the proposed amendment would be futile. NRCP 15(a).
5. PLEADING.
   A proposed amendment may be deemed ''futile,'' as grounds for denying leave to amend a complaint, if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. NRCP 15(a).
6. FRAUD.
   Economic loss doctrine applied to bar claims by steel installation subcontractor and its successor-in-interest against structural engineer/designer for negligent misrepresentation based on engineer/designer's alleged misrepresentations about inspections and on-site adjustments to steel installation during construction of high-rise; subcontractor and successor sought only economic losses, and they had available remedies under contract.
7. FRAUD.
   Liability for negligent misrepresentation is only imposed on a party who has supplied false information, where that information is for the guidance of others and where the party knows that the information will be relied upon by a foreseeable class of persons. Restatement (Second) of Torts § 552.
8. FRAUD.
   Liability for negligent misrepresentation is proper in cases where there is significant risk that the law would not exert significant financial pressures to avoid such negligence, and these types of cases encompass economic losses sustained, for example, as a result of defamation, intentionally caused harm, negligent misstatements about financial matters, and loss of consortium. Restatement (Second) of Torts § 552.
9. FRAUD; TORTS.
   Intentional torts are not barred by the economic loss doctrine; thus, the economic loss doctrine does not preclude litigants from asserting claims of intentional misrepresentation.
10. FRAUD.
    Negligent misrepresentation is an unintentional tort and cannot form the basis of liability solely for economic damages in claims against commercial construction design professionals.

Before the Court EN BANC.[1]

OPINION

By the Court, SAITTA, J.:

In this opinion, we address whether the economic loss doctrine applies to bar a claim alleging negligent misrepresentation against a structural steel engineer on a commercial construction project. We exercise our discretion to review this petition for extraordinary writ relief, as our intervention will help resolve related future litigation by addressing an important legal issue, which our decision in *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 206 P.3d 81 (2009), left open. Ultimately, we conclude that the economic loss doctrine bars negligent misrepresentation claims against commercial construction design professionals where the recovery sought is solely for economic losses.

PROCEDURAL HISTORY AND FACTS

This original proceeding stems from the construction of, and subsequent litigation regarding, the Harmon Tower (the Harmon) located within CityCenter, a mixed-use urban development in Las Vegas owned and developed in part by MGM Mirage Design Group. MGM retained an architectural firm and a general contractor, Perini Building Company, Inc., to assist in the project's development. The architectural firm retained petitioner Halcrow, Inc., to design the Harmon's structure, prepare drawings, and perform ongoing structural engineering services, including observations and inspections, throughout the construction of multiple structures in CityCenter. Perini hired real party in interest Century Steel, Inc., to provide the steel installation. Following the construction of a portion of the Harmon, Century assigned its assets, including the contract for the Harmon, to real party in interest Pacific Coast Steel (PCS).

All parties agree that Halcrow had no contract with PCS, Century, or Perini. Nonetheless, pursuant to PCS's and Century's contractual obligations to Perini, they were required to follow Halcrow's design and specifications for installing reinforcing steel in the Harmon. Problems arose when defects were discovered relating to the reinforcing steel's installation.

After construction was stopped on the Harmon, Perini filed a complaint against MGM for allegedly failing to make timely payments. MGM filed a counterclaim against Perini for the alleged reinforcing steel defects and other nonconforming work on the Har-

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

mon. Perini then filed a third-party complaint against Century and PCS, among others, asserting claims for contractual indemnity. Century and PCS in turn filed their own third- and fourth-party complaints against several entities, including Halcrow, alleging claims for negligence, equitable indemnity, and contribution and apportionment, and seeking declaratory relief.

Halcrow filed a motion to dismiss Century's and PCS's third- and fourth-party complaints for failure to state a claim on which relief can be granted, based on this court's holding in *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 206 P.3d 81 (2009). Halcrow argued that *Terracon* bars unintentional tort claims against design professionals in commercial construction projects when the claimant incurs purely economic losses. The district court granted Halcrow's motion and dismissed Century's and PCS's claims for negligence, indemnity, contribution, and declaratory relief.

PCS then sought leave to amend its third-party complaint in order to include a cause of action for negligent misrepresentation. Century followed suit and filed a motion for leave to amend its fourth-party complaint against Halcrow and others, to allege a claim for negligent misrepresentation. Halcrow filed an opposition to Century's and PCS's motions to amend their complaints, arguing that *Terracon* did not carve out an exception to the economic loss doctrine for negligent misrepresentation claims, and thus, PCS and Century should not be permitted to maintain such claims. Century and PCS on the other hand argued that Halcrow owed them a duty to act with reasonable care, pursuant to the Restatement (Second) of Torts section 552, in communicating information to Century and PCS about the steel installation. Specifically, they alleged that Halcrow failed to conduct timely inspections in accordance with its representations that inspections would take place and erroneously stated that on-site adjustments would alleviate errors in its plans. Century and PCS therefore contended that as a result of their foreseeable reliance on Halcrow's false representations regarding the steel installation inspection and correction process, Halcrow could be held liable for negligent misrepresentation.

Following a hearing, the district court granted the motions to amend but stayed the proceedings pending resolution of the legal issues by this court. This petition for extraordinary writ relief followed.

DISCUSSION

Writ of mandamus

[Headnotes 1-3]

A writ of mandamus is available to compel the performance of an act that the law requires as ''a duty resulting from an office,

trust or station.'' NRS 34.160. Mandamus relief may also be proper ''to control an arbitrary or capricious exercise of discretion.'' *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Mandamus is an extraordinary remedy, and we have full discretion to determine whether a petition will be considered. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Writ relief will not be available when an adequate and speedy legal remedy exists. NRS 34.170. ''Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.'' *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007); *see also Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997) (indicating that this court will consider a petition challenging an order denying motions to dismiss when an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition).

We exercise our discretion to consider this petition because the legal issue of whether a negligent misrepresentation tort claim may be maintained against a design professional in a commercial construction setting is one of first impression in Nevada and the issue has resulted in split decisions in Nevada state and federal district courts such that our clarification of this important issue now will promote sound judicial economy and administration. *D.R. Horton, Inc.*, 123 Nev. at 474-75, 168 P.3d at 736.

The district court acted arbitrarily and capriciously in granting leave to amend in order to plead negligent misrepresentation

[Headnotes 4, 5]

NRCP 15(a) provides that leave to amend a complaint shall be ''freely given when justice so requires.'' However, leave to amend should not be granted if the proposed amendment would be futile. *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *See Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

Negligent misrepresentation and the economic loss doctrine

[Headnote 6]

In *Terracon*, we held that the economic loss doctrine applied to preclude a plaintiff from asserting professional negligence claims against design professionals when the plaintiff sought to recover

purely economic losses in a dispute concerning commercial construction. Specifically, we concluded that:

> in a commercial property construction defect action in which the plaintiffs seek to recover purely economic losses through negligence-based claims, the economic loss doctrine applies to bar such claims against design professionals who have provided professional services in the commercial property development or improvement process.

125 Nev. at 80, 206 P.3d at 90. In so holding, we explained that the economic loss doctrine is intended to mark '' 'the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others.' '' *Id.* at 72-73, 206 P.3d at 86 (alteration in original) (quoting *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004)). We further explained that application of the doctrine protects parties from unlimited economic liability, which could result from negligent actions taken in commercial settings. *Id.* at 74, 206 P.3d at 86-87.

