been able to consider, the validity of her marriage on appeal. Therefore, we conclude that writ relief is inappropriate because an appeal would have been an adequate legal remedy.

We recognize that Geanie's failure to timely appeal or move to set aside the district court's order leaves her without legal recourse to challenge the district court's conclusion. However, as noted, ''writ relief is not available to correct an untimely notice of appeal,'' *Pan*, 120 Nev. at 224-25, 88 P.3d at 841, and her failure to timely challenge the district court's order by appeal, NRCP 60(b) motion, or otherwise has resulted in both parties relying on the validity of the order in their subsequent pursuits. Accordingly, we decline to exercise our discretion to entertain this writ petition, and it is thus denied.

PICKERING, C.J., and SAITTA, J., concur.

THE STATE OF NEVADA, PRIVATE INVESTIGATOR'S LICENSING BOARD, APPELLANT, *v.* DWAYNE TATALOVICH AND TATALOVICH & ASSOCIATES, INC., RESPONDENTS.

No. 58803

September 19, 2013 309 P.3d 43

Appeal from a district court order granting a petition for judicial review of a Private Investigator's Licensing Board decision. First Judicial District Court, Carson City; James E. Wilson, Judge.

Private Investigator's Licensing Board cited expert witness for engaging in the business of a private investigator without a Nevada license. The district court dismissed the citation. The Board sought further review. The supreme court, PICKERING, C.J., held that actions of expert witness in preparing for his testimonies in two Nevada civil court cases fell outside Nevada's licensing requirement for private investigators.

Affirmed.

Catherine Cortez Masto, Attorney General, and *Jeffrey D. Menicucci*, Deputy Attorney General, Carson City, for Appellant.

Arrascada & Arrascada, Ltd., and *John L. Arrascada*, Reno, for Respondents.

1. ADMINISTRATIVE LAW AND PROCEDURE.

The supreme court defers to an administrative agency's findings of fact, as well as to its conclusions of law, where those conclusions are closely related to the agency's view of the facts.

2. STATUTES.
In construing a statute, a court considers the statutory scheme as a whole and avoids an interpretation that leads to absurd results.
3. DETECTIVES AND SECURITY GUARDS.
Nevada's licensing requirement for private investigators does not apply to experts employed to give an opinion on some aspect or aspects of a case where the expert witness performs duties and tasks within his or her field to verify or obtain information necessary to form the basis for the opinion testimony. NRS 648.012, 648.060.
4. DETECTIVES AND SECURITY GUARDS.
Actions of expert witness in preparing for his testimonies in two Nevada civil court cases fell outside Nevada's licensing requirement for private investigators; expert witness visited the crime scenes, took photographs and measurements, examined security measures, reconstructed events, and ran background checks on one defendant to form an opinion as to the soundness of a hiring decision, those tasks were necessary to form the bases for expert witness's opinions, and expert witness's Arizona private investigator's license granted him access to the relevant databases for the background checks. NRS 648.012, 648.060.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, C.J.:

On this appeal, we consider whether investigative work undertaken for the purpose of developing and giving expert opinion testimony in a Nevada civil court case requires a Nevada private investigator's license. We agree with the district court that it does not and therefore affirm.

I.

Respondent Dwayne Tatalovich was hired as an expert witness in two Nevada civil court cases. The plaintiffs in each case sought damages for injuries due to criminal acts that allegedly would not have occurred but for the property owner's negligent failure to provide adequate premises security. To prepare for the first case, Tatalovich inspected the crime scene and took measurements and photographs. For the second case, he again examined the crime scene, then reviewed all security measures and devices and reconstructed the crime. Tatalovich holds an Arizona private investigator's license. From his office in Arizona, he ran background checks on federal and state Internet databases. Tatalovich used his research to formulate his expert opinions for each case.

Based on this work by Tatalovich, appellant State of Nevada, Private Investigator's Licensing Board (Board) cited him for engaging in the business of a private investigator without a Nevada license in violation of NRS 648.060. The district court dismissed

the citation. It held that Tatalovich's investigative activities were incidental to his formation of expert testimony and, as such, fell outside NRS Chapter 648's licensing scheme.[1]

II.

[Headnotes 1, 2]

This court defers to an agency's findings of fact, as well as to its conclusions of law, where those conclusions are closely related to the agency's view of the facts. *State Indus. Ins. Sys. v. Bokelman*, 113 Nev. 1116, 1119, 946 P.2d 179, 181 (1997). However, if the petitioner's substantial rights have been prejudiced by the agency's decision and that decision rests on an error of law, exceeds its powers, or is clearly erroneous, arbitrary, capricious, or an abuse of discretion, this court may set it aside. NRS 233B.135(3); *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006); *Dredge v. State ex rel. Dep't of Prisons*, 105 Nev. 39, 43, 769 P.2d 56, 58-59 (1989). In construing a statute, this court considers the statutory scheme as a whole and avoids an interpretation that leads to absurd results. *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 434-35, 117 P.3d 182, 192 (2005).

Our analysis begins with the text of the licensing statutes. NRS 648.060 provides that ''*no person may*: (a) *Engage in the business of private investigator*, private patrol officer, process server, repossessor, dog handler, security consultant, or polygraphic examiner or intern *or* (b) *Advertise his or her business as such*, . . . unless the person is licensed pursuant to this chapter.'' NRS 648.060(1) (emphasis added). ''Private investigator'' is defined by NRS 648.012, which reads as follows:

> [A]ny person who for any consideration engages in business or accepts employment to furnish, or agrees to make or makes any investigation for the purpose of obtaining, information with reference to:
>
> 1. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation or character of any person;
>
> 2. The location, disposition or recovery of lost or stolen property;

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[1]The Board also cited Tatalovich for working without a license as a security consultant under NRS 648.0155, but the district court overruled the Board because it found that Tatalovich merely gave opinion testimony and did not engage in any of the statutorily enumerated activities. Because the Board does not appeal this finding, we do not address it.

3. The cause or responsibility for fires, libels, losses, accidents or damage or injury to persons or to property;

4. Securing evidence to be used before any court, board, officer or investigating committee; or

5. The prevention, detection and removal of surreptitiously installed devices for eavesdropping or observation.

The question presented is whether these statutes vest the Board with the authority to regulate expert witness work. The Board maintains that the statutes encompass a wide range of activities and that expert witnesses may not personally investigate facts in Nevada unless they hold a Nevada private investigator's license. By extension, the Board argues that conducting any activity in Nevada that is investigatory in nature constitutes a private investigation for which NRS 648.060 requires a license. Tatalovich counters that, as a matter of law, expert witnesses need not hold a Nevada private investigator's license to research their cases.

The Board's reading of the licensing statutes gives them greater reach than their text and evident purpose allow. To be sure, the language ''engage in the business of,'' NRS 648.060(1)(a); *see* NRS 648.012, is neither defined nor self-limiting. But NRS 648.060(1)(b)'s reference to ''[a]dvertis[ing one's] business as such'' suggests that the statute regulates those who solicit and accept employment for the purpose of providing the professional services named, not just anyone who incidentally undertakes activities also commonly performed by those professionals en route to providing a different service—here, forensic consulting or expert opinion testimony.

Licensing requirements ''protect the public safety and general welfare'' of the public by restricting the activities of unlicensed or unqualified individuals who claim but do not possess the skills required of a professional in that field. NRS 648.017; *see also* NRS 622.080 (regulating an occupation or profession is for the ''benefit of the public''). NRS Chapter 648 governs professionals providing a primary service to clients who either rely or act upon that service for their own safety or welfare or that of their clients, patrons, or families.[2] Given this focus, it makes sense for these professionals to be licensed and regulated by the Board. However, no similar purpose is achieved by extending the licensing requirement to expert witnesses such as Tatalovich, the validity of whose qualifications and work is tested—and contested—in court.

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[2]For example, a private patrol officer provides security to protect others and their property, prevent property loss or theft, or recover lost or stolen property. NRS 648.013. A person who hires a repossessor relies on the person to recover personal property subject to a security interest. NRS 648.015. And an employer relies on a security guard for personal and property protection. NRS 648.016.

Kennard v. Rosenberg, 273 P.2d 839 (Cal. Ct. App. 1954), is on point. In *Kennard*, an attorney hired a retired fireman and two chemists—none of whom held a private investigator's license—to testify as experts in a lawsuit over the cause of a fire. *Id.* at 840. The experts inspected the site of the fire, took samples, ran chemical tests, reviewed photographs, and conducted chemical experiments. *Id.* at 840-41. The court concluded that the California private investigator's licensing statute, which closely resembles Nevada's, did not apply to experts employed ''to make tests, conduct experiments and act as consultants in a case requiring the use of technical knowledge.'' The object of the experts' activities was to gather information to form their opinions, not private investigation. *Id.* at 842.

The Board notes that, in *Kennard,* the experts held California licenses in their fields of specialty, just not private investigator's licenses. It characterizes Tatalovich's activities, by contrast, as pure private investigation, not subject to other licensing schemes. But this distinction does not diminish *Kennard*'s persuasiveness. In the first place, the Board ignores the fact that Tatalovich ran the background checks in Arizona, where he holds a private investigator's license.[3] Second, an expert may well need a professional license in a particular field to testify credibly—or at all—in a particular area. *See also Wright v. Las Vegas Hacienda, Inc.*, 102 Nev. 261, 720 P.2d 696 (1986) (noting that NRS 50.275 does not impose a licensing requirement on expert witnesses). But the question is whether experts must *also* have a private investigator's license to gather information needed to develop or support their testimony. It may be, as the Board argues, that the risk of illegal or unethical activities does not vanish just because it is the predicate for expert opinion testimony, as opposed to more direct use.[4] Nonetheless, work by forensic experts, even work not subject to other professional licensing requirements, is not unregulated. It is limited by the rules of the court, the judge's approval of the expert's qualifications to provide the opinion, and the judge's determination of what testimony, if any, to allow. *Cf. Baggerly v. CSX Transp. Inc.*, 635 S.E.2d 97, 104 (S.C. 2006) (''We refuse to endorse an

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[3]The Board argues that the background check effectively occurred in Nevada because it accessed information from Nevada databases. But an Internet search that utilizes a Nevada database open to anyone with appropriate access does not, by itself, subject the user to the Board's control.

[4]The Board notes but does not develop the argument that NRS 648.012(4) refers to ''[s]ecuring evidence to be used before any court, board, officer or investigating committee,'' as work requiring a private investigator's license. The 2013 amendments to NRS 648.012 convince us that this subsection applies to work undertaken for the purpose of gathering direct evidence, not work undertaken by an expert witness as the basis for his or her opinion testimony. *See infra* note 6.

interpretation of the [local] professional engineer licensing statute which has the potential of either preventing out-of-state experts from testifying in South Carolina courts or imposing the unreasonable burden of getting licensed in the State simply to be permitted to provide forensic testimony.'').

