IN THE MATTER OF DISCIPLINE OF RONALD N. SEROTA, BAR NO. 7904.

No. 57960

IN THE MATTER OF DISCIPLINE OF RONALD N. SEROTA, BAR NO. 7904.

No. 59551

IN THE MATTER OF DISCIPLINE OF RONALD N. SEROTA, BAR NO. 7904.

No. 60719

October 3, 2013 309 P.3d 1037

Automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney be disbarred from the practice of law in Nevada (Docket No. 57960); original petition by bar counsel to report attorney convicted of crime (Docket No. 59551); original petition by attorney for dissolution of order temporarily suspending him from the practice of law (Docket No. 60719).

Attorney disciplinary proceeding was instituted. The supreme court held that: (1) attorney's misappropriation of $319,000 in client funds violated professional rules, and (2) attorney's misconduct warranted disbarment.

Recommendation approved (Docket No. 57960); petitions denied as moot (Docket Nos. 59551/60719).

Ronald N. Serota, Las Vegas, in Proper Person.

David Clark, Bar Counsel, and *Glenn Machado*, Assistant Bar Counsel, Las Vegas, for the State Bar of Nevada.

1. ATTORNEY AND CLIENT.
   Although persuasive, the hearing panel's findings and recommendations in an attorney disciplinary proceeding are not binding.
2. ATTORNEY AND CLIENT.
   The paramount objective of attorney disciplinary proceedings is to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole.
3. ATTORNEY AND CLIENT.
   In determining the proper disciplinary sanction for an attorney, the supreme court considers four factors: (1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances.
4. ATTORNEY AND CLIENT.
   Attorney's misappropriation of $319,000 in client funds, which were to be used to satisfy a judgment in a Securities and Exchange Commission action against the client, and thereafter allowing client to sign the consent

to entry of judgment despite knowing that he had already misappropriated the money intended to satisfy the judgment, violated professional rules requiring attorneys to safekeep clients' property and prohibiting attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. RPC 1.15, 8.4(c).

5. ATTORNEY AND CLIENT.

Attorney's misappropriation of $319,000 in client funds, which were to be used to satisfy a judgment in a Securities and Exchange Commission action against the client, and thereafter allowing client to sign the consent to entry of judgment despite knowing that he had already misappropriated the money intended to satisfy the judgment, warranted disbarment.

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

OPINION

Per Curiam:

These bar matters, though separately docketed, all involve the same attorney, Ronald N. Serota, Bar No. 7904. They are not consolidated; however, we have elected to resolve them in a single disposition.[1]

Docket No. 57960 is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that Serota be disbarred from the practice of law in Nevada. *See* SCR 105(3)(b). Serota misappropriated $319,000 in client funds that were to be used to satisfy a judgment in a Securities and Exchange Commission (SEC) action against the client. He asks us to impose a lesser sanction, contending that because of mitigating factors, we should merely suspend him from the practice of law and/or refer him to a diversion program. On de novo review, we conclude that disbarment is the proper sanction and therefore approve the panel's recommendation.

Docket No. 59551 is an original petition by bar counsel advising us that Serota has been convicted of a felony for the same conduct underlying the disciplinary matter. *See* SCR 111(4). Docket No. 60719 is an original petition by Serota seeking dissolution of our prior order temporarily suspending him from the practice of law.[2] *See* SCR 102(4)(d). We conclude that the petitions in Docket

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[1]We originally decided these matters in an unpublished order filed May 24, 2013. Bar counsel subsequently filed a motion pursuant to NRAP 36(f) to reissue our order as an opinion. We grant the motion and therefore issue this opinion in place of our prior order.

[2]We previously temporarily suspended Serota from the practice of law pending the outcome of the instant disciplinary proceedings. *In re Discipline of Serota*, Docket No. 54856 (Order of Temporary Suspension, November 18, 2009).

Nos. 59551 and 60719 have been rendered moot as a result of our decision in Docket No. 57960 that Serota be disbarred from the practice of law.

FACTS AND PROCEDURAL HISTORY

Docket No. 57960

Serota represented a client in an action by the SEC. The SEC alleged that the client engaged in accounting practices that were violative of federal law. On August 3, 2009, Serota's client signed a consent to entry of judgment, which was filed with the federal court on August 27, 2009.

In anticipation of this negotiated outcome, the client paid Serota all of the monies necessary to satisfy the judgment in advance, by way of 14 checks totaling $319,901.59 written between July 2 and July 24, 2009. The checks were deposited into Serota's client trust account. Each check contained a notation indicating that it was for some aspect of the SEC action.

Meanwhile, on July 16, 2009, a check from Serota's client trust account was written to Beverage Plus, a company in which Serota had an ownership interest, for $225,000. Despite this misappropriation, Serota continued to accept additional checks from the client until the client had paid him the entire amount of the anticipated judgment in the SEC action. On July 28, 2009, a check from Serota's trust account was written to Clean Path Resources, another company in which Serota had an interest, for $94,000. Thus, Serota had misappropriated virtually the entire amount of the judgment prior to having his client sign the consent to entry of judgment on August 3, 2009.