In this case, Halcrow contends that the clear and explicit holding in *Terracon* bars all negligence-based claims, including negligent misrepresentation. It further argues that numerous courts have refused to exempt negligent misrepresentation claims from the economic loss doctrine in cases of large commercial construction projects. In contrast, PCS and Century argue that *Terracon* left open the question of whether negligent misrepresentation may be an appropriate exception to the economic loss doctrine. Further, both PCS and Century argue that negligent misrepresentation should be adopted as an exception to the economic loss doctrine because it would not lead to the type of unlimited liability that the doctrine seeks to avoid. They maintain that the Restatement (Second) of Torts section 552 (1977) imposes on design professionals a duty of care, separate and apart from any duties arising from Halcrow's contract with the architectural firm, and because Halcrow breached that duty by negligently misrepresenting that it inspected and made corrections to the steel work, thus causing Century and PCS financial damages, they should be permitted to amend their complaints to assert negligent misrepresentation. We disagree.

Although *Terracon* recognized that exceptions to the economic loss doctrine exist, it answered only the specific question of whether the doctrine applied to preclude professional negligence claims against design professionals who provided services in the commercial property development and improvement process, when

the plaintiff sought purely economic losses. In this case, Century's and PCS's proposed amended complaints include a cause of action for negligent misrepresentation, based on Halcrow's alleged misrepresentations that it would inspect and make appropriate on-site adjustments to the steel installation, and on which representations Century and PCS allege they relied. *Terracon* did not address whether the economic loss doctrine applied to bar plaintiffs from asserting such claims, and we resolve that question now.

[Headnote 7]

We have previously adopted section 552 of the Second Restatement of Torts in upholding a claim for negligent misrepresentation. That section provides:

> ''One who, in the course of his business, profession or employment, or in any other [trans]action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.''

Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev., 94 Nev. 131, 134, 575 P.2d 938, 940 (1978) (quoting Restatement (Second) of Torts § 552 (1977)). Section 552 provides that in situations where only pecuniary loss results, liability for negligent misrepresentation is not based on general duty rules, but instead, on a ''restricted rule of liability.'' Restatement (Second) of Torts § 552 cmt. a (1977). Liability is only imposed on a party who has supplied false information, where that information is for the guidance of others and where the party knows that the information will be relied upon by a foreseeable class of persons. *Id.* cmt. b.

[Headnote 8]

In *Terracon*, we left open the door for exceptions to the economic loss doctrine for negligent misrepresentation claims ''in [a] certain categor[y] of cases when strong countervailing considerations weigh in favor of imposing liability.'' 125 Nev. at 73, 206 P.3d at 86. Liability is proper in cases where there is significant risk that ''the law would not exert significant financial pressures to avoid such negligence.'' *Id.* at 76-77, 206 P.3d at 88. These types of cases encompass economic losses sustained, for example, as a result of defamation, intentionally caused harm, negligent misstatements about financial matters, and loss of consortium. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 56 (1st Cir. 1985) (citing numerous exceptions to the economic loss doctrine that have been accepted by courts). However, in the context of commercial construction design professionals, negligent misrepresentation

claims do not fall into such a category because ''contract law is better suited'' for resolving such claims. *Terracon*, 125 Nev. at 77, 206 P.3d at 89. Further, in commercial construction situations, the highly interconnected network of contracts delineates each party's risks and liabilities in case of negligence, which in turn ''exert significant financial pressures to avoid such negligence.'' *Id.* at 77, 206 P.3d at 88.

Additionally, complex construction contracts generally include provisions addressing economic losses. *See Terracon*, 125 Nev. at 78, 206 P.3d at 89. Therefore, the parties' ''disappointed economic expectations'' are better determined by looking to the parties' intentions expressed in their agreements. *Id.* at 79, 206 P.3d at 90 (quoting *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 57-58 (Va. 1988)). This is further supported by the fact that design professionals supply plans, designs, and reports that are relied upon to create a tangible structure; the ultimate quality of the work can be judged against the contract. *See id.* at 79, 206 P.3d at 90; *see also Fireman's Fund Ins. Co. v. SEC Donohue Inc.*, 679 N.E.2d 1197, 1202 (Ill. 1997). The drawings, reports, and on-site instructions are ''incidental to a tangible product.'' *Fireman's Fund Ins. Co.*, 679 N.E.2d at 1202; *see also Kuhn Constr. Co. v. Ocean & Coastal Consultants, Inc.*, 844 F. Supp. 2d 519, 527-28 (D. Del. 2012). Thus, requiring parties that are not in direct privity with one another but involved in a network of interrelated contracts to rely upon that network of contracts ensures that all parties to a complex project have a remedy and maintains the important distinction between contract and tort law. *See Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241-44, 89 P.3d 31, 31-33 (2004).

In *Terracon*, we concluded that a design professional's duty to a party with whom it contracted is set forth in the contract, and ''any duty breached arises from the contractual relationship *only*.'' 125 Nev. at 79, 206 P.3d at 90 (emphasis added). Based on the foregoing discussion, we see no reason to limit our conclusion in *Terracon* by imposing the extracontractual duty described in section 552 of the Second Restatement of Torts. *See Leis Family Ltd. P'ship v. Silversword Eng'g*, 273 P.3d 1218, 1224-25 (Haw. Ct. App. 2012); *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 555 N.E.2d 346, 353 (Ill. 1990); *Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 738 (Ind. 2010); *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*, 870 S.W.2d 832, 837 (Mo. Ct. App. 1993); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 881 P.2d 986, 993 (Wash. 1994).

Determining that design professionals have a separate and distinct duty, pursuant to section 552, to any subcontractor that must

rely on their plans would essentially allow any party to recast their barred negligence claim into a negligent misrepresentation claim. In the context of commercial construction projects, the evidence that would need to be presented in order to prove a negligent misrepresentation claim is almost identical to that which would be necessary in proving a claim for negligence. Allowing one and not the other would create a loophole in *Terracon*'s objective of foreclosing professional negligence claims against commercial construction design professionals and would, essentially, cause the economic loss doctrine to be nullified by negligent misrepresentation claims.

[Headnotes 9, 10]

Here, PCS and Century, the subcontractors hired to install the steel, sought to plead negligent misrepresentation claims against Halcrow, the steel engineer. Halcrow was employed on the Harmon as a design professional and responsible for creating the plans and overseeing the installation of the Harmon's steel infrastructure. PCS and Century have never stated that they sought anything other than economic losses. Negligent misrepresentation is an unintentional tort and cannot form the basis of liability solely for economic damages in claims against commercial construction design professionals.[2] Consequently, PCS and Century cannot assert claims of negligent misrepresentation against Halcrow.[3] Therefore, leave to amend should not have been granted because the amendment to PCS's and Century's pleadings was futile. *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993); *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

CONCLUSION

We conclude that, in commercial construction defect litigation, the economic loss doctrine applies to bar claims against design professionals for negligent misrepresentation where the damages alleged are purely economic.[4] Thus, the district court was com-

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[2]Intentional torts are not barred by the economic loss doctrine. *See Terracon*, 125 Nev. at 72-73, 206 P.3d at 85-86. Thus, the economic loss doctrine does not preclude litigants from asserting claims of intentional misrepresentation.

[3]Our conclusions, however, do not bar PCS or Century's potential reliance on *Home Furniture, Inc. v. Brunzell Construction Co.*, 84 Nev. 309, 313-14, 440 P.2d 398, 401-02 (1968), and *United States v. Spearin*, 248 U.S. 132, 136 (1918) (providing that contractors cannot be liable for loss or damage resulting from defects in the plans and specifications, when the contractors simply followed the plans as provided).