The Board's reading of NRS 648.012 and NRS 648.060 would capture conduct far afield from private investigation. For example, a journalist who searches public records for a news story on a politician could be acting as a private investigator by obtaining ''information with reference to [a person's] identity, habits, conduct . . . honesty, integrity.'' NRS 648.012(1).[5] Is a plumber who inspects a drain to determine whether a lost wedding ring is lodged in a sink's pipe acting as a private investigator by obtaining information about ''[t]he location . . . of lost . . . property''? NRS 648.012(2). What about a prospective employer who calls past employers to learn an applicant's work history? *See* NRS 648.012(1) (acting as a private investigator includes obtaining ''information with reference to . . . [t]he . . . honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty . . . reputation or character of any person'').

The Legislature has not endorsed the Board's expansive view of what constitutes private investigation. NRS Chapter 648 contains a growing list of exemptions. *See* NRS 648.018. And in 2013, after the Board cited Tatalovich and this litigation ensued, the Legislature amended NRS 648.012 to create a specific exception for expert witnesses who are ''retained for litigation or trial . . . and who perform[ ] duties and tasks within his or her field of expertise that are necessary to form his or her opinion'' related to a possible crime or tort.[6] These amendments appear to clarify, not

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[5]In 2009, the Legislature conducted hearings on whether NRS Chapter 648 regulates all investigative activities, without regard to purpose or scope. Some of the examples in the text are drawn from those hearings. *See* Hearing on S.B. 265 Before the Assembly Comm. on Commerce and Labor, 75th Leg. (Nev., May 15, 2009) (statement of Assemblywoman Barbara E. Buckley, Member of the Assembly Committee on Commerce and Labor, indicating that ''[i]t seems unbelievable that somebody looking through public records could be accused of being a private investigator''); *see also* Hearing on S.B. 265 Before the Senate Comm. on Commerce and Labor, 75th Leg. (Nev., March 23, 2009) (statement of Senator Maggie Carlton, Chair of the Senate Committee on Commerce and Labor, noting that it ''was not anyone's intention'' that the licensing requirement be extended to journalists investigating public records for commercial purposes).

[6]The amendment was signed on June 1, 2013, and takes effect October 1, 2013. A.B. 306, 77th Leg. (Nev. 2013). Of note, the 2013 amendments leave intact NRS 648.012's reference to ''[s]ecuring evidence to be used before any court, board, officer or investigating committee,'' as requiring a private investigator's license. To the extent an individual works to unearth facts to be used as direct evidence, as opposed to information to be used as the basis for expert opinion testimony, NRS 648.060's licensing requirements may apply.

change, the law, correcting a ''doubtful [agency] interpretation'' of a controlling statute. *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 156-57, 179 P.3d 542, 554 (2008) (internal quotations omitted); *see In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (construing amendment as clarifying a doubtful interpretation of an earlier statute).

[Headnote 3]

For these reasons, we reject the Board's position. NRS 648.012 regulates those employed or acting as private investigators to protect public safety and welfare and the consumers of their services. Its licensing requirement does not apply to experts employed to give an opinion on some aspect(s) of a case where the expert witness performs duties and tasks within his or her field to verify or obtain information necessary to form the basis for the opinion testimony.

[Headnote 4]

Tatalovich was hired as an expert witness, and in forming his testimony he visited the crime scenes, took photographs and measurements, examined security measures, and reconstructed events. He also ran background checks on one of the accused in order to form an opinion concerning the soundness of a hiring decision. These tasks were necessary to form the basis of his opinion testimony. And Tatalovich's Arizona license granted him access to the relevant databases for the background checks. His actions therefore fell outside the Nevada licensing requirement.

We affirm.

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

ALEX LOEB, DERIVATIVELY ON BEHALF OF UNIVERSAL TRAVEL GROUP, PETITIONER, *v.* THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CARSON CITY, AND THE HONORABLE JAMES TODD RUSSELL, DISTRICT JUDGE, RESPONDENTS, AND JIANGPING JIANG; JING XIE; HUJIE GAO; JIDUAN YUAN; LIZONG WANG; WENBIN AN; LAWRENCE LEE; YIZHAO ZHANG; LIQUAN WANG; AND UNIVERSAL TRAVEL GROUP, A NEVADA CORPORATION, REAL PARTIES IN INTEREST.

No. 60242

September 19, 2013 309 P.3d 47

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to serve individual defendants by publication.

Plaintiff, on behalf of company incorporated in Nevada, filed shareholder derivative suit against company officers and directors residing in China, and also filed motion to serve individual defendants by publication. Company opposed motion. The district court denied motion. Plaintiff filed petition for a writ of mandamus or prohibition challenging a district court's order. The supreme court, HARDESTY, J., held that: (1) writ of mandamus was the appropriate vehicle for considering whether plaintiff was entitled to extraordinary relief; and (2) as an apparent issue of first impression, defendants had to be served under terms of Hague Convention.

Petition denied.

The O'Mara Law Firm, P.C., and *David C. O'Mara*, Reno; *Robbins Umeda LLP* and *Kevin Seely* and *Christopher L. Walters*, San Diego, California, for Petitioners.

McDonald Carano Wilson LLP and *Matthew C. Addison*, Reno; *Katten Muchin Rosenman LLP* and *Richard H. Zelichov*, Los Angeles, California; *Katten Muchin Rosenman LLP* and *Bruce G. Vanyo*, New York, New York, for Real Parties in Interest.

1. PROCESS; TREATIES.

   A party residing outside of the United States whose foreign address is known must be served according to the terms of the Hague Convention, rather than by publication pursuant to Nevada Rules of Civil Procedure. NRCP 4(e)(1).

2. MANDAMUS.

   The supreme court would exercise its discretion in shareholder derivative suit to entertain petition for writ of mandamus to determine whether defendants residing outside of the United States whose foreign addresses were unknown could be served by publication pursuant to rules of civil procedure, rather than under the terms of the Hague Convention,

given that, in light of the early stage of the proceedings and the need for efficient judicial administration, an appeal would not be a speedy and adequate legal remedy in the case.

3. PROHIBITION.
   Writ of prohibition challenging a district court's order denying motion to serve defendants by publication in shareholder derivative suit was not the appropriate vehicle for considering whether petitioner was entitled to extraordinary relief, given that petitioner argued that the district court was required to grant his motion for service by publication, rather than that the court lacked jurisdiction to enter the order regarding service.
4. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.
5. MANDAMUS.
   Writ relief is generally not appropriate if the petitioner has a speedy and adequate legal remedy. NRS 34.170.
6. COURTS.
   The supreme court may consider a petition for extraordinary relief if an important issue of law needs clarification and public policy is served by the court's invocation of its original jurisdiction.
7. APPEAL AND ERROR.
   Interpretation of an international treaty is a question of law that the supreme court reviews de novo.
8. COURTS.
   Rules of civil procedure are subject to the same rules of interpretation as statutes.
9. APPEAL AND ERROR.
   Statutory interpretation is a question of law subject to de novo review.
10. STATUTES.
    When a statute's language is plain and unambiguous, the supreme court will give that language its ordinary meaning.
11. PROCESS; TREATIES.
    Under the Hague Convention, service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action, as determined by the otherwise applicable state rules governing the method of service.
12. PROCESS; TREATIES.
    The Hague Convention applies to service of process if the state's service rules require the transmittal of documents abroad in order for service to be deemed complete.
13. CONSTITUTIONAL LAW; PROCESS; TREATIES.
    The Hague Convention does not apply to service of process if service of process is valid and complete domestically under the applicable state rules, so long as the service satisfies due process. U.S. CONST. amend. 14.
14. TREATIES.
    If the Hague Convention applies, any inconsistent state law methods of service of process are preempted.
15. PROCESS; TREATIES.
    Defendant officers and directors in shareholder derivative suit, who lived in China and whose foreign addresses were known, had to be served

under terms of the Hague Convention, rather than by publication pursuant to Nevada Rules of Civil Procedure; because defendants lived in China, effectuating process constituted the transmittal of judicial documents for service abroad.

16. PROCESS.

Under rule of civil procedure governing process, if the defendant's address is known, the party serving process must both complete publication and mail the documents to the defendant's address; service is not complete based on the publication alone. NRCP 4(e)(1)(iii).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

The Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention)[1] sets forth the procedures to be followed when ''there is occasion to transmit a judicial . . . document for service abroad.'' Hague Convention art. 1, Nov. 15, 1965, 20 U.S.T. 361. Under the terms of the Hague Convention, a party in a foreign country may be served (1) ''through the central authority of the receiving country,'' (2) ''through diplomatic or consular agents that the receiving country considers non-objectionable,'' or (3) ''by any method permitted by the internal law of the receiving country.'' *Dahya v. Second Judicial Dist. Court*, 117 Nev. 208, 212, 19 P.3d 239, 242 (2001) (internal quotations omitted) (citing Hague Convention art. 5, 8-11, 19, 20 U.S.T. at 362-65).

[Headnote 1]

In Nevada, NRCP 4(e)(1) permits service on a defendant who resides outside of this state by publishing the summons in a Nevada newspaper and mailing a copy of the summons and complaint to the defendant's residence, if it is known. In this proceeding, we are asked to decide whether a party residing outside of the United States whose foreign address is known may be served by publication pursuant to NRCP 4(e)(1)(i) and (iii), rather than under the terms of the Hague Convention. Based on the plain language of the applicable provisions, we conclude that a party residing outside of the United States whose address is known must be served according to the terms of the Hague Convention, and we deny the petition.

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[1]Because several different treaties have been signed at Hague Conventions, we note that the term ''the Hague Convention'' in this opinion refers specifically to the Hague Service Convention.

FACTS

This writ petition arises from a shareholder derivative suit brought by petitioner Alex Loeb on behalf of real party in interest Universal Travel Group, a company incorporated in Nevada, against the officers and directors of Universal Travel Group, real parties in interest Jiangping Jiang, Jing Xie, Hujie Gao, Jiduan Yuan, Lizong Wang, Wenbin An, Lawrence Lee, Yizhao Zhang, and Liquan Wang (collectively, the Jiang parties). The Jiang parties all reside in China. After filing the complaint, Loeb unsuccessfully attempted to locate the Jiang parties in Nevada and subsequently sought their addresses from Universal Travel Group, which initially refused to disclose the addresses. Universal Travel Group also declined to accept service on behalf of the Jiang parties. As a result, Loeb moved the district court pursuant to NRCP 4(e)(1) to permit service by publication. Universal Travel Group opposed Loeb's motion, arguing that he was required to comply with the terms of the Hague Convention, which would not permit service by publication under the circumstances of this case.

After Loeb filed his motion to permit service by publication, Universal Travel Group's counsel provided Loeb with the Jiang parties' addresses in China. Thereafter, the district court denied Loeb's motion to permit service by publication on the ground that such service is not allowed by the Hague Convention when a defendant's address is known. Thus, the district court ordered Loeb to serve the Jiang parties in compliance with the terms of the Hague Convention.[2] This petition for a writ of mandamus or prohibition followed. While Loeb concedes that he never mailed copies of the summons or complaint to the Jiang parties in China, he argues that the terms of the Hague Convention do not apply because the mailing of the summons and complaint under NRCP 4(e)(1)(i) and (iii) is not an element of service.