Pursuant to the signed consent, final judgment was entered against Serota's client in the SEC action on September 25, 2009. The final judgment ordered the client to, among other things, pay a total judgment of $319,901.59 within 10 business days. On October 7, 2009, just two days before the judgment was to be paid, Serota admitted his misappropriations to the State Bar.

Consequently, the State Bar filed a complaint against Serota alleging that his conduct violated RPC 1.15 (safekeeping property), RPC 3.4 (fairness to opposing party and counsel), and RPC 8.4 (misconduct). Thereafter, a formal disciplinary hearing was held, at which the State Bar put on evidence of Serota's misappropriations and of aggravating circumstances it alleged were present in this matter; the defense focused primarily on mitigating circumstances that it alleged were present.

The disciplinary panel found unanimously that Serota had violated RPC 1.15 and RPC 8.4. It recommended, by a 4-1 vote, that Serota be disbarred and ordered to pay the costs of the proceed-

ings. Consequently, Serota's disciplinary matter was forwarded to us for automatic review pursuant to SCR 105(3)(b).

Docket Nos. 59551 and 60719

Bar counsel subsequently filed an original petition pursuant to SCR 111(4), Docket No. 59551, informing this court that Serota was convicted in the Eighth Judicial District Court of one count of theft, a category B felony pursuant to NRS 205.0832 and NRS 205.0835, for the same conduct underlying the disciplinary proceeding. Thereafter, Serota filed an original petition pursuant to SCR 102(4)(d), Docket No. 60719, seeking dissolution of our November 18, 2009, order of temporary suspension entered in Docket No. 54856.

DISCUSSION

[Headnotes 1-3]

We review a decision of a hearing panel recommending disbarment automatically. SCR 105(3)(b). The panel's findings must be supported by clear and convincing evidence. SCR 105(2)(e); *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). Although persuasive, the panel's findings and recommendations are not binding on us. *In re Discipline of Droz*, 123 Nev. 163, 168, 160 P.3d 881, 884 (2007). Our review is conducted de novo, requiring us to exercise independent judgment to determine whether and what type of discipline is warranted. SCR 105(3)(b); *In re Discipline of Stuhff*, 108 Nev. 629, 633, 837 P.2d 853, 855 (1992). The paramount objective of attorney disciplinary proceedings is ''to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole.'' *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 129, 756 P.2d 464, 473 (1988). In determining the proper disciplinary sanction, we consider four factors: (1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances. *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

The panel's findings are supported by clear and convincing evidence

[Headnote 4]

We conclude that the panel's findings are supported by clear and convincing evidence. Serota concedes that he violated RPC 1.15, which requires a lawyer, among other things, to safekeep clients' property in the lawyer's possession. Serota's client turned over money to him that was to be paid to the SEC to satisfy a judgment against the client, but instead of safeguarding those funds, Serota

misappropriated them for his own purposes. He therefore failed in his duties to safekeep his client's property. Serota also concedes that he violated RPC 8.4(c), which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. In addition to misappropriating the client's funds for his own purposes, Serota allowed the client to sign the consent to entry of judgment despite knowing that he had already misappropriated the money intended to satisfy the judgment. He therefore engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. We conclude that clear and convincing evidence supports the panel's findings that Serota violated RPC 1.15 and 8.4.[3]

Disbarment is the appropriate discipline

[Headnote 5]

We further conclude that, considering the four *Lerner* factors, disbarment is the appropriate disciplinary sanction in this case. Serota's conduct in this matter violated duties to his client, the profession, and the public. We conclude that his conduct was intentional and caused actual injury to his client. The egregiousness of his actions alone justifies disbarment. *See generally* American Bar Association Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, at 455 (2013 ed.) (disbarment is generally appropriate when a lawyer knowingly converts client property causing injury or potential injury).

The presence of aggravating circumstances further supports this conclusion. *See* SCR 102.5(1) (listing examples illustrative of aggravating circumstances). One such circumstance is that Serota has a prior disciplinary offense.[4] SCR 102.5(1)(a). In addition, we agree with the State Bar that his conduct evinces a dishonest or selfish motive. SCR 102.5(1)(b). Furthermore, there was a pattern of misconduct where, prior to each misappropriation, Serota accepted several payments from the client beforehand, and hid his misconduct afterwards until its discovery was imminent. SCR 102.5(1)(c). Finally, Serota concedes that he committed multiple offenses. SCR 102.5(1)(d). Even assuming arguendo that Serota's conduct did not by itself warrant disbarment, the presence of these

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[3]Because clear and convincing evidence supports the panel's findings regarding these rules of professional conduct, we need not consider the parties' remaining arguments regarding RPC 3.4 (fairness to opposing party and counsel) or subsection (d) of RPC 8.4 (conduct prejudicial to the administration of justice).