[4]Because we determine that negligent misrepresentation and professional negligence claims cannot form a basis for liability, *Terracon*, 125 Nev. at 80, 206 P.3d at 90, Halcrow cannot be deemed a joint tortfeasor with PCS or Cen-

pelled to deny Century's and PCS's motions to amend their third- and fourth-party complaints to include claims for negligent misrepresentation against Halcrow. Accordingly, we grant Halcrow's petition for a writ of mandamus. The clerk of this court shall issue a writ of mandamus directing the district court to vacate its order granting PCS and Century leave to amend their third- and fourth-party complaints and the amended complaints.

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

EMIL FREI, III, BY AND THROUGH HIS GUARDIAN AD LITEM, EMIL FREI, IV, APPELLANT, *v.* DANIEL V. GOODSELL, AN INDIVIDUAL; AND GOODSELL & OLSEN, A NEVADA LIMITED LIABILITY PARTNERSHIP, RESPONDENTS.

No. 58391

July 3, 2013 305 P.3d 70

Appeal from a district court judgment on a jury verdict in a legal malpractice action. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Widower brought legal malpractice action against attorney who prepared trust documents for deceased wife. The district court entered judgment on a jury verdict in favor of attorney. Widower appealed. The supreme court, PARRAGUIRRE, J., held that: (1) issue of whether widower and attorney entered into an attorney-client relationship was not necessarily litigated in prior trust action, thereby rendering doctrine of issue preclusion inapplicable in legal malpractice action; and (2) the district court did not abuse its discretion in prohibiting widower from presenting extrinsic evidence with regard to his specific intent in executing the unambiguous trust documents.

Affirmed.

Blut Law Group, APC, and *Elliot S. Blut*, Las Vegas, for Appellants.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *Christopher G. Rigler*, Las Vegas, for Respondents.

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tury. Consequently, PCS and Century's equitable claims for contribution, apportionment, and indemnity necessarily fail. *See Black & Decker (U.S.), Inc. v. Essex Grp., Inc.*, 105 Nev. 344, 345, 775 P.2d 698, 699 (1989).

1. APPEAL AND ERROR.
   The supreme court reviews de novo whether the doctrine of issue preclusion applies to preclude a party from relitigating legal issues that were addressed in a previous action.
2. JUDGMENT.
   For issue preclusion to apply, each of the following elements must be met: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action, (2) the initial ruling must have been on the merits and have become final, (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and (4) the issue was actually and necessarily litigated.
3. JUDGMENT.
   Although attorney was disqualified from representing trust in widower's prior action against trustee based on the district court's conclusion that a prior attorney-client relationship existed between widower and attorney that created a conflict of interest, the issue of whether widower and attorney entered into an attorney-client relationship was not necessarily litigated in the trust action, thereby rendering the doctrine of issue preclusion inapplicable in widower's subsequent legal malpractice action; resolution of the prior trust action was not dependent on whether attorney had an attorney-client relationship with widower.
4. JUDGMENT.
   Only where the common issue was necessary to the judgment in the earlier suit will its relitigation be precluded.
5. APPEAL AND ERROR.
   The supreme court reviews a district court's decision to admit or exclude evidence for abuse of discretion, and it will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse.
6. TRUSTS.
   The district court did not abuse its discretion in prohibiting widower from presenting extrinsic evidence with regard to his specific intent in executing the unambiguous trust documents.
7. EVIDENCE.
   Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument, since all prior negotiations and agreements are deemed to have been merged therein.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, appellant Emil Frei, III, challenges the district court's refusal to apply the doctrine of issue preclusion and its application of the parol evidence rule in an attorney malpractice action. Before filing the malpractice action, Frei sued the trustee of his deceased wife's estate, claiming that the trustee had improperly transferred Frei's assets into the trust. In that trust action, Frei successfully sought to disqualify respondent Daniel Goodsell, the attorney who prepared the trust documents, from representing

the trustee, based on the district court's conclusion that a prior attorney-client relationship existed between Frei and Goodsell, which created a conflict of interest.

Following resolution of the trust action, Frei sued Goodsell for malpractice. Frei asserted, and maintains on appeal, that the doctrine of issue preclusion prevented Goodsell from denying the existence of an attorney-client relationship with Frei in the legal malpractice lawsuit because he had been disqualified from representing the trustee in the previous trust action. Frei also objected to the district court's application of the parol evidence rule to preclude evidence of Frei's intent in executing a number of unambiguous documents prepared by Goodsell. We conclude that the issue of an attorney-client relationship between Frei and Goodsell was not ''necessarily litigated'' in the previous trust action, which is essential for issue preclusion to apply, and that the district court did not abuse its discretion in applying the parol evidence rule. Thus, we affirm the district court's judgment in Goodsell's favor.

FACTS AND PROCEDURAL HISTORY

Respondent Daniel Goodsell is an attorney who prepared various estate planning documents for the signature of appellant Emil Frei III.[1] Goodsell prepared the documents at the instruction of Frei's agent, Stephen Brock, who had been appointed as both Frei's attorney-in-fact and as trustee to a trust for Frei's wife. Per Brock's instruction, the documents were intended to correct an imbalance between two separate revocable trusts that benefited the couple's children from prior marriages. The documents included assignments of bank and investment accounts, a deed to Frei's home, two codicils to his will, an amendment to Frei's trust, and a declination to act as successor trustee to the wife's trust. Goodsell did not speak directly to Frei about the documents and delivered them to Brock for Frei's signature. Upon execution, the documents transferred over $1 million of Frei's assets into his wife's trust.

After his wife's death, Frei sought to void the documents and filed an action against Brock, arguing that he did not understand the impact of what he was signing and that the documents did not accurately reflect his intent. As litigation over the trust ensued, Frei also filed a motion to disqualify Goodsell from representing Brock, arguing that an attorney-client relationship existed to the extent that Goodsell prepared documents for Frei's signature. The district court concluded that Brock had been acting as Frei's agent in obtaining the documents, and it granted Frei's motion to disqualify Goodsell based on a conflict of interest. The trust action

[1]We refer to respondent Goodsell and his law firm, respondent Goodsell & Olsen, collectively as Goodsell. Appellant's son, Emil Frei IV, has been appointed guardian ad litem in this action.

was ultimately resolved through a settlement agreement, which was approved in district court.

After the trust litigation settled, Frei brought the underlying legal malpractice action against Goodsell, arguing that Goodsell breached his standard of care by failing to verify Frei's intentions before preparing the documents for his signature.

Before trial, Frei filed a motion in limine to preclude Goodsell from arguing that an attorney-client relationship did not exist. Specifically, Frei argued that under the doctrine of issue preclusion, Goodsell could not deny the existence of an attorney-client relationship in light of the district court's order disqualifying Goodsell from the trust action. The district court denied Frei's motion, reasoning that the disqualification ruling had not resulted in a final, appealable order.

During trial, Goodsell raised a parol evidence objection in response to questions regarding Frei's intent in executing the documents. Goodsell argued that each document was clear and unambiguous, such that Frei could not testify to contradict the plain meaning of its contents. The district court agreed that evidence of Frei's intent was precluded by the parol evidence rule. Following a general jury verdict, the district court issued judgment in Goodsell's favor.

DISCUSSION

On appeal, Frei argues that the doctrine of issue preclusion should have precluded Goodsell from denying the existence of an attorney-client relationship. Frei also argues that the district court erred by concluding that the parol evidence rule barred testimony regarding his intent and understanding of the documents. We disagree.