DISCUSSION

[Headnotes 2-6]

''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of

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[2]Prior to the district court issuing its order, Universal Travel Group provided Loeb with addresses in China for all of the Jiang parties except for Yizhao Zhang. The district court thus directed Universal Travel Group to provide Zhang's address to Loeb as well, or it would permit service by publication upon Zhang if Zhang's address could not be provided. At oral argument before this court, Loeb acknowledged that Universal Travel Group provided him with Zhang's address after the district court issued its order.

discretion.''[3] *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnotes omitted); *see also* NRS 34.160. Generally, writ relief is not appropriate if the petitioner has a speedy and adequate legal remedy. *See* NRS 34.170; *Mineral Cnty. v. State, Dep't of Conservation & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). This court may consider a petition for extraordinary relief if ''an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'' *Mineral Cnty.*, 117 Nev. at 243, 20 P.3d at 805 (internal quotations omitted). This case presents an important issue of law that needs clarification, specifically, whether a party residing outside of the United States may be served by publication pursuant to NRCP 4(e)(1)(i) and (iii), rather than under the terms of the Hague Convention, when the party's address is known. And in light of the early stage of the proceedings and the need for efficient judicial administration, an appeal would not be a speedy and adequate legal remedy in this case. *See Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. As a result, we will exercise our discretion to entertain this writ petition. *See Mineral Cnty.*, 117 Nev. at 243, 20 P.3d at 805.

Loeb must comply with the terms of the Hague Convention to properly effectuate service of process on the Jiang parties

[Headnotes 7-10]

Interpretation of an international treaty is a question of law that we review de novo. *Garcia v. State*, 117 Nev. 124, 127, 17 P.3d 994, 996 (2001). Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes. *Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). Statutory interpretation is also a question of law subject to de novo review. *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012). When a statute's language is plain and unambiguous, this court will give that language its ordinary meaning. *Id*.

[Headnotes 11-13]

The purpose of the Hague Convention is to facilitate service of process on defendants who are located outside of the United

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[3]Because Loeb argues that the district court was required to grant his motion for service by publication, rather than that the court lacked jurisdiction to enter the order regarding service, a writ of prohibition is not the appropriate vehicle for considering whether Loeb is entitled to extraordinary relief. *See* NRS 34.320 (explaining that a writ of prohibition is available to arrest district court proceedings when the district court acts without or in excess of its jurisdiction); *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (same).

States.[4] Hague Convention pmbl., 20 U.S.T. at 362. The Hague Convention only applies when the address of the person to be served is known. *Id.* art. 1, 20 U.S.T. at 362. Under the Hague Convention, ''[s]ervice of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action,'' as determined by the otherwise applicable state rules governing the method of service. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). In other words, the Hague Convention applies if the state's service rules require ''the transmittal of documents abroad'' in order for service to be deemed complete. *Id.* Conversely, it does not apply if service of process is ''valid and complete'' domestically under the applicable state rules, so long as the service satisfies due process. *Id.* at 707.

[Headnote 14]

If the Hague Convention applies, any inconsistent state law methods of service are preempted. *Id.* at 699; *Dahya v. Second Judicial Dist. Court*, 117 Nev. 208, 211, 19 P.3d 239, 242 (2001). Under the terms of the Hague Convention, a party residing in a foreign country may be served in three ways: (1) by sending service ''through the central authority of the receiving country,'' (2) by sending service ''through diplomatic or consular agents that the receiving country considers 'non-objectionable,' '' or (3) by serving the party in any other ''method permitted by the internal law of the receiving country.'' *Dahya*, 117 Nev. at 212, 19 P.3d at 242 (quoting 20 U.S.T. 361 at art. 8-11).[5]

[Headnote 15]

Here, it is undisputed that the Jiang parties reside outside of the United States and that Loeb knows their addresses in China. As a result, the question that follows is whether, under these circumstances, Nevada law requires judicial documents to be transmitted abroad in order for service to be complete. *See* Hague Convention art. 1, 20 U.S.T. at 362; *see also Volkswagenwerk*, 486 U.S. at

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[4]Both the U.S. and China are signatories to the Hague Convention. *See* The Hague Convention Relative to the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361.

[5]Loeb does not argue, and we do not decide, whether service of process by publication would be permissible under either the Hague Convention or applicable Chinese law. However, we note that service by publication may only be done in China when the party's address is unknown or service cannot be effected in any other authorized manner. Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., August 31, 2012, effective January 1, 2013), art. 92. Other authorized manners of service in China include: (1) personal service on a party or its delegated representative, (2) service at the party's residence, and (3) service via a court or the internal Chinese mail system. *Id.* art. 85-88.

699. If the laws of this state do require transmittal abroad, then the Hague Convention applies.

Neither party disputes that the summons and complaint are ''judicial documents'' within the scope of the Hague Convention. *See Black's Law Dictionary* 923 (9th ed. 2009) (providing that a judicial document is ''[a] court-filed paper that . . . has been both relevant to the judicial function and useful in the judicial process''). Loeb argues that service under NRCP 4(e)(1) is complete upon the act of publication and that the mailing of the summons and complaint to the defendant's address is merely ''follow up'' to the act of service. Thus, he argues that the mailing requirement does not implicate the Hague Convention.

Under NRCP 4(e)(1)(i), a plaintiff may serve process on any party who ''resides out of the state,'' who ''cannot, after due diligence, be found within the state,'' or who ''seeks to avoid the service of summons'' by publishing the summons in a Nevada newspaper. When a plaintiff serves a party by publication and the party's address is known, a copy of the summons and complaint must also ''be deposited in the post office, [and] directed to the person to be served at the person's place of residence.'' NRCP 4(e)(1)(iii). If the address is known, service is not complete until ''the expiration of 4 weeks from such [mailing].'' *Id*.

[Headnote 16]

Loeb's interpretation of the rule is contrary to its plain language. Under NRCP 4(e)(1)(iii), if the defendant's address is known, the party serving process must *both* complete publication *and* mail the documents to the defendant's address. Service is not complete based on the publication alone. Indeed, the necessity of the mailing is reflected in the portion of the rule providing that service is not complete until four weeks after a copy of the summons and complaint is deposited in the post office. *See* NRCP 4(e)(1)(iii). Thus, if a defendant whose address is known resides outside of the United States, the summons and complaint must be transmitted abroad in order for service to be effective, triggering the requirement that the party serving process comply with the provisions of the Hague Convention.[6] *See* Hague Convention art. 1, 20 U.S.T. at 362.

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[6]Because the language of these provisions is plain and unambiguous, it is not necessary to resort to the rules of construction or other sources to interpret its meaning. Nevertheless, we note that our interpretation is supported by extrajurisdictional authority requiring a party to mail a document abroad in addition to performing an act of service domestically in order to complete service on a defendant residing outside of the United States. *See, e.g.*, *Froland v. Yamaha Motor Co.*, 296 F. Supp. 2d 1004, 1007-08 (D. Minn. 2003) (holding that the Hague Convention applied because, while Minnesota law permitted a foreign corporation to be served with process through the secretary of state's office,

In summation, the plain language of NRCP 4(e)(1)(iii) requires a party serving process by publication to mail the summons and complaint to any defendant whose address is known. Thus, as Loeb knows the Jiang parties' addresses, we conclude that, under Nevada's rules, Loeb would be required to mail copies of the summons and complaint to the Jiang parties before service by publication could be deemed complete. But because the Jiang parties live in China, doing so constitutes the transmittal of judicial documents for service abroad. As a result, the district court correctly determined that Loeb was required to comply with the terms of the Hague Convention to effectuate service of process on the Jiang parties.[7]

Accordingly, we deny the writ petition.[8]

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

VANGUARD PIPING SYSTEMS, INC., NKA VG PIPE, LLC; VIEGA, LLC; INDUSTRIES, INC.; AND VIEGA, INC., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, RESPONDENTS, AND AVENTINE-TRAMONTI HOMEOWNERS ASSOCIATION, A NEVADA NONPROFIT CORPORATION, REAL PARTY IN INTEREST.

No. 61747

September 19, 2013 309 P.3d 1017

Original petition for a writ of mandamus or prohibition challenging a district court order compelling disclosure of insurance policies.

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the applicable statute also required the secretary of state to mail a copy of the summons to the foreign corporation before service was effectuated); *Quinn v. Keinicke*, 700 A.2d 147, 154 (Del. Super. Ct. 1996) (where Delaware's nonresident motor vehicle statute permitted service of process on the secretary of state, the Hague Convention was applicable because service was not complete under the statute until a copy of the summons was mailed to the foreign defendant).

[7]The Jiang parties also argue that service by publication alone is unconstitutional because it does not satisfy due process. In light of our conclusions herein, it is not necessary for us to reach this issue. *See Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008) (explaining that this court ''will not decide constitutional questions unless necessary'').

[8]In issuing this opinion, we make no comment on the effectiveness of service of process by publication on a party residing outside of the United States when that party's address is not known.

Homeowners association filed suit against piping subcontractor, its German parent, and others arising out of alleged construction defects. The district court issued stay of claims against parent, then subsequently entered order compelling subcontractor to disclose to association insurance agreements that parent had purchased. Subcontractor petitioned for writ of mandamus or prohibition challenging discovery order. The supreme court, HARDESTY, J., held that: (1) order requiring subcontractor to disclose additional insurance agreements purchased by its parent would not violate order staying homeowner association's claims against parent, (2) association's potential use of insurance agreements purchased by parent for unrelated litigation had no bearing on whether insurance agreements were relevant to association's claims against subcontractor, and (3) civil rule requiring parties to disclose any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment required disclosure of additional agreements.

Petition denied.

Lincoln, Gustafson & Cercos and *Nicholas B. Salerno*, Las Vegas; *Carroll, Burdick & McDonough, LLP*, and *Alexander P. Imberg*, San Francisco, California, for Petitioners.

Canepa Riedy & Rubino and *Scott K. Canepa, Terry W. Riedy*, and *Bryan T. Abele*, Las Vegas; *Carraway & Associates* and *James D. Carraway*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *J. Randall Jones*, Las Vegas; *Lynch, Hopper & Salzano, LLP*, and *Francis Lynch, II*, Las Vegas; *Maddox, Isaacson & Cisnernos* and *Robert C. Maddox*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   Because writ relief is an extraordinary remedy, the supreme court will exercise its discretion to consider a petition for writ of mandamus only when there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.160, 34.170, 34.330.
3. MANDAMUS.
   The supreme court typically will not exercise its discretion to review a pretrial discovery order on a petition for writ of mandamus unless the order could result in irreparable prejudice, such as when the order is a blanket discovery order or an order requiring disclosure of privileged information.
4. PRETRIAL PROCEDURE.
   Order requiring piping subcontractor to disclose additional insurance agreements purchased by its German parent would not violate order staying homeowner association's claims against parent in association's action against subcontractor arising out of alleged construction defects; rather,

stay only temporarily halted proceedings against parent and did not stay discovery of documents relevant to claims against contractor. NRCP 16.1(a)(1)(D).