[4]On August 18, 2008, Serota received a letter of reprimand for violating RPC 1.1 (competence), RPC 3.1 (meritorious claims and contentions), and RPC 5.5 (unauthorized practice of law).

aggravating circumstances would justify an increase in the degree of discipline to be imposed. *See* SCR 102.5(1) (aggravating circumstances are ''any considerations or factors that may justify an increase in the degree of discipline to be imposed'').

We further conclude that, although there are some mitigating circumstances present in this case, they do not justify a reduction in the degree of discipline to be imposed. *See* SCR 102.5(2) (listing examples illustrative of mitigating circumstances). To begin, Serota's contention that there is an absence of a dishonest or selfish motive is belied by his conduct. SCR 102.5(2)(b). In addition, though his medical condition may have contributed to personal or emotional problems, we conclude that these mitigating circumstances are insufficient to warrant a reduction in discipline in light of the egregiousness of his misconduct. SCR 102.5(2)(c), (h). We further conclude that his claimed mental disabilities are largely uncorroborated and, in any event, he failed to establish a causal connection between them and his misconduct. SCR 102.5(2)(i)(2). Although he was cooperative and self-reported, SCR 102.5(2)(e), discovery of his misconduct was imminent, and thus this does not warrant a reduction in discipline. We conclude that Serota's claimed rehabilitation is not supported by the record. SCR 102.5(2)(k). We further conclude that he failed to demonstrate genuine remorse; instead, on appeal he attempts to blame the victim. SCR 102.5(2)(m). Finally, his claims of having done pro bono and other work to benefit the profession and the community are largely unsubstantiated, and even if established would not warrant a reduction in discipline in light of the seriousness of his misconduct. SCR 102.5(2). Under the circumstances presented here, we conclude that disbarment is the only viable option. We agree with the panel's recommendation in Docket No. 57960 that Serota be disbarred from the practice of law in Nevada.

In light of this disposition, we conclude that the other bar matters pending before us regarding Serota have been rendered moot. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (court's duty is not to render advisory opinions but to resolve actual controversies by an enforceable judgment); *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981) (duty of judicial tribunal is to decide actual controversies by a judgment that can be carried into effect, not to give opinions on moot questions or abstract propositions or to declare principles of law that cannot affect the matter at issue). We therefore deny as moot the State Bar's petition in Docket No. 59551 regarding Serota's felony conviction. Likewise, we deny as moot Serota's petition in Docket No. 60719 for dissolution of our order temporarily suspending him from the practice of law.

CONCLUSION

We conclude that clear and convincing evidence supports the panel's findings that Serota failed to safekeep his client's property, a violation of RPC 1.15, and that he engaged in misconduct, a violation of RPC 8.4. Moreover, the egregiousness of misappropriating $319,000 in client funds warrants disbarment. The presence of aggravating circumstances provides further support for the conclusion that disbarment is the only appropriate discipline in this case. In light of our conclusion that disbarment is the appropriate disciplinary sanction, bar counsel's petition regarding Serota's felony conviction, and Serota's petition for dissolution of our order temporarily suspending him from the practice of law, are denied as moot.

Accordingly, Serota is hereby disbarred from the practice of law in Nevada.[5] If he has not already done so, Serota shall pay the costs of the disciplinary proceedings in the amount of $2,142.75 within 30 days from the date of this order. If they have not already done so, Serota and the State Bar shall comply with SCR 115 and SCR 121.1.

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[5]Serota's motion to set aside the recommendation of disbarment by the board, filed July 7, 2011, in Docket No. 57960 is denied. The State Bar's motion to strike or, in the alternative, opposition to Serota's motion to set aside the recommendation of disbarment by the board, filed July 20, 2011, in Docket No. 57960 is therefore denied as moot.

Serota has communicated to this court by way of several letters addressed to the clerk of the court. He is admonished that any request for relief from this court must be presented by way of a formal, written motion, not by way of a letter addressed to the clerk of the court. *Weddell v. Stewart*, 127 Nev. 645, 652 n.8, 261 P.3d 1080, 1085 n.8 (2011). In addition, Serota's briefs in Docket No. 57960 contain numerous factual assertions not supported by references to the record and references to facts that are outside the record altogether. This is improper, and we disregard such references. *See* NRAP 28(e)(1); SCR 105(3)(b); *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981). In addition, Serota has improperly attempted to supplement the record in Docket No. 57960 with exhibits not before the disciplinary panel, which we cannot consider. *See* NRAP 10; NRAP 30(b); SCR 105(3)(b); *State, Dep't of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 282, 871 P.2d 331, 336 (1994). We direct the clerk of this court to return, unfiled, the document entitled ''Appellant's Exhibit Supplement to Reply Brief,'' provisionally received on October 19, 2011, in Docket No. 57960; we further direct the clerk of this court to strike Exhibits 1-6 from ''Appellant's Reply Brief'' filed October 21, 2011, in Docket No. 57960.