Application of the doctrine of issue preclusion

[Headnote 1]

Frei argues that the district court erred in denying his motion in limine because the doctrine of issue preclusion should have precluded Goodsell from arguing that an attorney-client relationship did not exist. We review de novo whether the doctrine of issue preclusion applies to preclude a party from relitigating legal issues that were addressed in a previous action. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008); *Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004).

[Headnote 2]

In order for issue preclusion to apply, each of the following elements must be met:

> ''(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation''; and (4) the issue was actually and necessarily litigated.

Five Star, 124 Nev. at 1055, 194 P.3d at 713 (alteration in original) (quoting *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)); *see also Kahn v. Morse & Mowbray*, 121 Nev. 464, 474, 117 P.3d 227, 234-35 (2005) (noting that ''a litigant must show that an issue of fact or law was necessarily and actually litigated in a prior proceeding'').

[Headnotes 3, 4]

Focusing on the fourth factor—whether the issue was actually and necessarily litigated, which is dispositive here—we conclude that while the issue of Goodsell's attorney-client relationship with Frei was actually litigated in the previous trust action, *cf. In re Sandoval*, 126 Nev. 136, 139-40, 232 P.3d 422, 424-25 (2010) (concluding that a case had not been ''actually . . . litigated'' without knowledge and participation of both parties and findings of fact established by evidence); *see* Restatement (Second) of Judgments § 27 cmt. d (1982) (''When an issue is properly raised . . . and is submitted for determination, . . . the issue is actually litigated . . . .''), it was not necessarily litigated. Nevada law provides that only where ''the common issue was . . . *necessary to the judgment in the earlier suit*,'' will its relitigation be precluded. *Tarkanian*, 110 Nev. at 599, 879 P.2d at 1191 (emphasis added). Thus, for issue preclusion to apply in this case, the issue of whether Frei and Goodsell had an attorney-client relationship must have been necessary for resolution of the trust action.

In resolving this issue, we look to the Massachusetts Supreme Judicial Court, which addressed a similar issue in *Jarosz v. Palmer*, 766 N.E.2d 482, 486 (Mass. 2002). *Jarosz* involved the preclusive effect of a district court ruling in a wrongful termination action, in which a corporate co-owner and former officer unsuccessfully moved to disqualify the corporation's attorney based on a conflict of interest arising from the attorney's actions in helping the former officer acquire his interest in the corporation. *Id.* at 485. The former officer then filed a subsequent legal malpractice claim against the attorney, who in turn moved for summary judgment on the ground that an attorney-client relationship did not exist as a matter of law. *Id.* The *Jarosz* court declined to apply the doctrine of issue preclusion after concluding that ''[t]he issue of [an]

attorney-client relationship . . . was clearly not essential to a determination of . . . wrongful termination claims against the [corporation].'' *Id.* at 489 (reasoning that the former officer ''could have prevailed on those claims regardless of the outcome of his motion to disqualify'').

Here, resolution of the prior trust action was not dependent on whether Goodsell had an attorney-client relationship with Frei. Instead, the record indicates that either party to the trust action could have prevailed regardless of the district court's disqualification of Goodsell. Thus, we conclude that the issue of whether Frei entered into an attorney-client relationship was not necessarily litigated in the trust action, thereby rendering the doctrine of issue preclusion inapplicable in the subsequent legal malpractice action.[2] *Five Star*, 124 Nev. at 1052, 194 P.3d at 711.

Accordingly, the district court did not err in denying Frei's motion in limine or by allowing the issue of an attorney-client relationship to be determined by the jury.

Parol evidence rule

[Headnotes 5, 6]

Frei argues that the district court erred in applying the parol evidence rule to preclude testimony of his actual intent in executing the documents.[3] ''We review a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere

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[2]Frei argues that the district court erred in concluding that the disqualification ruling did not result in an appealable, final order. Because we conclude that the underlying issue was not necessarily litigated in the trust action—a point contested in the parties' briefs and at oral argument—we need not address Frei's argument. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (stating that this court may affirm a district court's decision for different reasons than relied upon below).

[3]We limit our discussion on this issue to the arguments raised by Frei on appeal and therefore assume without deciding that the parol evidence rule is available here. It is unclear whether the parol evidence rule applies to this type of action, where appellant seeks recovery for legal malpractice and is not specifically seeking to contradict the terms of the document. *See Schneider, Smeltz, Ranney & LaFond, P.L.L., v. Kedia*, 796 N.E.2d 553, 555-56 (Ohio Ct. App. 2003) (concluding in a *legal malpractice* case that the parol evidence rule would not preclude a client from introducing evidence that the document prepared by his attorney included different terms than those agreed to prior to execution); *Thomson v. Canyon*, 129 Cal. Rptr. 3d 525, 537 (Ct. App. 2011) (''The parol evidence rule prevents reconstruction of the parties' contractual obligations; it does not immunize real estate agents, attorneys, or other professionals from liability arising from their misconduct in drafting a contract.''). We do not address this issue, however, as Frei did not properly raise this argument on appeal. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider an issue not cogently argued or supported by relevant legal authority).

with the district court's exercise of its discretion absent a showing of palpable abuse.'' *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).

[Headnote 7]

Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument, '' 'since all prior negotiations and agreements are deemed to have been merged therein.' '' *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001) (quoting *Daly v. Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980)).

Frei concedes that all of the documents are unambiguous on their face, but he argues that evidence of his intent was essential for proving that the documents did not meet his objectives. For support, Frei primarily relies on *Russ v. General Motors Corp.* for the proposition that the district court should have allowed extrinsic evidence regarding his understanding of the documents' effect in order to show a unilateral mistake in execution. 111 Nev. 1431, 1438-39, 906 P.2d 718, 723 (1995) (stating that ''a court should provisionally receive all credible evidence concerning a party's intentions to determine whether the language of a release is reasonably susceptible to the interpretation urged by the party''). We conclude that Frei's reliance on *Russ* is misplaced, as this court has subsequently discredited this language as dictum. *Kaldi*, 117 Nev. at 282, 21 P.3d at 22 (concluding that ''*Russ* does not stand for a general proposition that evidence of a party's intent may be admissible to create ambiguity in an otherwise unambiguous written contract'').

In the alternative, Frei argues that the parol evidence rule should not have applied because, in the context of estate planning, courts routinely admit extrinsic evidence of a testator's intent. *See Ohanneson v. Lambrinidou (In re Sargavak's Estate)*, 216 P.2d 850, 852 (Cal. 1950). In *In re Sargavak's Estate*, the court concluded that extrinsic evidence is admissible to show whether an allegedly testamentary instrument was intended by the testator to be effective as a will. *Id.* However, the court proceeded to modify its holding by explaining that such evidence is not admissible ''for the purpose of proving the meaning the testator attributed to specific provisions of an admitted will.'' *Id.*; *Bowles v. Bradley*, 461 S.E.2d 811, 813 (S.C. 1995) (''If the language of the trust instrument is plain and capable of legal construction, that language determines the force and effect of the instrument . . . [and] extrinsic evidence will not be admitted to alter the plain language of the instrument.''). Accordingly, we conclude that this argument is unpersuasive, as Frei does not argue that he lacked testamentary intent while signing the

documents or that he failed to understand the effect of the unambiguous documents at the time of their execution.[4]

Therefore, we conclude that the district court did not abuse its discretion in prohibiting Frei from presenting extrinsic evidence with regard to his specific intent in executing the unambiguous documents.