5. PRETRIAL PROCEDURE.
That homeowner association might use insurance agreements purchased by piping subcontractor's German parent for unrelated litigation had no bearing on whether insurance agreements were relevant to association's claims against subcontractor, as grounds for disclosure of agreements, in association's action against subcontractor arising out of alleged construction defects.
6. PRETRIAL PROCEDURE.
There is no prohibition against the use of discovery in later, unrelated litigation, provided that discovery is relevant to the current litigation.
7. COURTS.
Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes.
8. APPEAL AND ERROR.
Statutory interpretation is a question of law that the supreme court reviews de novo.
9. STATUTES.
If a statute is clear and unambiguous, the court will give effect to the plain meaning of the words, without resort to the rules of construction.
10. PRETRIAL PROCEDURE.
Civil rule requiring parties to disclose ''any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action'' required piping subcontractor to disclose to homeowners' association insurance agreements purchased by subcontractor's parent, regardless of whether policy limits of other insurance agreements already disclosed to association exceeded amount of subcontractor's potential liability, in suit against subcontractor arising out of alleged construction defects. NRCP 16.1(a)(1)(D).
11. COURTS.
The use of the word ''must'' means that a rule's requirements are mandatory.
12. COURTS.
Federal cases interpreting a rule of civil procedure that contains similar language to an analogous Nevada rule are strong persuasive authority in the interpretation of the Nevada rule.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

NRCP 16.1(a)(1)(D) requires a party in litigation to produce for the opposing party any agreement where an insurance company

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, did not participate in the decision of this matter.

may be required to pay all or part of any judgment entered in the action. Here, petitioners, defendants in the action below, disclosed certain insurance policies, which they contend are more than sufficient to satisfy any judgment that may be entered against them. Thus, they assert that disclosure of any other primary or any secondary insurance policies is unnecessary unless the previously disclosed policies are exhausted. The district court ordered the petitioners to produce all previously undisclosed policies, and this writ petition followed. In it, we are asked to determine whether NRCP 16.1(a)(1)(D) compels disclosure of all insurance agreements, regardless of whether the policy limits exceed the amount of potential liability or whether the policies provide secondary coverage. We conclude that it does because the plain language of NRCP 16.1(a)(1)(D) requires disclosure of *any* insurance agreement that may be liable to pay a portion of a judgment. Therefore, we deny the petition.

FACTS

In the district court, real party in interest Aventine-Tramonti Homeowners Association filed construction defect actions against petitioners Vanguard Piping Systems, Inc.; Viega, LLC; Industries, Inc.; and Viega, Inc. (collectively, Vanguard), and Vanguard's German parent companies Viega GmbH and Viega International GmbH. In June 2012, this court entered a stay of the district court proceedings as to the German parent companies, which, to date, has not been lifted. The stay order did not stay or otherwise limit any pending proceedings against Vanguard.

During discovery in the present case, Vanguard disclosed some of its primary insurance agreements to Aventine-Tramonti, pursuant to NRCP 16.1(a)(1)(D). Aventine-Tramonti subsequently learned that additional undisclosed policies covering Vanguard may have been purchased by the German parent companies and sought the disclosure of any such agreements. The special master ordered Vanguard to disclose these agreements after it initially refused to do so.

Vanguard objected to the special master's order and sought relief from the district court on the grounds that producing the insurance agreements would violate the stay of proceedings against the German parent companies and that it had already complied with NRCP 16.1(a)(1)(D)'s requirements by disclosing its primary insurance agreements that were sufficient to cover any judgment against it. The district court affirmed the special master's order, finding that NRCP 16.1(a)(1)(D) requires disclosure of *any* insurance agreement that may be used to satisfy a judgment. This writ petition followed.

DISCUSSION

[Headnotes 1-3]

Vanguard petitions this court for a writ of mandamus or prohibition.[2] ''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *Int'l Game Tech. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see also* NRS 34.160. Because writ relief is an extraordinary remedy, this court ''will exercise [its] discretion to consider such a petition only when there is no 'plain, speedy and adequate remedy in the ordinary course of law.' '' *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005) (quoting NRS 34.170; NRS 34.330). The right to an appeal is generally an adequate remedy in the ordinary course of law. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Thus, this court typically will not exercise its discretion to review a pretrial discovery order unless the order could result in irreparable prejudice, such as when the order is a blanket discovery order or an order requiring disclosure of privileged information. *Valley Health Sys. v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 678-79 (2011).

[Headnote 4]

Although Vanguard concedes that the insurance agreements at issue are not privileged, it argues that the production of those agreements would violate the stay entered by this court in regard to the German parent companies. The referenced stay temporarily halted the district court proceedings as to the German parent companies only. *See Viega GmbH v. Eighth Judicial Dist. Court (La Paloma Homeowners' Ass'n)*, Docket No. 60015 (Order Granting Motions for Stay, June 13, 2012). It did not stay production of documents relevant to the proceedings against Vanguard. Thus, even if the insurance policies were purchased by, and are in the possession of, the German parent companies, we reject the conclusion that disclosure of those agreements violates the stay of proceedings against the German parent companies. The question that remains is whether the order requiring Vanguard to produce the policies nevertheless would result in irreparable prejudice warranting writ relief.

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[2]Even if petitioners' arguments were meritorious, a writ of prohibition would not be an appropriate remedy as petitioners have not alleged that the district court lacked jurisdiction to enter the order at issue. *See* NRS 34.320 (explaining that a writ of prohibition is available to arrest district court proceedings when the court acts without or in excess of its jurisdiction).

[Headnotes 5, 6]

Vanguard argues that it should not be required to disclose these agreements because Aventine-Tramonti's counsel seeks their disclosure for an improper purpose, *i.e.*, to use in other pending construction defect litigation against Vanguard. But there is nothing in the record indicating that these insurance agreements will later be used for an improper purpose, and there is no prohibition against the use of discovery in later, unrelated litigation provided that discovery is relevant to the current litigation. *See Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (''[W]here the discovery sought is relevant[,] . . . the mere fact that it may be used in other litigation does not mandate a protective order.''); *Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 75-76 (S.D.N.Y. 2010) (holding that ''it is well established that the Federal Rules of Civil Procedure[ ] create no automatic prohibition against using discovery obtained in one litigation in another litigation''). Here, whether the special master's order requires disclosure of irrelevant information depends upon whether NRCP 16.1(a)(1)(D) requires disclosure of additional insurance agreements when a party has already disclosed proof of insurance coverage in excess of the claimed damages. Thus, we exercise our discretion to consider this writ petition.

NRCP 16.1(a)(1)(D) requires disclosure of the additional insurance agreements

[Headnotes 7-9]

Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes. *Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). ''Statutory interpretation is a question of law that we review de novo.'' *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012). If a statute is clear and unambiguous, we give effect to the plain meaning of the words, without resort to the rules of construction. *Id.*

[Headnotes 10, 11]

NRCP 16.1(a)(1)(D) states that the parties ''must'' disclose

> any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitation of coverage or reservation of rights under any such insurance agreement.

The plain language of NRCP 16.1(a)(1)(D) states that ''*any* insurance agreement'' which ''may be liable to satisfy part or all of a

judgment'' be disclosed. (Emphasis added.) The rule does not mention agreements with policy limits sufficient to satisfy a judgment, nor does it distinguish between primary and secondary insurance policies. *See Consipio Holding*, 128 Nev. at 460, 282 P.3d at 756 (explaining that this court will give words their ordinary meaning when a statute is clear and unambiguous). In addition, NRCP 16.1(a)(1)(D) states that a party ''must'' disclose any insurance agreement. The use of the word ''must'' means that the rule's requirements are mandatory. *See Washoe Cnty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012). Therefore, we conclude that the plain language of NRCP 16.1(a)(1)(D) requires disclosure of any and all insurance agreements that may be liable to pay a portion of a judgment regardless of whether the party has already disclosed policies with limits that exceed that party's potential liability.[3]

[Headnote 12]

Our interpretation is consistent with the interpretation that federal courts have given to FRCP 26(a)(1)(A)(iv), Nevada's federal counterpart, which requires parties to disclose ''any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.'' Because of the similarity in the language, federal cases interpreting FRCP 26(a)(1)(A)(iv) ''are strong persuasive authority.'' *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted).

Federal courts have broadly interpreted FRCP 26(a)(1)(A)(iv). For example, some federal courts have interpreted this rule as requiring disclosure of reinsurance agreements, which are even farther removed from primary liability than a secondary insurance agreement.[4] *See U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 641 (D. Kan. 2007). These courts also maintain that the federal rule's language is mandatory. *See id.* (applying FRCP 26(a)(1)(D) (2007), the predecessor to FRCP 26(a)(1)(A)(iv), and stating that the language ''is absolute . . . and does not require any showing of relevance''). Thus, federal courts reject efforts to limit disclosure of insurance agreements to only those agreements that a

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[3]We decline to address Vanguard's argument that the district court should have used its discretion to limit the insurance information requests pursuant to NRCP 26(b)(2)(iii) as being unduly burdensome because Vanguard did not present any evidence to the district court, or to this court, demonstrating how disclosure of these policies would be burdensome.

[4]''Reinsurance is purchased by insurance companies to insure their liability under policies written to their insureds.'' *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1199 (3d Cir. 1995).

party deems to be relevant. *See In re ML-Lee Acquisition Fund II, L.P.*, 151 F.R.D. 37, 41 (D. Del. 1993) (discussing FRCP 26(b)(2) (1993), the predecessor to FRCP 26(a)(1)(A)(iv), and summarily rejecting arguments from certain defendants that additional insurance policies need not be disclosed because those defendants had sufficient personal assets to satisfy any judgment against them); *Sierrapine v. Refiner Prods. Mfg., Inc.*, 275 F.R.D. 604, 613 (E.D. Cal. 2011) (requiring a defendant to locate and disclose *all* insurance agreements that may be liable to pay a judgment despite the defendant's argument that it had already disclosed all of the insurance agreements it was ''able to identify or locate, or [that it] had knowledge of'').

We agree with the approach taken by the federal courts. Vanguard is involved in several other pending cases. Permitting it to determine which insurance agreements are relevant for disclosure overlooks the fact that it is impossible to foresee all possible circumstances in which the primary insurance policies will be subject to liability and potentially exhausted by other judgments. Further, NRCP 16.1(a)(1)(D) requires that *more* information be disclosed than FRCP 26(a)(1)(A)(iv). Specifically, in addition to requiring disclosure of insurance agreements and indemnification or reimbursement agreements, as required by FRCP 26(a)(1)(A)(iv), NRCP 16.1(a)(1)(D) also requires disclosure of disclaimers and limitations of coverage. *See* NRCP 16.1 drafter's note (2004) (noting that NRCP 16.1(a)(1)(D) ''expands on the federal rule''). Therefore, we conclude that NRCP 16.1(a)(1)(D) requires that *any* insurance agreement which may be liable to pay a portion of the judgment must be disclosed. Accordingly, we deny the writ petition.

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

MCKNIGHT FAMILY, LLP, APPELLANT, *v.* ADEPT MANAGEMENT SERVICES, INC.; NEVADA ASSOCIATION SERVICES, INC.; TORREY PINES HOMEOWNERS ASSOCIATION; AND DESIGN 3.2 LLC, RESPONDENTS.