Finally, on August 4, 2011, Serota filed an opposition to the State Bar's motion to extend the time in which to file the answering brief in Docket No. 57960. At the time the opposition was filed, the extension of time had already been granted; however, it would appear that the documents may have crossed in the mail. Under these unique circumstances, we elect to treat Serota's opposition as a motion for reconsideration of our order granting the requested extension of time, and we deny it. *See* NRAP 31(b)(3)(B); SCR 105(3)(b).

NEWMAR CORPORATION, A DELAWARE CORPORATION, APPELLANT, *v.* ALLISON MCCRARY, AN INDIVIDUAL, RESPONDENT.

No. 58174

NEWMAR CORPORATION, A DELAWARE CORPORATION, APPELLANT, *v.* ALLISON MCCRARY, AN INDIVIDUAL, RESPONDENT.

No. 59045

October 3, 2013 309 P.3d 1021

Consolidated appeals from a district court judgment in a revocation of acceptance and breach of warranty action and from a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Purchaser of motorhome brought action against manufacturer alleging causes of action for revocation of acceptance, breach of contract, and breach of warranty. After bench trial, the district court found in favor of purchaser and awarded her $406,500 in damages but required her to return motorhome as part of the revocation. Both parties appealed. The supreme court, CHERRY, J., held that: (1) as matter of apparent first impression, purchaser of motorhome is entitled to revoke acceptance of motorhome against its manufacturer where privity exists; (2) the district court properly awarded incidental and consequential damages to purchaser on her revocation claim against manufacturer; and (3) purchaser was not entitled to attorney fees under offer of judgment statute.

Affirmed in part and reversed in part.

Morris Law Group and *Robert McCoy, Rex D. Garner*, and *Raleigh C. Thompson*, Las Vegas, for Appellant.

Alverson, Taylor, Mortensen & Sanders and *Kurt R. Bonds, Alan V. Mulliner*, and *Eric W. Hinckley*, Las Vegas, for Respondent.

1. SALES.

Purchaser of motorhome is entitled to revoke acceptance of motorhome against its manufacturer when privity exists between manufacturer and purchaser because manufacturer interjected itself into the sales process and had direct dealings with purchaser to ensure the completion of the transaction; the resulting relationship is sufficient to include manufacturer within the definition of ''seller'' under Uniform Commercial Code and, as a result, allow for revocation of acceptance against manufacturer. NRS 104.2103(1)(c).

2. SALES.

When manufacturer is ultimately responsible for the defect that resulted in the breach to consumer, and has directly involved itself in the

transaction to ensure the sale, it can be the entity that is held responsible to consumer. NRS 104.2103(1)(c).

3. SALES.
   The district court properly awarded incidental and consequential damages to purchaser on her revocation claim against motorhome manufacturer under Uniform Commercial Code; incidental and consequential damages could be awarded pursuant to the revocation claim. NRS 104.2715.
4. SALES.
   Motorhome manufacturer's repeated failed attempts to repair motorhome under the expanded warranty resulted in the frustration and deprivation of purchaser's benefit of the bargain to the point that no remedy was available to her, and because purchaser's remedy failed to serve its purpose, she was entitled to pursue remedies available under the Uniform Commercial Code, which explicitly provided for the award of incidental and consequential damages. NRS 104.2715, 104.2719(2).
5. COSTS.
   Purchaser was not entitled to attorney fees under civil practice statute governing attorney fees because motorhome manufacturer's defense against revocation was not unreasonable. NRS 18.010.
6. COSTS.
   Purchaser was not entitled to attorney fees under offer of judgment statute because purchaser did not receive a larger award at trial of her revocation claim against motorhome manufacturer than she would have under the pretrial offer of judgment. NRS 17.115(4); NRCP 68(f).
7. SALES.
   Under the Uniform Commercial Code, purchaser is permitted to receive the purchase price along with incidental and consequential damages. NRS 104.2715.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

In this opinion, we consider whether a purchaser of a motor home may revoke acceptance and recover the purchase price from the motor home's manufacturer under the Uniform Commercial Code (UCC). We hold that a purchaser is entitled to revoke acceptance of the motor home against its manufacturer where, as here, privity exists between the manufacturer and the buyer because the manufacturer interjected itself into the sales process and had direct dealings with the buyer to ensure the completion of the transaction. We also conclude that the district court properly awarded incidental and consequential damages but that it abused its discretion in awarding attorney fees. Thus, we affirm the judgment but reverse the award of attorney fees.