CONCLUSION

We conclude that the district court properly refused to apply the doctrine of issue preclusion because the issue of an attorney-client relationship between Frei and Goodsell was not necessarily litigated in the previous trust action. We also conclude that the district court did not abuse its discretion in applying the parol evidence rule. Accordingly, we affirm the district court's judgment.

HARDESTY and CHERRY, JJ., concur.

COUNTY OF CLARK, NEVADA; AND MICHELE SHAFE, IN HER OFFICIAL CAPACITY AS CLARK COUNTY ASSESSOR, APPELLANTS, *v.* HOWARD HUGHES COMPANY, LLC, A FOREIGN LIMITED LIABILITY COMPANY AUTHORIZED TO DO BUSINESS IN NEVADA, RESPONDENT.

No. 60790

July 3, 2013 305 P.3d 896

Appeal from a district court order denying a motion for change of venue. First Judicial District Court, Carson City; James Todd Russell, Judge.

Protesting property owners from Clark County filed in the First Judicial District Court in Carson City an action to challenge the State Board of Equalization's property tax assessment. Clark County and the County Assessor filed a motion to change venue to Clark County. The district court denied the motion. Appellants ap-

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[4]Finally, Frei cites *Massie v. Chatom*, 127 P. 56, 57 (Cal. 1912), for the proposition that the parol evidence rule only applies to actions between parties to the contract or their privies. In rejecting this argument, we note that California law wavers in this position, as recent cases have held that the ''key consideration in application of the parol evidence rule, whether invoked by a party or a stranger to the contract, is whether the extrinsic evidence is being offered to reconstruct the parties' contractual obligations.'' *Thomson v. Canyon*, 129 Cal. Rptr. 3d 525, 536 (Ct. App. 2011). In any event, Nevada has never limited application of the parol evidence rule to actions between the parties to a contract or their privies, and we decline to do so here.

pealed. The supreme court, CHERRY, J., held that protesting property owners may file their actions to recover taxes in any State of Nevada court of competent jurisdiction.

Affirmed.

Steven B. Wolfson, District Attorney, and *Paul D. Johnson*, Deputy District Attorney, Clark County, for Appellants.

Lionel Sawyer & Collins and *Max Couvillier, William J. McKean*, and *Paul D. Bancroft*, Reno, for Respondent.

1. APPEAL AND ERROR.
   When interpreting a venue statute to determine whether the district court properly denied a motion for a change of venue, the supreme court applies de novo review.
2. STATUTES.
   A long-standing rule of statutory construction mandates that where a specific and general statute conflict, the specific statute controls.
3. VENUE.
   A protesting property owner may commence a suit in any court of competent jurisdiction in the State of Nevada against the state or county in which the taxes were paid. NRS 361.420(2).

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

In this appeal, we consider whether a property owner whose property is located outside of Carson City may file a petition for judicial review from a State Board of Equalization property tax valuation in the First Judicial District Court in Carson City. We conclude that the First Judicial District Court is an appropriate venue for filing a property tax valuation challenge, irrespective of the physical location of the property, because it is a ''court of competent jurisdiction in the State of Nevada'' as required by NRS 361.420(2). We further conclude that the statutory language provides that a property owner with property located in any Nevada county may file a property tax valuation action in any district court in the state.

FACTS AND PROCEDURAL HISTORY

Respondent Howard Hughes Company, LLC, owns four parcels of real property known as Summerlin West located in Clark County, Nevada. Dissatisfied with the appraisal performed by appellant Michele Shafe, the Clark County Assessor, for the tax

year 2011-2012, Howard Hughes Company challenged its assessment before the Clark County Board of Equalization, which lowered the valuation. Subsequently, appellant Clark County appealed the revised assessment to the State Board of Equalization, which increased the valuation. Ultimately, Howard Hughes Company petitioned the First Judicial District Court in Carson City for judicial review pursuant to NRS 361.420 and NRS 233B.130.[1]

Clark County and the Assessor filed a motion for change of venue, arguing that the action should be maintained in the Eighth Judicial District Court in Clark County. They claimed that actions against counties are to take place in the district court that embraces that named county under NRS 13.030(1). The district court denied the motion, holding that the petition was properly filed in the First Judicial District Court in Carson City in accordance with NRS 361.420(2). This appeal followed.

DISCUSSION

[Headnote 1]

Protesting property owners from counties throughout the State of Nevada have challenged their property tax assessment in the First Judicial District Court in Carson City. *See Washoe Cnty. v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012) (action initiated in Carson City when the property was located in Washoe County); *State ex rel. Bd. of Equalization v. Barta*, 124 Nev. 612, 188 P.3d 1092 (2008) (same); *State ex rel. Bd. of Equalization v. Bakst*, 122 Nev. 1403, 148 P.3d 717 (2006) (same); *Mineral Cnty. v. State, Bd. of Equalization*, 121 Nev. 533, 119 P.3d 706 (2005) (action commenced in Carson City when the property was located in Mineral County). We take this opportunity to clarify that property owners whose property is located outside of Carson City may, in fact, file a petition for judicial review from a State Board of Equalization property tax valuation in the First Judicial District Court. Applying de novo review, we interpret the applicable venue statutes to determine whether the district court properly denied the motion for change of venue. *See Otto*, 128 Nev. at 430-31, 282 P.3d at 724.

[Headnotes 2, 3]

It is a long-standing rule of statutory construction that where a specific and general statute conflict, ''the specific statute will take precedence.'' *Anderson Family Assocs. v. State Eng'r*, 124 Nev. 182, 187, 179 P.3d 1201, 1204 (2008). NRS 361.420(2) provides that a protesting property owner ''may commence a suit in any court of competent jurisdiction in the State of Nevada against the State and county in which the taxes were paid.'' *See Marvin v. Fitch*, 126 Nev. 168, 178, 232 P.3d 425, 431 (2010) (''Recognizing that the State Board's equalization process is adversarial, the

[1]The petition was timely filed under NRS 361.420(3).

Legislature provided that a taxpayer may seek judicial review of a State Board's determination or bring a lawsuit 'in any court of competent jurisdiction in the State.' '' (quoting NRS 361.420(2))). By contrast, NRS 13.030(1) states that ''[a]ctions against a county may be commenced in the district court of the judicial district embracing the [defendant] county.''

Here, NRS 361.420(2) answers the question of where venue may be taken in a property tax valuation action. *See State Indus. Ins. Sys. v. Surman*, 103 Nev. 366, 368, 741 P.2d 1357, 1358-59 (1987) (determining that a statue that specifically addresses a question is specific). NRS 13.030 does not specifically address venue as it relates to property tax valuation actions and is therefore general. *See In re State Eng'r Ruling No. 5823*, 128 Nev. 232, 245, 277 P.3d 449, 457 (2012) (including NRS 13.030 in a discussion of general venue statutes). Because NRS 361.420(2) is specific and NRS 13.030 is general, NRS 361.420(2) is controlling and, thus, venue in a tax valuation challenge may be taken in any court of competent jurisdiction in this state.

The Nevada Legislature has unmistakably declared in NRS 361.420(2) where protesting property owners may file their actions for recovery of taxes—in any court of competent jurisdiction in Nevada. The First Judicial District Court in Carson City is an appropriate venue because Howard Hughes Company's petition for judicial review from the State Board of Equalization's property tax valuation may be filed in the district court of any Nevada county.

Accordingly, we affirm the district court's order denying the motion for change of venue.

HARDESTY and PARRAGUIRRE, JJ., concur.