No. 56527

ADEPT MANAGEMENT SERVICES, INC., A NEVADA NONPROFIT CORPORATION; NEVADA ASSOCIATION SERVICES, INC.; AND TORREY PINES HOMEOWNERS ASSOCIATION, APPELLANTS, *v.* MCKNIGHT FAMILY, LLP, RESPONDENT.

No. 57182

October 3, 2013 310 P.3d 555

Consolidated appeals from a district court order dismissing a complaint pursuant to NRS 38.310 and from a post-judgment order denying a motion for attorney fees and costs. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Property owner brought action against homeowners' association and purchaser of property after association sold owner's properties at a trustee sale due to unpaid property assessments. The district court dismissed complaint. Property owner appealed. The supreme court, DOUGLAS, J., held that: (1) property owner was not entitled to injunctive relief; (2) claims of negligence, breach of contract, and statutory claims were precluded by alternative dispute resolution statute; (3) slander of title claim was precluded by alternative dispute resolution statute; (4) wrongful foreclosure claim was precluded by alternative dispute resolution statute; but (5) quiet title claim was not precluded by alternative dispute resolution statute.

Affirmed in part, reversed in part, and remanded.

James S. Kent, Ltd., and *James S. Kent*, Las Vegas, for McKnight Family, LLP.

Gibbs, Giden, Locher, Turner, Senet & Wittbrodt LLP and *Rich Haskin, Becky A. Pintar*, and *Airene Haze*, Las Vegas, for Adept Management Services, Inc., Nevada Association Services, Inc., and Torrey Pines Homeowners Association.

Design 3.2 LLC, in Proper Person.

1. APPEAL AND ERROR.

   The supreme court reviews issue of statutory interpretation de novo.

2. INJUNCTION.

   Property owner whose property that was sold at trustee sale due to unpaid property assessments did not face an immediate threat of irreparable harm, and therefore was not entitled to injunctive relief to pre-

vent the sale in action against homeowners' association and purchaser, where property owner no longer faced the foreclosure threat after the sale had been completed. NRS 38.310.

3. ALTERNATIVE DISPUTE RESOLUTION.
   Property owner's claims of negligence, breach of contract, and statutory claims against homeowners' association and purchaser stemming from sale of property due to unpaid property assessments were precluded by statute requiring mediation or arbitration of claims related to the interpretation, application, or enforcement of any covenants, conditions, or restrictions applicable to residential property, where claims did not affect title of property and regarded obligations and duties set forth by statutes and association covenants and restrictions. NRS 38.310.
4. ALTERNATIVE DISPUTE RESOLUTION.
   Property owner's slander of title claim against homeowners' association and purchaser stemming from trustee sale of property due to unpaid property assessments was precluded by statute requiring mediation or arbitration of claims related to the interpretation, application, or enforcement of any covenants, conditions, or restrictions applicable to residential property; slander of title did not infringe upon an individual's right to use or dispose of his or her property. NRS 38.310.
5. LIBEL AND SLANDER.
   Slander of title involves false and malicious communications that disparage a person's title in land and cause special damages.
6. LIBEL AND SLANDER.
   Slander of title exists separate from the title to land.
7. LIBEL AND SLANDER.
   Slander of title may cloud an individual's title, perhaps resulting in a lower sale price.
8. LIBEL AND SLANDER.
   Slander of title does not infringe upon an individual's right to use or dispose of his or her property.
9. ALTERNATIVE DISPUTE RESOLUTION.
   Property owner's wrongful foreclosure claim against homeowners' association and purchaser stemming from trustee sale of property due to unpaid property assessments was precluded by statute requiring mediation or arbitration of claims related to the interpretation, application, or enforcement of any covenants, conditions, or restrictions applicable to residential property, where a wrongful foreclosure claim challenged the authority behind the foreclosure, not the foreclosure act itself. NRS 38.310.
10. MORTGAGES.
    A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself.
11. ALTERNATIVE DISPUTE RESOLUTION.
    Property owner's quiet title claim against homeowners' association and purchaser stemming from trustee sale of property due to unpaid property assessments was not precluded by statute requiring mediation or arbitration of claims related to the interpretation, application, or enforcement of any covenants, conditions, or restrictions applicable to residential property, where a quiet title claim required the court to determine who holds superior title to a land parcel, and such a claim directly related to an individual's right to possess and use his or her property. NRS 38.310.
12. APPEAL AND ERROR.
    A court's decision regarding a motion to set aside a default judgment will not be disturbed absent an abuse of discretion.

13. APPEAL AND ERROR.
A trial court may abuse its discretion when it acts in clear disregard of the guiding legal principles.
14. APPEAL AND ERROR.
The supreme court cannot resolve disputed questions of fact.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

After unsuccessful settlement negotiations regarding a dispute over unpaid property assessments, respondents/appellants Torrey Pines Homeowners Association, Adept Management, and Nevada Association Services (collectively, TP HOA) sold appellant/respondent McKnight Family, LLP's properties at a trustee sale. Design 3.2 purchased one of the properties.

McKnight filed a complaint naming TP HOA and Design 3.2 as defendants and a motion to set aside the sale based on improper notice. The district court entered a default judgment against Design 3.2 for failing to timely answer McKnight's complaint; however, the court later set aside the default.

The district court denied McKnight's motion to set aside the sale, determining that TP HOA properly served McKnight. Further, the district court dismissed McKnight's complaint because the court determined that, pursuant to NRS 38.310, the claims should have been submitted to a form of alternative dispute resolution before being brought in district court.

While the district court was correct in determining that most of McKnight's claims were subject to NRS 38.310, we conclude that the district court erred to the extent that it dismissed McKnight's claim for quiet title because that claim was not subject to NRS 38.310. Accordingly, we reverse the dismissal of McKnight's quiet title claim. In light of this determination, we also reverse the district court's order denying the motion to set aside the trustee's sale.

FACTS

McKnight owned two properties in a housing community managed by TP HOA. TP HOA placed a lien on McKnight's properties under NRS 116.3116 after a dispute over allegedly unpaid assessments. In response, McKnight filed a complaint and an ex parte application for a temporary restraining order. McKnight alleged seven claims in its complaint, including one for injunctive relief. The district court granted the temporary restraining order and set a preliminary injunction hearing. However, the parties agreed to engage in settlement negotiations and signed a stipulation

to halt all litigation and foreclosure proceedings for 30 days. As a result, the preliminary injunction hearing was taken off the court's calendar.

The settlement negotiations were unsuccessful, and TP HOA sold the properties at a trustee's sale. In response, McKnight filed an amended complaint alleging seven claims: (1) preliminary/permanent injunction, (2) negligence, (3) breach of contract, (4) violation of NAC 116.300,[1] (5) violation of NAC 116.341,[2] (6) violation of NRS 116.1113 and NRS 116.3103, and (7) slander of title/wrongful foreclosure/quiet title. All seven claims were alleged in the original complaint; the only difference in the amended complaint was McKnight's addition of Design 3.2, LLC, as a defendant because Design 3.2 purchased one of the properties at the trustee's sale.

The district court entered a default judgment against Design 3.2 for failing to timely answer McKnight's complaint but later set aside the judgment. The parties briefed and argued the default judgment issue at an evidentiary hearing. At the hearing, Design 3.2 argued that the district court should set aside the default judgment because McKnight did not properly serve it with the amended complaint. The district court determined it would set aside the default judgment due to the Nevada Supreme Court's ''liberal'' attitude regarding setting aside a default if the motion to set aside the default is brought within ''the six-month time frame.'' The district court later issued an order granting Design 3.2's motion to set aside the default, but did not determine whether McKnight properly served Design 3.2.

Additionally, McKnight requested that the district court set aside the trustee's sale due to improper notice. McKnight alleged that TP HOA did not send notice of the sale via certified or registered mail, as Nevada law requires. In response, TP HOA filed a notice of compliance with the district court, which included two notices of delinquent assessment, two notices of default and election to sell, and two notices of sale. Additionally, the document contained several receipts for certified mail and sworn affidavits stating that each notice was sent to McKnight via certified mail. In light of the evidence TP HOA presented, the district court determined that TP HOA provided McKnight with proper notice of the sale and denied McKnight's motion to set aside the trustee's sale.

Further, the district court dismissed McKnight's amended complaint because it determined the parties were required to participate in alternative dispute resolution under NRS 38.310 before McKnight could bring the claims in district court.

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[1]The Nevada Administrative Code has since been revised. This provision was recodified at NAC 116A.320.

[2]Recodified at NAC 116A.345.

After the district court dismissed McKnight's complaint, TP HOA moved for attorney fees. The district court denied the motion without prejudice, pending the resolution of this appeal.[3]

DISCUSSION

The district court erred in dismissing McKnight's entire complaint

[Headnote 1]

The district court's decision to dismiss McKnight's complaint pursuant to NRS 38.310 involves an issue of statutory interpretation; thus, we review this issue de novo. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 295, 183 P.3d 895, 899 (2008).

NRS 38.310 states:

> 1. No civil action based upon a claim relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property . . .
>
> . . . .
>
> may be commenced in [state court] unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive . . . .

Under NRS 38.300(3), a civil action includes ''an action for money damages or equitable relief,'' but not ''an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.''

McKnight argues that NRS 38.310(2) prohibits the district court from dismissing a complaint once it commences, irrespective of whether the complaint violates NRS 38.310(1). NRS 38.310(2) states that ''[a] court shall dismiss any civil action which is commenced in violation of the provisions of [NRS 38.310(1)].'' McKnight's argument is meritless because NRS 38.310(2)'s language does not determine when a court can dismiss a civil action; rather, it mandates the court to dismiss any civil action initiated in violation of NRS 38.310(1). Therefore, the district court had the authority to dismiss the complaint. The only remaining issue regarding the complaint is whether the district court erred in dismissing every claim. To make such a determination, we must analyze each claim under NRS 38.310.

An action is exempt from the NRS 38.310 requirements if the action relates to an individual's right to possess and use his or her

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[3]Our decision to reverse and remand this matter for further proceedings renders the attorney fees issue moot. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

property. In *Hamm*, this court determined that a lien on a property does not present an immediate danger of irreparable harm nor is it related to an individual's title to property for NRS 38.310 purposes because a lien exists separate from the property, and the right to use and dispose of the property remains with the owner until the lien is enforced at foreclosure proceedings. 124 Nev. at 298-99, 183 P.3d at 901-02. Contrarily, this court determined that a threat of foreclosure constitutes a danger of irreparable harm because land is unique. *Id*. at 297, 183 P.2d at 901. With these principles in mind, we now analyze the claims McKnight alleged in its amended complaint.

Injunctive relief claim

[Headnote 2]

The injunctive relief claim was properly dismissed because McKnight did not face an immediate threat of irreparable harm. The amended complaint superseded all claims for relief alleged in the original complaint. *See Las Vegas Network, Inc. v. B. Shawcross & Assocs.*, 80 Nev. 405, 407, 395 P.2d 520, 521 (1964). McKnight filed its amended complaint after TP HOA sold the properties at the trustee sale; thus, McKnight no longer faced the foreclosure threat. Without some immediate threat of a future irreparable harm, the injunctive relief claim is subject to NRS 38.310. Therefore, the district court properly dismissed it. *See Hamm*, 124 Nev. at 297-98, 183 P.3d at 901.