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

FACTS AND PROCEDURAL HISTORY

Respondent Allison McCrary purchased a luxury motor home manufactured by appellant Newmar Corporation from Wheeler's Las Vegas RV. The purchase included Newmar's two-year express warranty for repair and service. After purchasing the motor home, McCrary let it remain in Wheeler's possession for repairs, due to some issues noticed during the test drives. A week later, McCrary returned to inspect and pick up the motor home. Noticing continued problems with the motor home during the inspection, McCrary met with a Newmar factory representative. She stated that she would not take possession of the motor home until the representative assured her that Newmar would take care of any problems and that there was a full, bumper-to-bumper warranty. After receiving the sought-after reassurances from Newmar, McCrary took possession of the motor home.

Shortly thereafter, the motor home experienced significant electrical problems, making it unsafe to drive and resulting in repeated delays and canceled vacation plans for McCrary. After numerous repairs at the Newmar factory and other repair shops, McCrary attempted to revoke her acceptance of the motor home from Newmar, but Newmar rejected the revocation. McCrary then filed the underlying action asserting, *inter alia*, causes of action for revocation of acceptance, breach of contract, and breach of warranty against Newmar.[2]

Prior to trial, both parties made offers of judgment. Neither offer was accepted. Following a bench trial, based on the particular facts of this case, the district court concluded that McCrary did not take possession of the motor home when she signed the contract and would not have completed the purchase and eventually taken possession except for the interactions with and assurances made by Newmar's representative to McCrary. Ultimately, the district court found in favor of McCrary and awarded her $406,500 in damages—the $385,000 purchase price for the motor home based on the revocation of acceptance, but required McCrary to return the motor home as part of the revocation, $12,500 for the cost of insuring the motor home, and $9,000 for storage fees—plus $44,251.40 in prejudgment interest and $107,581.50 in attorney fees. The court entered judgment accordingly, and these appeals followed.

DISCUSSION

We must first determine whether revocation of acceptance is an available cause of action against a manufacturer before we can reach the issues of damages and attorney fees.

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[2]McCrary also asserted claims against Wheeler's. Wheeler's was subsequently removed from the litigation during the summary judgment stage because McCrary attempted to revoke acceptance only from Newmar.

Revoking acceptance from Newmar

Newmar argues that, under Nevada's applicable UCC provision, NRS 104.2608, a buyer can only revoke acceptance from a seller, and while it manufactured the motor home, it was not a seller of the motor home. Thus, Newmar contends that Wheeler's is the only entity from whom McCrary can revoke acceptance and that, because McCrary revoked acceptance with the wrong entity, she alone must bear the consequences of that mistake.

McCrary contends that the district court correctly determined that Newmar was a co-seller based on Newmar's exclusive warranty and its employee's participation in the sales process. McCrary asserts that Newmar should be held to its actions.

The UCC provision governing revocation of acceptance was adopted and codified in Nevada as NRS 104.2608. It allows a buyer to revoke her acceptance of a purchased good if the item suffers from a ''nonconformity [that] substantially impairs its value to the buyer'' and the buyer accepted the item on the understanding that the seller would cure the nonconformity or was induced into accepting a nonconforming item ''either by the difficulty of discovery before acceptance or by the seller's assurances.'' NRS 104.2608(1)(a), (b);[3] *see also* NRS 104.2608(2) (requiring notification to the seller of the defect and timeliness for revocation). Under the UCC, '' '[s]eller' means a person who sells or contracts to sell goods.'' NRS 104.2103(1)(c). Here, there is no question as to the motor home's nonconformity, and thus we turn directly to whether the manufacturer can be considered a ''seller'' under the UCC.

We have previously addressed revocation of acceptance against the immediate seller, but we have not yet determined whether revocation of acceptance is available against a manufacturer. *See Waddell v. L.V.R.V., Inc.*, 122 Nev. 15, 125 P.3d 1160 (2006) (affirming judgment for revocation against the dealer that sold the subject motor home); *Havas v. Love*, 89 Nev. 458, 459, 514 P.2d 1187, 1188 (1973) (allowing revocation against the defendant who sold a motorbus to the plaintiff). The Legislature has given some guidance, directing our courts to liberally construe and apply the UCC to ''make uniform the law among the various jurisdictions.'' NRS 104.1103(1)(c). However, the jurisdictions are split as to whether revocation of acceptance is proper against a manufacturer, giving us the opportunity to decide the issue de novo. *See Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) (''[I]ssues involving a purely legal question are reviewed de novo.'').

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[3]The legislative history of NRS 104.2608 does not indicate whether the Legislature intended that the buyer may revoke only against the immediate seller or may return the goods to a remote seller such as the manufacturer.