MOUNTAIN VIEW RECREATION, INC., DBA MOUNTAIN VIEW RECREATION CENTER, APPELLANT, *v.* IMPERIAL COMMERCIAL COOKING EQUIPMENT CO.; HARMONY FIRE PROTECTION, INC.; AND HERITAGE OPERATING, L.P., RESPONDENTS.

No. 56193

July 3, 2013 305 P.3d 881

Appeal from a district court order granting a motion to change venue. Fifth Judicial District Court, Nye County; Robert E. Estes, Judge.

Owner of recreation center, which was destroyed by fire that allegedly started when deep fat fryer overheated and the building's sprinkler system failed to extinguish the fire, filed a complaint

against fryer's manufacturer and fuel company, which provided propane fuel to recreation center and serviced the fryer, and sprinkler system designer, which designed and installed the building's sprinkler system. The district court granted fuel company's motion to change venue from Nye County to Clark County. Owner of recreation center appealed. The supreme court, HARDESTY, J., held that: (1) evidence was insufficient to support the district court's decision changing venue from Nye to Clark County, (2) the district court abused its discretion by changing venue based on inadequate courtroom facilities, and (3) the district court abused its discretion by failing to consider the docket and the availability of courtrooms and staff in Clark County before reaching its decision to change venue.

Reversed and remanded.

Lewis & Roca, LLP, and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *McDonald & McCabe, LLC*, and *Thomas A. McDonald, David R. Butzen, Michael P. Rohan*, and *Terry L. Welch*, Chicago, Illinois, for Appellant.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Respondent Imperial Commercial Cooking Equipment Co.

Lincoln, Gustafson & Cercos and *Nicholas B. Salerno* and *James M. Barrington*, Las Vegas, for Respondent Harmony Fire Protection, Inc.

Wood, Smith, Henning & Berman, LLP, and *Janice M. Michaels* and *T. Blake Gross*, Las Vegas, for Respondent Heritage Operating, L.P.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of a motion to transfer a trial based on the doctrine of forum non conveniens for an abuse of discretion.
2. VENUE.
   The district courts have wide discretion when considering whether to grant motions to change venue.
3. VENUE.
   Plaintiff's selected forum choice may only be denied under exceptional circumstances strongly supporting another forum.
4. VENUE.
   Motion for change of venue based on forum non conveniens must be supported by affidavits so that the district court can assess whether there are any factors present that would establish such exceptional circumstances.
5. VENUE.
   General allegations regarding inconvenience or hardship are insufficient for change of venue based on forum non conveniens because specific factual showing must be made.

6. VENUE.

Evidence was insufficient to support district court's decision changing venue from Nye to Clark County based on forum non conveniens in action brought by recreation center, which was destroyed by fire that allegedly started when deep fat fryer overheated and building's sprinkler system failed to extinguish the fire, against fryer manufacturer and fuel and sprinkler system companies; allegations that holding trial in Pahrump or Tonopah would be inconvenient to witnesses and parties because majority of the litigation and discovery, including the majority of depositions, took place in Las Vegas, that physical evidence, the special master, and the majority of counsel were located in Las Vegas, and that all experts located outside of Pahrump would have to travel through Las Vegas to attend court proceedings in Pahrump failed to establish the existence of exceptional circumstances. NRS 13.050.

7. VENUE.

The district court abused its discretion by changing venue from Nye to Clark County based on inadequate courtroom facilities in action brought by recreation center, which was destroyed by fire that allegedly started when deep fat fryer overheated and building's sprinkler system failed to extinguish the fire, against fryer manufacturer and fuel and sprinkler system companies; record did not support the district court's findings that the courtroom facilities in Pahrump or Tonopah in Nye County were inadequate to conduct trial or that alternative facilities suggested by center owner were inadequate and no specific details were provided as to what cases were currently pending in the one available courtroom in Pahrump or how many days were free on the court schedule. NRS 3.100(2).

8. COURTS.

A county has a statutory duty to provide adequate courtroom facilities and support staff for trials. NRS 3.100.

9. VENUE.

When considering whether a change of venue is necessary based on a potential inadequacy of courtroom facilities within a county, a district court must analyze and provide specific findings regarding whether: (1) existing courtroom facilities are adequate or, with comparatively minor expense and effort, can be made adequate; and (2) if existing courtroom facilities are inadequate, whether there are alternative facilities within the county that may be appropriately utilized to accommodate the trial.

10. VENUE.

When assessing docket congestion in one venue with that of a proposed transferring venue, the real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket.

11. VENUE.

The district court abused its discretion by failing to consider the docket and the availability of courtrooms and staff in Clark County before reaching its decision to change venue from Nye to Clark County in action brought by recreation center, which was destroyed by fire that allegedly started when deep fat fryer overheated and building's sprinkler system failed to extinguish the fire, against fryer manufacturer and fuel and sprinkler system companies.

12. VENUE.

Party seeking a transfer has the burden to make prima facie proof that venue is maintainable in the county to which transfer is sought.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

This appeal arises from the district court's grant of a motion to change venue from Nye County to Clark County. The district court granted the motion based on the doctrine of forum non conveniens and its findings that existing courtroom facilities in Pahrump, located in Nye County, were inadequate to accommodate a trial in the underlying matter. We conclude that the district court abused its discretion by granting the motion for change of venue because it (1) failed to cite sufficient evidence supporting a change of venue pursuant to the doctrine of forum non conveniens; (2) failed to conduct a proper analysis, under NRS 3.100(2) and *Angell v. Eighth Judicial District Court*, 108 Nev. 923, 839 P.2d 1329 (1992), as expanded by this opinion, regarding the adequacy of courtroom facilities in a county; and (3) failed to consider the docket congestion in Clark County before reaching its decision. Accordingly, we reverse and remand for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

In 2003, a fire destroyed the Mountain View Recreation Center in Pahrump, Nevada. The fire allegedly started when a deep fat fryer overheated and the building's sprinkler system failed to extinguish the fire. In December 2005, appellant Mountain View Recreation, Inc., which owned and operated the recreation center, filed a complaint in Nye County against numerous defendants, including respondents Imperial Commercial Cooking Equipment Co., which manufactured the fryer, Heritage Operating, L.P. (Proflame), which provided propane fuel to Mountain View and serviced the fryer, and Harmony Fire Protection, Inc., which designed and installed the building's sprinkler system.

In February 2010, Proflame filed a motion for change of venue from Nye County to Clark County, which was joined by Harmony.[1] Proflame argued that finding an impartial jury in Pahrump was ''highly unlikely'' in light of the pretrial publicity and the community's connection to the recreation center,[2] and that a trial in Las

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[1]Imperial initially joined in Proflame's motion for change of venue, but it later withdrew its joinder because it intended to file a separate motion. However, nothing in the record before us demonstrates that Imperial filed a separate motion.

[2]To the extent that respondents rely on this argument as an alternative basis to uphold the district court on appeal, we reject this argument as we have previously concluded that the determination of an impartial jury ''is appropriate only after jury selection efforts have been made.'' *See Sicor, Inc. v. Sacks*, 127 Nev. 896, 901, 266 P.3d 618, 621 (2011).

Vegas, located in Clark County, would be more convenient for the witnesses and would better serve the ends of justice. Without providing any evidence to support its latter argument, Proflame asserted that (1) the majority of the pretrial litigation and discovery, including most of the depositions, had taken place in Las Vegas; (2) the physical evidence, the special master, and the majority of counsel were located in Las Vegas; (3) any experts located outside of Pahrump would have to travel through Las Vegas to attend court proceedings in Pahrump; (4) the majority of Mountain View's witnesses would not have to travel from Pahrump to Las Vegas; and (5) the transfer would not require reassignment to a Clark County district court judge because the Nevada Supreme Court had appointed the currently presiding senior judge. Mountain View opposed the motion, arguing that Proflame had failed to provide any affidavits or evidence in support of its argument that transferring the matter to Clark County would be more convenient for the witnesses and would better serve the ends of justice.