Negligence, breach of contract, NAC, and NRS claims

[Headnote 3]

The negligence, breach of contract, NAC, and NRS claims are civil actions as defined in NRS 38.300. Therefore, the district court properly dismissed these claims. The negligence claim does not affect the title to the properties, rather it concerns payments McKnight made to TP HOA. The breach of contract claim is related to obligations and duties set forth in the CC&Rs, and the alleged NAC and NRS violations required the district court to interpret regulations and statutes that contained conditions and restrictions applicable to residential property. Thus, these claims fell under NRS 38.310's purview. Additionally, McKnight sought money damages for its NRS claims, so those claims are civil actions as defined in NRS 38.300(3).

Slander of title

[Headnotes 4-8]

Slander of title involves false and malicious communications that disparage a person's title in land and cause special damages. *Higgins v. Higgins*, 103 Nev. 443, 445, 744 P.2d 530, 531 (1987).

Slander of title is an NRS 38.300(3) civil action because it exists separate from the title to land. Similar to the lien in *Hamm*, slander of title may cloud an individual's title, perhaps resulting in a lower sale price. *See Hamm*, 124 Nev. at 298-99, 183 P.3d at 901-02. However, slander of title does not infringe upon an individual's right to use or dispose of his or her property. Thus, the district court correctly dismissed this claim because the claim is subject to NRS 38.310 and must be submitted to alternative dispute resolution prior to being brought in district court.

Wrongful foreclosure

[Headnotes 9, 10]

Wrongful foreclosure is a civil action subject to NRS 38.310's requirements because deciding a wrongful foreclosure claim against a homeowners' association involves interpreting covenants, conditions, or restrictions applicable to residential property. *See Long v. Towne*, 98 Nev. 11, 14, 639 P.2d 528, 530 (1982) (finding no impropriety where ''the lien foreclosure sale was conducted under authority of the CC&Rs and in compliance with NRS 107.080''). A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself. *See Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983). To determine whether an individual violated any conditions or failed to perform any duties required under an association's CC&Rs, a court must interpret the CC&Rs to determine their applicability and enforceability regarding the individual. This type of interpretation falls under NRS 38.310. Therefore, the court acted properly in dismissing the wrongful foreclosure action.

Quiet title claim

[Headnote 11]

Unlike McKnight's other causes of action, the quiet title claim is exempt from NRS 38.310. A quiet title claim requires the court to determine who holds superior title to a land parcel. *See* NRS 40.010. Such a claim directly relates to an individual's right to possess and use his or her property. Therefore, it is not a civil action as defined in NRS 38.300(3) and, accordingly, is exempt from NRS 38.310. Thus, the district court erred in dismissing the quiet title claim, and we reverse the dismissal of this claim.

Motion to set aside the sale of the properties

In light of our decision regarding McKnight's quiet title claim, we also reverse the district court's order denying McKnight's motion to set aside the sale of the properties. While we disagree with McKnight's assertion that the district court erred in its findings of fact in its order denying the motion to set aside the trustee's sale,

we nevertheless reverse the district court's order denying the motion, because depending on the quiet title claim's outcome, the question of whether the sale should be set aside is still open. On remand, the district court should reconsider the motion to set aside once it resolves the quiet title claim.

Default judgment

[Headnotes 12, 13]

A court's decision regarding a motion to set aside a default judgment will not be disturbed absent an abuse of discretion. *Minton v. Roliff*, 86 Nev. 478, 481, 471 P.2d 209, 210 (1970). A trial court may abuse its discretion when it acts ''in clear disregard of the guiding legal principles.'' *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993).

In *Moseley v. Eighth Judicial District Court*, this court determined that it could not resolve a writ petition in its entirety because the district court failed to find whether a party—in seeking relief from a motion to dismiss—established excusable neglect. 124 Nev. 654, 668, 188 P.3d 1136, 1146 (2008). The factual issue of excusable neglect was critical to whether the party was entitled to relief from the dismissal; thus, without the issue resolved, this court could not properly review the petition. *See id*.

[Headnote 14]

We cannot determine whether the district court abused its discretion in setting aside the default judgment against Design 3.2 because the court did not make the necessary findings of fact. The motion to set aside the default judgment was based on the alleged fact that McKnight failed to serve Design 3.2. However, McKnight maintains it properly served Design 3.2, and McKnight supports its assertion with the process server's affidavit. Under NRCP 60(c), a district court may set aside a default judgment if a defendant is ''not personally served with summons and complaint.'' Thus, similar to the factual issue of excusable neglect in *Moseley*, the issue of whether McKnight served Design 3.2 is critical to whether Design 3.2 is entitled to relief from the default judgment. Further, this court cannot ''resolve disputed questions of fact.'' *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (internal citations omitted). Consequently, we vacate the district court's order granting Design 3.2's motion and remand the issue to the district court to determine whether McKnight properly served Design 3.2.

CONCLUSION

We affirm the district court's dismissal of all of McKnight's claims other than the quiet title claim. We reverse the district court's decisions to dismiss McKnight's quiet title claim, and to

deny McKnight's motion to set aside the foreclosure sale, we vacate the district court's order to grant Design 3.2's motion to set aside the default judgment, and we remand this matter to the district court for further proceedings consistent with this opinion.

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

NEVADA PUBLIC EMPLOYEES' RETIREMENT BOARD, AND ITS BOARD MEMBERS; SUE DEFRANCESCO; CHARLES SILVESTRI; ELIZABETH FRETWELL; PURISIMO HERNANDEZ; DAVID F. KALLAS; GEORGE STEVENS; AND WARREN WISH, APPELLANTS, *v.* DOUGLAS E. SMITH, RESPONDENT.

No. 56801

October 3, 2013 310 P.3d 560

Appeal from a district court order granting declaratory and other relief as to certain statutes governing the Public Employees' Retirement System. Eighth Judicial District Court, Clark County; Andrew J. Puccinelli, Visiting Judge.

Judge petitioned for judicial review of decision of the Public Employees' Retirement System (PERS) board determining that judge was not permitted to retire while he was actively employed in a different PERS-eligible position. The district court reversed. PERS appealed. The supreme court, PICKERING, C.J., held that: (1) judge could not receive PERS retirement benefits until he retired from current employment; (2) judge's failure to retire from PERS before becoming member of Judicial Retirement System disqualified judge from receiving PERS benefits; and (3) judge was not entitled to statutory equitable relief.

Reversed.

[Rehearing denied November 22, 2013]

GIBBONS, J., with whom CHERRY and SAITTA, JJ., agreed, dissented in part:

Woodburn & Wedge and *W. Chris Wicker* and *Jessica H. Anderson*, Reno, for Appellants.

Chuck R. Gardner, Las Vegas, for Respondent.

1. OFFICERS AND PUBLIC EMPLOYEES.

Although not subject to the Administrative Procedure Act, the decisions of the Public Employees' Retirement System Board are reviewable

by the courts on the basis of the same standard of review applied to other administrative actions.

2. ADMINISTRATIVE LAW AND PROCEDURE.
When reviewing an agency decision, a court may not substitute its judgment of the evidence for that of the administrative agency.

3. ADMINISTRATIVE LAW AND PROCEDURE.
When the factual findings of the administrative agency are supported by substantial evidence, they are conclusive, and the district court is limited to a determination of whether the agency acted arbitrarily or capriciously.

4. ADMINISTRATIVE LAW AND PROCEDURE.
For purposes of judicial review of an agency decision, ''substantial evidence'' is evidence that a reasonable mind might accept as adequate to support a conclusion.

5. APPEAL AND ERROR.
On appeal, the supreme court reviews questions of statutory construction and the district court's legal conclusions de novo.

6. ADMINISTRATIVE LAW AND PROCEDURE.
An administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws and set necessary precedent to administrative action, and the construction placed on a statute by the agency charged with the duty of administering it is entitled to deference.

7. ADMINISTRATIVE LAW AND PROCEDURE.
When an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference, and a reviewing court will not disturb them if they are supported by substantial evidence.

8. OFFICERS AND PUBLIC EMPLOYEES.
Statute providing effective date of retirement of a member of the Public Employees' Retirement System (PERS) did not set a retirement date only for purposes of calculating benefits, and therefore an employee could not effectively retire from PERS until the day when the last of the four enumerated requirements was complete; while other sections explained credit for service and how a member's designated retirement date affected his or her benefits, there was no other statute that defined what conditions were required to be met before a member could effectively retire. NRS 286.541(2).

9. JUDGES.
Judge's failure to retire from the Public Employees' Retirement System (PERS) before becoming a district court judge and a member of the Judicial Retirement System (JRS) disqualified judge from participating in or receiving benefits from PERS, where, pursuant to statute, a judge who exercised the option to switch from PERS to JRS was not permitted to not reestablish the service for which the liabilities were transferred. NRS 286.541(2)(b).

10. JUDGES.
Judge who became disqualified from retiring and receiving benefits from the Public Employees' Retirement System (PERS) by becoming a district court judge and a member of the Judicial Retirement System was not entitled to statutory equitable relief in order to receive PERS benefits, where statute provided the PERS Board with discretionary authority to adjust service or correct records in order to avoid error or inequity, but there was nothing to suggest that Board falsely or incorrectly recorded judge's information or gave him inaccurate information on which he detrimentally relied. NRS 286.190(3)(a).

11. STATUTES.
Statutes using the word ''may'' are generally directory and permissive in nature, while those that employ the term ''shall'' are presumptively mandatory.

12. STATUTES.
A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, C.J.:

On this appeal we consider NRS 286.541(2), governing retirement by members of the Public Employees' Retirement System (PERS). PERS interprets NRS 286.541(2) as limiting retirement eligibility. In its view, a member who goes from one PERS-eligible job to another without a break in service and retiring from PERS may not thereafter retire and receive benefits from PERS, until the member effectively retires from his or her new PERS-eligible job. A contrary interpretation, PERS maintains, would allow in-service distributions, violating NRS 286.541 and the Internal Revenue Code plan-qualification provisions on which PERS depends.

The district court disagreed. In its view, NRS 286.541(2) determines retirement benefit dates, not retirement eligibility. Thus, the district court held that PERS should have allowed respondent Douglas Smith to retire and receive benefits from PERS based on his prior public service, even after he was sworn in as a district court judge, another PERS-eligible position. The district court also held that, under NRS 286.190(3)(a), PERS could and should have equitably excused Judge Smith's noncompliance with NRS 286.541, and allowed him to reverse his eventual election to transfer from PERS to the Judicial Retirement System (JRS), despite NRS 1A.280(6), which makes such an election irrevocable.

The district court erred in its interpretation of the controlling statutes and in reviewing the PERS Board's decision de novo, rather than deferentially. We therefore reverse and reinstate the PERS Board's determination that Judge Smith is not eligible to receive retirement benefits at this time.