In revocation of acceptance cases, the term ''seller'' has been restricted to the immediate seller by a majority of jurisdictions but has been inclusive of the manufacturer by a minority of jurisdictions. A majority of jurisdictions have determined that revocation is not available against a manufacturer because the manufacturer is not a ''seller'' under the UCC. *See, e.g.*, *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 214 (Ariz. 1981) (following ''the logic as well as the letter of the U.C.C.'' to require privity and hold that a motor home ''manufacturer who does not sell to the purchaser [directly and for whom the seller was not agent] cannot be liable for revocation and attendant damages''); *Griffith v. Latham Motors, Inc.*, 913 P.2d 572, 577 (Idaho 1996) (determining that the manufacturer could not be liable under a revocation claim because it did not sell the vehicle to the plaintiffs); *Henderson v. Chrysler Corp.*, 477 N.W.2d 505, 507-08 (Mich. Ct. App. 1991) (rejecting revocation against nonselling manufacturer when there was no privity and leaving plaintiff with remedies under a warranty); *Neal v. SMC Corp.*, 99 S.W.3d 813, 816-18 (Tex. App. 2003) (noting that because ''[t]he nature of a revocation claim logically requires privity of contract[,] . . . revocation is available to the buyer only against the immediate seller''; the motor home manufacturer, ''in the absence of a contractual relationship with the consumer, is not a seller'' by virtue of a manufacturer's express warranty); *see generally Fedrick v. Mercedes-Benz USA, L.L.C.*, 366 F. Supp. 2d 1190, 1200 (N.D. Ga. 2005); *Conte v. Dwan Lincoln-Mercury, Inc.*, 374 A.2d 144, 150 (Conn. 1976); *Hardy v. Winnebago Indus., Inc.*, 706 A.2d 1086, 1091 (Md. Ct. Spec. App. 1998); *Ayanru v. Gen. Motors Acceptance Corp.*, 495 N.Y.S.2d 1018, 1023 (Civ. Ct. 1985); *Reece v. Yeager Ford Sales, Inc.*, 184 S.E.2d 727, 731 (W. Va. 1971). According to these courts, revocation is not available against the manufacturer unless there is a direct contractual relationship between the manufacturer and the buyer or an agency relationship between the manufacturer and the seller. The rationale behind this position is that revocation is intended to return the buyer and seller to their original positions and that because the manufacturer does not own the goods or receive the purchase price when the goods are sold, it cannot be involved in restoring the parties to their former positions. *See, e.g.*, *Seekings*, 638 P.2d at 214; *Griffith*, 913 P.2d at 577; *Henderson*, 477 N.W.2d at 507-08; *Neal*, 99 S.W.3d at 817-18; *Gasque v. Mooers Motor Car Co., Inc.*, 313 S.E.2d 384, 390 (Va. 1984).

Conversely, a minority of states have held that revocation of acceptance can be had against entities further removed from the transaction than the immediate seller, such as the manufacturer. *See, e.g.*, *Ford Motor Credit Co. v. Harper*, 671 F.2d 1117, 1126 (8th Cir. 1982); *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d

349, 357-58 (Minn. 1977); *Volkswagen of Am., Inc. v. Novak*, 418 So. 2d 801, 804 (Miss. 1982); *Fode v. Capital RV Ctr., Inc.*, 575 N.W.2d 682, 687-88 (N.D. 1998); *Gochey v. Bombardier, Inc.*, 572 A.2d 921, 924 (Vt. 1990). As explained in *Gochey*, this decision is based on the viewpoint that traditional privity is not necessary, but that the relationship established based on a manufacturer's warranty is sufficient:

> ''Under state law the right to revoke acceptance for defects substantially impairing the value of the product and to receive a refund of the purchase price are rights available to a buyer against a seller in privity. Where the manufacturer gives a warranty to induce the sale it is consistent to allow the same type of remedy as against that manufacturer. Only the privity concept, which is frequently viewed as a relic these days, has interfered with a rescission-type remedy against the manufacturer of goods not purchased directly from the manufacturer. If we focus on the fact that the warranty creates a direct contractual obligation to the buyer, the reason for allowing the same remedy that is available against a direct seller becomes clear.''

572 A.2d at 924 (quoting *Ventura v. Ford Motor Corp.*, 433 A.2d 801, 811-12 (N.J. Super. Ct. App. Div. 1981) (citations omitted)).

In assessing these two positions, we find the majority position to be too inflexible in its adoption of a strict, literal interpretation of privity and in defining what constitutes a ''seller.'' This position ignores the UCC's mandate for liberal application. We perceive instances where, as here, revocation of acceptance against a manufacturer might be appropriate.