At a hearing on the motion, the district court declined to change venue based on the potential inability to seat an impartial jury, but nonetheless indicated that the trial could not be held in Pahrump because existing courtroom facilities were inadequate and NRCP 41(e)'s five-year want-of-prosecution rule would require dismissal of the action in December 2010. In response to the district court's concerns, Mountain View argued that Nye County was required to provide facilities for trial in Pahrump and suggested substitute locations such as a banquet room or school. Mountain View alternatively asked that, if the trial was moved from Pahrump, it be transferred to Tonopah, also located in Nye County, rather than to Las Vegas. The district court ordered supplemental briefing by the parties to address whether it was required to seek alternative facilities within Nye County instead of granting the motion to change venue.

Mountain View argued in its supplemental brief that, under *Angell v. Eighth Judicial District Court*, 108 Nev. 923, 839 P.2d 1329 (1992), Nye County must provide adequate facilities for the district court to conduct the trial within the county. It further argued that the trial should be conducted in Nye County based on local private and public interests in the matter.

Imperial and Proflame argued that *Angell* was distinguishable and did not apply to Mountain View's argument to conduct the trial in Tonopah.[3] Specifically, Imperial and Proflame contended that in *Angell* (1) there was no motion to change venue; (2) the

[3]While Imperial failed to file a separate motion for change of venue, it did submit a supplemental brief as ordered by the district court. However, there is no indication in the record on appeal as to whether Harmony filed a supplemental brief or joined the supplemental brief of another party.

dicta stated that a trial is to be held within existing judicial facilities and not in banquet halls or schoolhouse facilities and, further, the judge would have to approve if such change was made, which did not occur in this instance; and (3) the court did not require a change of venue to Tonopah. Moreover, Imperial and Proflame asserted that the facilities in Pahrump and Tonopah were inadequate to accommodate a trial of this magnitude. Imperial provided no supporting affidavits, citing only the discovery disclosures made by Mountain View that listed 35 potential percipient witnesses and 8 expert witnesses, with only 10 of those witnesses having Pahrump addresses.

Thereafter, the district court entered a written order granting Proflame's motion for change of venue based on the convenience of the witnesses and the promotion of the ends of justice. In particular, the court found that because Pahrump had only one courtroom in which to conduct such a large trial, the existing courtroom facilities in Pahrump were inadequate in light of the number of defendants involved, the estimated length of time needed for the trial, and the Pahrump district court's current calendar. And the court rejected Mountain View's suggestion to use alternative facilities in Pahrump, finding that the proposed facilities would not provide for adequate security or accommodate ''the comfort or simple logistics of complex litigation.'' As a result, the court concluded that the ends of justice could not be served by retaining the case in Pahrump because doing so would result in the case being dismissed for failure to bring it to trial within five years.

Having concluded that the trial could not be held in Pahrump, the district court was faced with deciding whether to transfer the case to Las Vegas or Tonopah. In making this determination, the court generally noted that Tonopah is 167 miles from Pahrump, whereas Las Vegas is only 63 miles from Pahrump, and that ''[a]ll of the physical and documentary evidence to be admitted at trial is in Las Vegas.'' Without further elaboration, the district court concluded that, under the doctrine of forum non conveniens, the trial should be transferred to Clark County, rather than Tonopah. Thus, while acknowledging the deference due to Mountain View's choice of venue, the court nonetheless granted the motion for change of venue to Clark County. This appeal followed.

DISCUSSION

[Headnotes 1, 2]

This court reviews a district court's grant of a motion to transfer a trial based on the doctrine of forum non conveniens for an abuse of discretion. *Roethlisberger v. McNulty*, 127 Nev. 559, 563, 256 P.3d 955, 957 (2011). District courts have wide discretion when considering whether to grant such motions. *Id.*

Mountain View contends, among other things, that the district court abused its discretion by granting Proflame's motion for a change of venue because (1) respondents failed to provide any affidavits or evidence in support of its argument that transferring the matter to Clark County would be more convenient for the witnesses and would better serve the ends of justice; (2) the district court failed to recognize the obligation of Nye County under NRS 3.100(2) and *Angell v. Eighth Judicial District Court*, 108 Nev. 923, 839 P.2d 1329 (1992), to provide adequate facilities for the litigation; and (3) the district court failed to consider the congestion of the Clark County district court's docket in determining whether it could accommodate the trial if transferred. We agree.

Forum non conveniens

[Headnotes 3-6]

The doctrine of forum non conveniens is statutorily embodied in NRS 13.050. *See Cariaga v. Eighth Judicial Dist. Court*, 104 Nev. 544, 547, 762 P.2d 886, 888 (1988). NRS 13.050(2)(c) states that ''[t]he court may, on motion, change the place of trial . . . [w]hen the convenience of the witnesses and the ends of justice would be promoted by the change.'' However, a plaintiff's selected forum choice may only be denied under exceptional circumstances strongly supporting another forum. *Eaton v. Second Judicial Dist. Court*, 96 Nev. 773, 774-75, 616 P.2d 400, 401 (1980), *overruled on other grounds by Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). A motion for change of venue based on forum non conveniens must be supported by affidavits so that the district court can assess whether there are any factors present that would establish such exceptional circumstances. *Id.* at 775, 616 P.2d at 401. General allegations regarding inconvenience or hardship are insufficient because ''[a] specific factual showing must be made.'' *Id.*

Respondents maintain that holding the trial in Pahrump or Tonopah would be inconvenient to the witnesses and parties because a majority of the litigation and discovery, including the majority of depositions, took place in Las Vegas; the physical evidence, the special master, and the majority of counsel are located in Las Vegas; and all experts located outside of Pahrump would have to travel through Las Vegas to attend court proceedings in Pahrump. We conclude that these arguments lack merit because they fail to establish the existence of exceptional circumstances under *Eaton*.[4]

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[4]Extrajurisdictional caselaw supports our conclusion. *See Costello v. Home Depot U.S.A., Inc.*, 888 F. Supp. 2d 258, 268 (D. Conn. 2012) (''The convenience of counsel is not [an] appropriate consideration on a motion to transfer.''); *Scheinbart v. Certain-Teed Prods. Corp.*, 367 F. Supp. 707, 709-10

Respondents further contend that the majority of Mountain View's witnesses will not be inconvenienced by transferring venue to Las Vegas because many already live in Las Vegas, and, if the case were transferred to Tonopah, those witnesses would have to travel a distance of 211 miles to attend trial. However, respondents fail to support such arguments with evidence in the record. We conclude that this argument also provides little, if any, support for respondents' position even if such evidence were provided in the record. *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1336 (9th Cir. 1984) (noting that ''a district court should keep in mind that the increased speed and ease of travel and communication . . . makes, especially when a key issue is the location of witnesses, no forum as inconvenient [today] as it was [in years past]'' (first and second alterations in original) (internal quotations omitted)); *Maynard v. Oakes*, 534 N.Y.S.2d 541, 542 (App. Div. 1988) (''In our mobile society, a drive of some 2½ hours is not a matter of much inconvenience.''); *see also Roethlisberger*, 127 Nev. at 563, 256 P.3d at 957 (upholding a district court's denial of a motion to change venue from Douglas County to Washoe County, Nevada, and stating that ''difference[s] in travel times to the courts in either county are, for many witnesses, relatively minimal'').