I.

Public Employees' Retirement System members may not receive PERS retirement benefits until they effectively retire from PERS. NRS 286.541.[1] Under NRS 286.520(1)(a)(2), benefit pay-

[1]Judge Smith disputes PERS's use of the word ''retire,'' claiming it muddies the difference between retirement from a place of employment and retirement

ments ordinarily cease if a retired employee resumes work for a PERS-eligible employer. But NRS 286.520(5) provides an exception for ''a retired employee [who] is chosen by election or appointment to fill an elective public office.'' Such a retired employee may continue receiving PERS benefits, so long as the new office is not the same as the office in which the employee earned the benefits.

In this case, respondent Douglas Smith meant to avail himself of NRS 286.520(5). A sitting justice of the peace with 23 years of creditable PERS service, Judge Smith ran for and was elected to the Eighth Judicial District Court in November of 2008. He planned to retire as a justice of the peace, start receiving benefits (reduced for early retirement) from PERS, take office as a district court judge, and then elect to participate in JRS rather than PERS.[2] Judge Smith believed that this would allow him to receive PERS retirement benefits, in addition to his district judge salary, while accruing a second set of retirement benefits under JRS, eventually receiving benefits under both PERS and JRS.[3]

Judge Smith consulted PERS staff in November and December 2008 about retirement options. He received estimates based on different scenarios, using an expected retirement date of December 31, 2008. PERS staff also provided Judge Smith with materials explaining how PERS determines effective retirement dates and the implications of taking other public employment before and after retiring from PERS. The PERS Preretirement Guide includes a section, ''Some Pitfalls and How to Avoid Them,'' which cautions: ''As we have stated before, your effective date of retirement is the day after your last day of employment, the day your application is received [by] PERS . . . , or the date requested on the application, *whichever is later*. . . . *You must take the initiative. No one will automatically do it for you, and no one, including your*

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from PERS membership. As indicated in NRS 286.401, ''[a] retired employee'' is a person who has terminated his or her membership in PERS, and we will use the statutory meaning of ''retire'' here, with the understanding that ''retiring from PERS'' is a more efficient way of saying ''effectively retire for the purpose of collecting benefits from PERS.''

[2]Under NRS 286.293(1), most public employees must enroll as members of PERS. In 2001, the Legislature formed the Judicial Retirement System to transition retirement benefits for certain judicial officers, including district court judges and some justices of the peace, from PERS to JRS. NRS 1A.100(1). The PERS Board administers JRS. NRS 1A.170.

[3]NRS 1A.280(7) states that, ''No justice of the Supreme Court or district judge . . . may receive benefits under both this chapter [JRS] and chapter 286 [PERS] of NRS.'' We requested and received supplemental briefing from the parties on the impact of this statute on Judge Smith's plan to participate in both JRS and PERS. Because we decide this case by reinstating the Board's determination, which rested on NRS 286.541(2) and NRS 286.190(3)(a), we do not reach, and express no opinion on, how NRS 1A.280(7) may have impacted Judge Smith's plans.

public employer, can file your retirement paperwork.'' Public Employees' Retirement System of Nevada, *Preretirement Guide* 13 (March 2008 revision).

Separately, Judge Smith consulted Clark County about health insurance. Justices of the peace are paid by the County, while district judges are paid by the State, and Judge Smith faced a gap between plans. Judge Smith learned that he could extend his and his family's County-paid health insurance up to February 1 if he continued as a justice of the peace into January. Under the Nevada Constitution, Article 6, Section 5, Judge Smith's term as a district judge began, and he was sworn in, on January 5, 2009, the first Monday in January. To maximize his insurance coverage, Judge Smith provided a resignation letter to Clark County designating Sunday, January 4, 2009, as his last day as justice of the peace. Clark County reported Judge Smith's termination date as January 4, 2009, and afforded him insurance coverage through January 31, 2009. Judge Smith received his last Clark County paycheck on December 19, 2008.

Judge Smith waited until January 8, 2009, to file the papers required to retire from PERS.[4] By then, he had been sworn in as a district court judge. In that capacity, he was employed by a PERS-eligible employer and earning creditable service with PERS. After research, PERS staff determined that, consistent with NRS 286.541(2), Judge Smith could not retire from PERS while employed in a PERS-eligible position. PERS therefore denied Judge Smith's application for retirement benefits.

Judge Smith appealed staff's determination to the PERS Board. At the PERS Board hearing, Judge Smith cited NRS 286.190(3)(a) and asked for an equitable exception to NRS 286.541(2). He acknowledged that PERS staff made no misrepresentations to him but argued that it was unduly harsh to deny him early retirement benefits because he filed his paperwork three days late. The Board debated whether it could make an exception to NRS 286.541(2) and, if so, whether it would be allowing an in-service distribution and deviating from operational guidelines, which could jeopardize PERS with the IRS.

The Board denied Judge Smith's appeal in its written findings of fact, conclusions of law, and decision. It held that ''[t]he applicable provisions of the Retirement Act [NRS 286.541(2)] clearly prohibit a member from retiring while he is actively employed and receiving service credit.'' Addressing Judge Smith's request for equitable relief, the Board first determined that NRS 286.190(3)(a) did not apply, since ''Judge Smith could not point to any erroneous

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[4]Judge Smith suggested to the PERS Board that he faxed these papers to PERS on January 5. The Board rejected this claim, since the papers were not notarized until January 6 and bore a fax date of January 8.

representation by [PERS] upon which he reasonably and detrimentally relied.'' Second, the Board concluded that ''allowing a 'retired' member to be employed and accrue service credit, with no clear break from service, violates the Internal Revenue Service's 'in service distribution' rule and could jeopardize the entire retirement fund[']s status as a qualified retirement plan.''

Under NRS 1A.280(3)(a), Judge Smith had until March 31, 2009, to give written notice that he intended to withdraw from PERS and participate in JRS. *See supra* note 2. If he did not, he would automatically remain in PERS. NRS 1A.280(5). Judge Smith signed and faxed his JRS election form on March 31. The form states, ''I, Douglas E. Smith, hereby elect to withdraw from the Public Employees' Retirement System (PERS) and become a member of the Judicial Retirement System (JRS) pursuant to NRS 1A.280. I understand that this election is irrevocable and that I may not reestablish my service in PERS under any circumstances.'' Judge Smith transmitted the election form under a letter stating that he was doing so ''under protest as there is an open appeal process on going.'' Pursuant to Judge Smith's election, PERS calculated its retirement benefits liability to him at more than $1 million. On June 15, 2009, PERS transferred that sum to JRS, which has invested and managed it since. The PERS Board's denial of Judge Smith's retirement application has not cost Judge Smith a loss of creditable service or any associated benefits.

Judge Smith petitioned for judicial review. After discovery, he and PERS stipulated to submit the dispute to the district court on the depositions taken and documents produced during discovery and the PERS Board hearing transcript and record. The district court thereafter entered its written findings of fact, conclusions of law, and order. It reversed the PERS Board's decision to deny Judge Smith's retirement application, declared a retroactive retirement date of January 8, 2009, and ordered PERS to pay all retirement payments due retroactive to January 8, 2009. PERS timely appealed.

II.

A.

[Headnotes 1-4]

Although not subject to the Administrative Procedure Act, ''[t]he decisions of the PERS Board are reviewable by the courts on the basis of the same standard of review applied to other administrative actions.'' *State ex rel. Dep't of Transp. v. Pub. Emps.' Ret. Sys.*, 120 Nev. 19, 23, 83 P.3d 815, 817 (2004). The court may not '' 'substitute its judgment of the evidence for that of the administrative agency.' '' *Id.* (quoting *United Exposition Serv. Co. v. SIIS*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993)). ''When

the factual findings of the administrative agency are supported by [substantial] evidence, they are conclusive, and the district court is limited to a determination of whether the agency acted arbitrarily or capriciously.'' *Mishler v. Nev. Bd. of Med. Exam'rs*, 109 Nev. 287, 292, 849 P.2d 291, 294 (1993). ''Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion.'' *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

[Headnotes 5-7]

On appeal, this court ''reviews questions of statutory construction and the district court's legal conclusions de novo.'' *I. Cox Constr. Co. v. CH2 Invs., L.L.C.*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013). ''However, an administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws and set necessary precedent to administrative action, and the construction placed on a statute by the agency charged with the duty of administering it is entitled to deference.'' *Elliot v. Resnick*, 114 Nev. 25, 32 n.1, 952 P.2d 961, 966 n.1 (1998). ''[W]hen an agency's conclusions of law are closely related to its view of the facts, those conclusions are entitled to deference, and we will not disturb them if they are supported by substantial evidence.'' *Fathers & Sons & A Daughter Too v. Transp. Servs. Auth.*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008).

B.

[Headnote 8]

NRS 286.541(2) defines when a PERS member's retirement becomes effective. It reads in its entirety:

> Except as otherwise required by NRS 286.533,[5] retirement becomes effective on whichever of the following days is the later:
>
> (a) The day immediately following the applicant's last day of employment;
>
> (b) The day the completed application form is filed with the System;
>
> (c) The day immediately following the applicant's last day of creditable service; or
>
> (d) The effective date of retirement specified on the application form.

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[5]NRS 286.533 states that, ''Notwithstanding any other provision of law, every distribution to a member must be made pursuant to the provisions of section 401(a)(9) of the Internal Revenue Code, 26 U.S.C. § 401(a)(9), that apply to governmental plans.''

To retire from PERS, NRS 286.541(1) requires the member to file a completed application for service retirement allowances with PERS. NRS 286.541(2) defines the effective date of retirement from PERS. It is the *later* of the four listed conditions. It can be the day after the employee's last day of employment, if the other three conditions have been met. NRS 286.541(2)(a). It can be the day the completed application form is filed with PERS, if the other three conditions have been met. NRS 286.541(2)(b). It can be the day after the employee's last day of creditable service, if the other conditions have occurred. NRS 286.541(2)(c). Or it can be the effective date specified on the application, again if the other three conditions have been satisfied. NRS 286.541(2)(d). Even if an employee has met all the other conditions of NRS 286.541(2), paragraphs (a) and (c) preclude that employee from effectively retiring until the day after the employee's last day of creditable service, whichever is later. Together, paragraphs (a) and (c) thus prevent an in-service distribution.

But the district court held that NRS 286.541(2) sets a retirement date only for purposes of calculating benefits, thus allowing Judge Smith to retire from PERS even after going to work for a PERS-eligible employer. It reasoned that the statute is codified in the benefits section of NRS Chapter 286 and that PERS's retirement application states retirement *benefits* are effective on whichever event listed in NRS 286.541(2)(a)-(d) occurs last. This interpretation is surely wrong. It contradicts the plain language of the statute, and ''[w]ords may not be supplied in a statute where the statute is intelligible.'' 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:38 (7th ed. 2007).