We also have concerns with the minority view, based on the fact that the jurisdictions taking this approach have expressly eliminated privity, enacted relevant statutory definitions, or eliminated privity from consideration. *See, e.g.*, *Novak*, 418 So. 2d at 803-04 (determining that based on the Mississippi Legislature's ''abolish[ment of] privity of contract for breach of warranty claims including actions brought under the [UCC],'' the sales contract and the accompanying manufacturer's warranty were ''so closely linked both in time of delivery and subject matter, that they blended into a single unit at the time of sale''); *Harper*, 671 F.2d at 1126 (declining to limit relief as it would be ''contrary to the Code's mandate to administer its remedies liberally,'' even though the UCC ''eliminates the defense of privity in suits for damages for breaches of warranties, [but remains] silent as to revocation of acceptance''); *Durfee*, 262 N.W.2d at 357-58 (concluding that because plaintiff could have sued under a warranty theory, when ''the absence of privity would not bar the suit despite the language of the pertinent Code sections[,]'' the same logic should be applied to

revocation as ''[t]he remedies of the Code are to be liberally administered''); *Fode*, 575 N.W.2d at 687-88 (determining that the buyer could revoke acceptance from a nonprivity manufacturer based on the merger of the warranty with the contract); *Gochey*, 572 A.2d at 924 (concluding that an express warranty creates a contract with the ultimate buyer, pointing out that ''[w]hen the manufacturer's defect results in revocation by the consumer, the manufacturer must assume the liability it incurred when it warranted the product to the ultimate user''). Our Legislature thus far has been silent on the issue of privity. As a result, we are hesitant to completely eliminate any requirement of privity, particularly because doing so may result in too broad an application of the revocation of acceptance cause of action.

[Headnotes 1, 2]

While we have concerns with both positions, because of the unique circumstances of this case, we need not choose between the two at this point. The direct interactions and representations made by Newmar to McCrary expanded the relationship between the two parties and created privity.[4] Newmar, even though it was the manufacturer, interjected itself into the sales process and through its representations assisted in the completion of the sales transaction. Under the unique facts of this case, we conclude that this direct involvement on the part of the manufacturer in the sales process created a direct relationship with the buyer sufficient to establish privity between the manufacturer and the buyer. *See Alberti v. Manufactured Homes, Inc.*, 407 S.E.2d 819, 824 n.4 (N.C. 1991) (stating that the prerequisite for revocation of acceptance that there be a direct contractual relationship between the parties can include the manufacturer when the buyer and manufacturer have direct dealings with each other); *Cedars of Lebanon Hosp. Corp. v. European X-Ray Distribs. of Am., Inc.*, 444 So. 2d 1068, 1072 & n.4 (Fla. Dist. Ct. App. 1984) (holding that privity can exist between the manufacturer and buyer even though there is an intermediate seller when there are direct contacts between the two parties in completing the sale). This resulting relationship is sufficient to include the manufacturer within the definition of ''seller'' under NRS 104.2103(1)(c), and, as a result, allow for revocation of acceptance against the manufacturer. When the manufacturer is ultimately responsible for the defect that resulted in the breach to the consumer and has directly involved itself in the transaction to ensure the sale, it can be the entity that is held responsible to the

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[4]*Black's Law Dictionary* defines privity as ''[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest.'' *Black's Law Dictionary* 1320 (9th ed. 2009).

consumer. Accordingly, we affirm the district court's decision that McCrary was entitled to revoke acceptance from Newmar.

Award of incidental and consequential damages

[Headnotes 3, 4]

Newmar next argues that its single-page warranty explicitly and clearly disclaims liability for incidental and consequential damages. Newmar further contends that revocation cancels only a contract of sale and that the warranty from a manufacturer is still intact, preventing the collection of those damages. However, Newmar's repeated failed attempts to repair the motorhome under the expanded warranty resulted in the frustration and deprivation of McCrary's benefit of the bargain to the point that no remedy was available to her. NRS 104.2719(2) provides that ''[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.'' Because McCrary's remedy failed to serve its purpose, she was entitled to pursue remedies available under the UCC. The pertinent UCC provision, NRS 104.2715, explicitly provides for the award of incidental and consequential damages. *See also Clark v. Int'l Harvester Co.*, 581 P.2d 784, 797, 802 (Idaho 1978) (noting that ''other courts have uniformly held that where a party limits its warranty obligation to the repair and replacement of defective parts failure to fulfill that obligation, if such failure operates to deprive the other party of the substantial value of the bargain, causes the limited remedy 'to fail of its essential purpose' within the meaning of that section and entitles the party to pursue the remedies otherwise available under the UCC'' including incidental and consequential damages (quoting Idaho Code § 28-2-719(2))); *Durfee v. Rod Baxter Imps., Inc.*, 262 N.W.2d 349, 357-58 (Minn. 1977) (awarding the purchase price plus incidental damages and determining that because ''[t]he existence and comprehensiveness of a warranty undoubtedly are significant factors in a consumer's decision to purchase a particular automobile[,] . . . [w]hen the exclusive remedy found in the warranty fails of its essential purpose and when the remaining defects are substantial enough to justify revocation of acceptance, we think the buyer is entitled to look to the warrantor for relief''); *Koperski v. Husker Dodge, Inc.*, 302 N.W.2d 655, 664, 666 (Neb. 1981) (noting that '' '[r]epair and replacement' clauses, . . . have become the basic mechanism by which manufacturers limit or avoid liability in actions for breach of warranty,'' and explaining that when the car is so defective that the repair and replace warranty fails in its essential purpose, the buyer may sue for breach of warranty and may, in some cases, sue for incidental and consequential damages); *Ehlers v. Chrysler Motor Corp.*, 226 N.W.2d 157, 161 (S.D. 1975) (determining that respondent was entitled to

incidental and consequential damages under the warranty when the available remedy failed its essential purpose due to a breach caused by unreasonable delays in the vehicle's repairs). Accordingly, because incidental and consequential damages may be awarded pursuant to the revocation claim, we affirm the district court's award of those damages. *See* NRS 104.2715; *Novak*, 418 So. 2d at 803; *Fode*, 575 N.W.2d at 689.