The record is devoid of affidavits from either percipient or expert witnesses or other evidence to demonstrate how the witnesses would be inconvenienced if the trial were held in Pahrump. *See Eaton*, 96 Nev. at 774-75, 616 P.2d at 401. Additionally, the district court failed to articulate how changing venue from Pahrump to Las Vegas would be more convenient for the witnesses or would serve the ends of justice. Thus, to the extent the district court relied on the doctrine of forum non conveniens as a basis for its decision, we conclude that there is insufficient evidence in the record to support such a finding.

Inadequate courtroom facilities

[Headnote 7]

The district court's decision to change venue away from Pahrump was based, in part, on its conclusion that the facilities

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(S.D.N.Y. 1973) (''The convenience of expert witnesses has little or no significance in determining whether an action should be transferred.''); *Rothschild v. Superior Court*, 31 Cal. Rptr. 248, 249 (Ct. App. 1963) (disregarding affidavits from the plaintiff and the defendant's employee because ''neither the convenience of a party nor an employee of a party is to be considered in determining a [forum non conveniens] motion'' (citations omitted)); *Said v. Strong Mem'l Hosp.*, 680 N.Y.S.2d 785, 786 (App. Div. 1998) (''It is well established that the convenience of the parties, their agents and employees, or others under their control carries little if any weight'' when considering a motion to change venue.).

were inadequate, and the trial would have to be conducted elsewhere. However, Mountain View contends that the court was obligated to direct Nye County to provide adequate facilities.

NRS 3.100(2) states that ''[i]f a room for holding court . . . is not provided by the county, . . . the court may direct the sheriff to provide such room, attendants, fuel, lights and stationery, and the expenses thereof shall be a county charge.'' In *Angell*, the petitioners sought a writ of mandamus directing the district court to require Clark County to provide a sufficient courtroom and court personnel to accommodate the underlying mass-tort litigation. 108 Nev. 923, 926-28, 839 P.2d 1329, 1331-32 (1992). This court denied mandamus relief because there was no evidence in the record before it to demonstrate that ''existing County facilities [were] inadequate or could not, with comparatively minor expense and effort, be made adequate.'' *Id.* at 927, 839 P.2d at 1332. This court concluded that Clark County ''should . . . determine what facilities may exist within the county that may be appropriately utilized to accommodate the trial.'' *Id.* In doing so, this court further concluded that Clark County had a statutory obligation to either find existing facilities within the county that could accommodate a trial of this magnitude, or find other suitable courtroom facilities, noting that

> [a]lthough . . . Clark County is generally responsible for providing a suitable and sufficient trial facility and necessary court personnel, . . . the County may wish to seek an accommodation for the [litigation] within existing judicial facilities by suggesting alternative trial methods that have been used elsewhere to accommodate mass tort litigation.

Id.

[Headnotes 8, 9]

Consistent with our holding in *Angell*, we conclude that Nye County has a statutory duty under NRS 3.100 to provide adequate courtroom facilities and support staff. We now expand our holding in *Angell* and require that when considering whether a change of venue is necessary based on a potential inadequacy of courtroom facilities within a county, a district court must analyze and provide specific findings regarding whether: (1) existing courtroom facilities are adequate or, ''with comparatively minor expense and effort, [can] be made adequate''; and (2) if existing courtroom facilities are inadequate, whether there are alternative facilities within the county that ''may be appropriately utilized to accommodate the trial.'' *Id.*

Here, as in *Angell*, there is no evidence in the record to support the district court's findings that the courtroom facilities in Pahrump or Tonopah were inadequate to conduct the trial or why alternative

facilities suggested by Mountain View were inadequate. Instead, the district court made generalized statements regarding the existing courtroom facilities and rejected out of hand the feasibility of alternative facilities in Pahrump and the ability of those facilities to accommodate a trial in this complex litigation. Thus, no specific details were provided as to what cases were currently pending in the one available courtroom in Pahrump, how many days were free on the court schedule, how many people the courtroom could accommodate, and what size of courtroom would be needed given the size of the trial. In addition, when the court's order was issued, seven months remained before the five-year deadline, but the court did not specifically refer to the court's schedule and, instead, made general statements that there was no way that a trial could be scheduled before the five years ran.

Furthermore, the district court failed to conduct any analysis to determine whether, under *Angell* and NRS 3.100(2), Nye County met its responsibility to provide adequate or alternative courtroom facilities. Instead, the district court ruled, without any evidentiary support or proper analysis, that alternative facilities in Pahrump would be unaccommodating to jurors, and it thus transferred the case to Las Vegas for trial proceedings. And, beyond its determination that Tonopah was farther in distance from Pahrump than Las Vegas, the district court conducted no further analysis in determining whether Tonopah served as an adequate alternative facility to conduct the trial.

Because the district court failed to conduct a proper analysis prior to granting a change of venue in this matter, we conclude that the district court abused its discretion.

Congestion of docket

[Headnotes 10, 11]

Finally, Mountain View contends that the district court failed to consider Clark County's court schedule and docket congestion before ordering a change of venue. At the outset, we note the Ninth Circuit's observation that ''[t]he *forum non conveniens* doctrine should not be used as a solution to court congestion.'' *Gates Learjet Corp.*, 743 F.2d at 1337. When assessing docket congestion in one venue with that of a proposed transferring venue, ''[t]he real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket.'' *Id.* (noting that ''the district court . . . observed only that its docket was congested; it did not determine whether a trial would be speedier in the [proposed transferring venue]'').

[Headnote 12]

''A party seeking a transfer has the burden to make prima facie proof that venue is maintainable in the county to which transfer is sought.'' *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 543 (Tex. 1998); *see also Walker v. Iowa Marine Repair Corp.*, 477 N.E.2d 1335, 1342 (Ill. App. Ct. 1985) (concluding that ''a compilation of [courtroom] statistics prepared by the Administrative Office of the Illinois Courts showing the number of cases disposed of and the average time to trial'' submitted by the defendant convincingly demonstrated that defendant was entitled to a transfer of the case to a different county).

Here, nothing in the record demonstrates that respondents satisfied their burden of proof by demonstrating that venue was maintainable in Clark County. Furthermore, nothing in the record or the district court's order indicates that the district court considered the docket congestion of the Clark County district court system before deciding to change venue to that county. The district court should have properly considered the docket and the availability of courtrooms and staff in Clark County before reaching its decision. The district court's failure to do so was an abuse of discretion. *See Roethlisberger*, 127 Nev. at 563, 256 P.3d at 957.

For the foregoing reasons, we reverse the district court's order granting the motion for change of venue and remand this matter to the district court for further proceedings consistent with this opinion.[5]

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

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[5]Mountain View also challenges the district court's order denying its motion for reconsideration. However, Mountain View filed its motion for reconsideration after filing its notice of appeal before this court. Thus, we conclude that the district court was divested of jurisdiction to decide the motion. *See Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 454-55 (2010) (''[T]he timely filing of a notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court.'' (internal quotations omitted)); *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 14 n.3, 251 P.3d 690, 692 n.3 (2011) (''[A]rguments set forth for the first time in a motion for reconsideration are only reviewable if the district court addresses those arguments on the merits in an order entered before the notice of appeal is filed.'' (citing *Arnold v. Kip*, 123 Nev. 410, 416-17, 168 P.3d 1050, 1054 (2007))).