Here, the statute conveys in no uncertain terms that *retirement* from PERS becomes effective when the last of the four specified events occurs. The statute does not establish a retirement date for a limited purpose, and it never uses the word ''benefits.'' Although the district court is correct that NRS 286.541(2) is codified in the benefits section of Chapter 286, the statute defines *eligibility* to receive benefits. It would not make sense if NRS 286.541(2) applied solely to calculating benefits because other sections, such as NRS 286.495 and NRS 286.510, explain credit for service and how a member's designated retirement date affects his or her benefits. But there is no other statute that defines what conditions must be met before a member can effectively retire.

''While not controlling, an agency's interpretation of a statute is persuasive,'' *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988), when the statute is one the agency administers. *Elliot*, 114 Nev. at 32 n.1, 952 P.2d at 966 n.1. The PERS Board governs PERS. *See* NRS 286.120. It has interpreted NRS 286.541(2) so as to comport with the statute's language and PERS's overarching ob-

ligation to comply with the Internal Revenue Service provisions applicable to governmental retirement plans. PERS indicates in its Preretirement Guide and its briefs that it does not limit NRS 286.541 to the calculation of benefits. Instead, PERS determines a member's effective retirement date based on information the member provides and which of the four events listed in NRS 286.541(2) occurs last. Thus, we conclude that an employee cannot effectively retire from PERS until the day when the last of the four enumerated requirements is complete.

C.

[Headnote 9]

Here, Judge Smith remained an active PERS member until March 31, 2009, when he elected to transfer to JRS. The Board decided that the earliest Judge Smith could have effectively retired would have been January 8, 2009, ''[t]he day the completed application form [was] filed with the System.'' NRS 286.541(2)(b). But because Judge Smith took his elected office on January 5, 2009, PERS received the application while he was employed in a PERS-eligible job. Under paragraphs (a) and (c) of NRS 286.541(2), a member still employed in a PERS-eligible job may not receive retirement benefits. After all, a person who continues PERS-eligible employment has not yet reached an effective ''last day of employment'' or ''last day of creditable service.'' NRS 286.541(2)(a), (c).

Judge Smith's JRS election further complicates matters since he no longer has a PERS account from which he could draw benefits; all PERS contributions and liabilities have been transferred to JRS. The district court held that Judge Smith could revoke his JRS election because ''[h]is hand was essentially forced.'' We recognize that Judge Smith's dispute with the PERS Board affected his decision to join JRS, but NRS 1A.280 plainly does not allow an employee to revoke his decision. Pursuant to NRS 1A.280(6), a judge who exercises the option to switch from PERS to JRS ''may not re-establish the service for which the liabilities were transferred.'' Accordingly, after the Board transferred Judge Smith's accrued benefits from his PERS account to his new JRS account, he can no longer participate in or receive benefits from PERS.

III.

[Headnote 10]

Judge Smith next argues that, even assuming his failure to retire from PERS before becoming a district court judge disqualified him from thereafter retiring and receiving benefits from PERS, the PERS Board should have granted him equitable relief under NRS 286.190(3)(a). This statute provides that the PERS Board:

> *May*:
>
> (a) *Adjust the service or correct the records*, allowance or benefits of any member, retired employee or beneficiary *after an error or inequity has been determined*, and require repayment of any money determined to have been paid by the System in error, if the money was paid within 6 years before demand for its repayment.

NRS 286.190(3)(a) (emphasis added). NRS 286.190(4) defines ''error or inequity'' as ''the existence of extenuating circumstances, including, but not limited to, a member's reasonable and detrimental reliance on representations made by the System or by the public employer pursuant to NRS 286.288 which prove to be erroneous, or the mental incapacity of the member.''

[Headnote 11]

Citing NRS 286.190(3), the district court held that the Board was *required* to grant Judge Smith equitable relief. But this reading ignores the statute's use of the permissive ''may.'' ''It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory.'' *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994). The district court's reading contravenes the presumption that every word, phrase, and provision—here, the word ''may''—in a statute has meaning. *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366-67, 184 P.3d 378, 386-87 (2008); *In re Prosole*, 32 Nev. 378, 383, 108 P. 630, 632-33 (1910).

[Headnote 12]

''A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute,'' so NRS 286.190(4)'s definition of ''error or inequity'' controls. *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002); 1A Norman J. Singer, *Statutes and Statutory Construction* § 20:8 (6th ed. 2002). Under NRS 286.190(4), error or inequity signifies *extenuating* circumstances, such as detrimental reliance or mental incapacity of the member. Although its use of ''including, but not limited to'' makes NRS 286.190(4)'s list of extenuating circumstances nonexhaustive, it is significant that none of the examples involves employee fault or neglect.

Judge Smith and our dissenting colleagues cite *Nevada Public Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1980), arguing that ''our courts have the inherent power to seek and to do equity.'' This is a true statement but the circumstances in *Byrne* were much different from Judge Smith's. In *Byrne*, PERS incorrectly told an employee he would receive

$725.35 a month upon retirement, but when the employee retired, he received a mere $86.78 a month. *Id*. at 278, 607 P.2d at 1352. Here, PERS gave Judge Smith accurate ''Estimated Calculations'' every time he requested information about his retirement options. Unlike *Byrne*, nothing suggests that the Board falsely or incorrectly recorded Judge Smith's information or gave him inaccurate information on which he detrimentally relied. In fact, as the Board noted, Judge Smith acknowledged that PERS staff made no misrepresentations. It appears that he chose to delay sending his retirement notice so as to ensure no gap in health insurance coverage as he changed jobs; this was his choice, not one PERS recommended. Judge Smith admitted that he did not read the materials PERS provided him. He failed to file his PERS retirement application before January 5, 2009, because he assumed that timing did not matter. Judge Smith relied on his own assumptions to his detriment.

The dissent would remand this matter back to the PERS Board with instructions ''to make specific findings of fact and conclusions of law under its equitable powers set forth in NRS 286.190(3).'' But the PERS Board has already done so. Thus, its written findings of fact, conclusions of law, and decision consider and reject application of *Byrne* because in *Byrne*, unlike this case, PERS made the error in calculation, on which the employee relied to his detriment. In this case, by contrast, the Board found that Judge Smith ''has not alleged any error in his records, or the calculation or amount of his benefit.'' He asks ''the Board [to] change the 'effective date of his retirement.' '' This the Board declined to do, because it would ''violate[ ] the Internal Revenue Service's 'in service distribution' rule and could jeopardize the entire retirement fund[']s status as a qualified retirement plan.''[6]

NRS 286.190(3)(a) permits the Board to ''[a]djust the service or correct the records'' of a member or retired employee after ''an error or inequity has been determined.'' By definition, ''adjust'' means to bring something into a proper state, and ''correct'' is to make something true, accurate, or right. *Concise Oxford English Dictionary* 16, 321 (11th ed. 2008). But as the Board found, its records and calculation of Judge Smith's service were accurate. What Judge Smith sought was to have the Board rewrite its records to establish an earlier retirement date than the true record and application of NRS 286.541(2) would dictate. According to the Board, this placed the plan as a whole at risk, because it amounted to an improper in-service distribution. Such calculated risk avoidance—involving a subject within the expertise of the Board, not the courts—is something a court should not lightly second guess. *See*

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[6]Judge Smith did not meaningfully contest the PERS Board's assessment of the IRS risk associated with in-service distributions.

In re State Eng'r Ruling 5823, 128 Nev. 232, 238-39, 277 P.3d 449, 453 (2012). Under these circumstances, we cannot conclude that the PERS Board abused its discretion when it determined that Judge Smith must wait until he retires from his current employment to collect his service benefit, none of which he has lost by reason of the Board's determination in this case.

We therefore reverse.

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

GIBBONS, J., with whom CHERRY and SAITTA, JJ., agree, concurring in part and dissenting in part:

While I concur with the majority that NRS 286.541(2) determines the effective date of retirement, I disagree that the Board may not grant equitable relief pursuant to NRS 286.190(3) and (4).

As a deputy public defender, as a deputy district attorney, and as an elected justice of the peace, Judge Smith was required to be enrolled as a member of PERS. In 2001, the Legislature created the Judicial Retirement System (JRS) for supreme court justices and district judges. In 2005, the Legislature adopted NRS 1A.285 to allow a justice of the peace or municipal judge to participate in JRS.

The district court found that, after his election to the Eighth Judicial District Court in November 2008, Judge Smith advised PERS that he intended to retire from PERS prior to taking office as a district judge on January 5, 2009. Judge Smith would then become a member of the JRS on that date.

PERS sent the necessary paperwork to Judge Smith to complete for his retirement. The district court found that Judge Smith retired as a justice of the peace on December 31, 2008, and Judge Smith ceased having contributions made to PERS on his behalf as of that date. As set forth in the majority, PERS received Judge Smith's retirement application on January 8, 2009, or three days after he commenced his service as an elected district judge.

NRS 286.190 sets forth the general powers of the PERS Board. NRS 286.190(3)(a) provides in part that the Board ''may adjust the service or correct the records, allowance or benefits of any member, retired employee or beneficiary after an error or inequity has been determined . . . .'' NRS 286.190(4) defines error or inequity as ''the existence of extenuating circumstances, including, but not limited to, a member's reasonable and detrimental reliance on representations made by the System.'' Contrary to the majority's conclusion, this statute does not limit the Board's authority to grant equitable relief to PERS members who make inadvertent mistakes. After he retired on December 31, 2008, Judge Smith should have delivered his fully executed retirement application to PERS prior to January 5, 2009. The application required a notarized sig-

nature by Judge Smith's wife consenting to the terms of his retirement option. There was a delay in obtaining this notarization.

In *Nevada Public Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1980), we affirmed the judgment of the district court estopping the PERS Board from altering the amount and calculation of retirement benefits it had originally represented to Mr. Byrne and ordering the payment of those retirement benefits. The PERS Board argued in part that because it had the inherent power to correct mistakes, any reliance on its representations was barred. *Id.* at 279, 607 P.2d at 1353. We disagreed and concluded that our courts have the ''inherent power to seek and to do equity.'' *Id.* at 280, 607 P.2d at 1354.

In the present case, the district court found and determined that ''PERS is equitably estopped from denying Judge Smith his PERS retirement benefits.'' The district court found and concluded that in response to reasonable inquires made by Judge Smith, PERS ''at no time informed [Judge Smith] of a deadline for submitting his application. Neither was this deadline explained in the application packet or the applicable statutes.'' The district court further found and concluded that Judge Smith enrolled in JRS only because of the unresolved status of this litigation. Finally, the district court noted that the enrollment was made under protest and was hardly voluntary. Based on these findings and conclusions, the district court properly determined that the Board could not fairly deny benefits and thus should have turned to its own powers under NRS 286.190 to do equity.

Therefore, I dissent from the majority's stringent interpretation of NRS 286.190(3) and (4). The PERS Board does have the power to remedy an ''error or inequity'' based upon a mistake of the PERS retirement applicant. Otherwise, a minor error may reduce significant retirement benefits which the applicant has earned over many years of service. The PERS Board has the equitable power to rescind the enrollment by Judge Smith in the JRS. Since we do not make factual findings, I would reverse the judgment of the district court with instructions to remand this case to the PERS Board to make specific findings of fact and conclusions of law under its equitable powers set forth in NRS 286.190(3) and (4) regarding the extenuating circumstances in this case.