Award of attorney fees

[Headnotes 5, 6]

Newmar also challenges the award of attorney fees. We conclude that the award of attorney fees to McCrary was an abuse of discretion, as the award was not authorized under the plain language of NRCP 68(f) and NRS 17.115(4). *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673, 137 P.3d 1110, 1129 (2006). We conclude that the district court properly declined to award attorney fees under NRS 18.010 because Newmar's defense against revocation was not unreasonable given the split in jurisdictions on this issue. Additionally, attorney fees were not proper under NRS 17.115(4) because McCrary did not receive a larger award at trial than she would have under the pretrial offer of judgment.

CONCLUSION

[Headnote 7]

For the reasons articulated above, we conclude that when a vehicle has substantial, irreparable defects, a purchaser is entitled to revoke acceptance of the vehicle from the manufacturer when the manufacturer interjected itself into the sales process and made direct representations to the buyer, thereby creating privity. Furthermore, under the UCC, the purchaser is permitted to receive the purchase price along with incidental and consequential damages.[5] We further conclude that the district court abused its discretion in awarding attorney fees. Thus, we affirm the judgment but reverse the order awarding attorney fees.

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

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[5]In light of our resolution of this appeal, we need not reach Newmar's remaining contentions.

SHA'KAYLA ST. MARY, APPELLANT, *v.*
VERONICA LYNN DAMON, RESPONDENT.

No. 58315

October 3, 2013 309 P.3d 1027

Appeal from a district court order determining custody of a minor child. Eighth Judicial District Court, Clark County; Kenneth E. Pollock, Judge.

Purported surrogate brought action against purported legal mother to establish custody, visitation, and child support obligations for minor child born through in vitro fertilization using purported legal mother's egg and anonymous donor's sperm. The district court refused to uphold the parties' co-parenting agreement or consider whether purported surrogate was a parent entitled to any custodial rights. Purported surrogate appealed. The supreme court, SAITTA, J., held that: (1) genuine issue of material fact existed regarding whether purported surrogate was legal mother or mere surrogate, (2) Nevada Parentage Act did not preclude a child from having two legal mothers, and (3) parties' co-parenting agreement did not constitute unenforceable surrogacy agreement.

Reversed and remanded with instructions.

Accelerated Law Group and *Joseph Timothy Nold*, Las Vegas, for Appellant.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager*, Las Vegas, for Respondent.

1. CHILDREN OUT-OF-WEDLOCK.
   To determine parentage, courts must look to the Nevada Parentage Act, which is modeled after the Uniform Parentage Act. NRS 126.031(1).
2. STATUTES.
   When interpreting a statute, the supreme court focuses on the statutory language and gives effect to the plain and ordinary meaning of the words.
3. STATUTES.
   The supreme court's ultimate goal in interpreting a statute is to give effect to the Legislature's intent.
4. CHILDREN OUT-OF-WEDLOCK.
   The Nevada Parentage Act did not preclude a child from having two legal mothers, and therefore purported surrogate who had child with her female partner through in vitro fertilization using partner's egg and anonymous donor's sperm was not precluded from being declared a legal mother of child, where, although Act contained procedures for rebutting paternity presumptions by establishing paternity of another man and those procedures arguably applied in maternity cases, best interest of child is paramount concern in determining custody and care of child, and gener-

ally a child's best interest is served by maintaining two actively involved parents. NRS 126.051(3).

5. CHILDREN OUT-OF-WEDLOCK.
   Co-parenting agreement between female partners who had a child using in vitro fertilization using one partner's egg and sperm from anonymous donor did not constitute an unenforceable surrogacy agreement that violated public policy; to bar the enforceability of a co-parenting agreement on the basis of the parents' genders conflicted with the Nevada Parentage Act's policies of promoting the child's best interest with the support of two parents, within their co-parenting agreement, the parties sought to provide for their child's best interest by agreeing to share the responsibilities of raising the child, even if the relationship between them ended, and the agreement's language provides the indicia of an effort by the parties to make the child's best interest their priority. NRS 126.045.
6. CONTRACTS.
   Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy.
7. PARENT AND CHILD.
   It is presumed that fit parents act in the child's best interest.
8. CHILD CUSTODY.
   Public policy favors fit parents entering agreements to resolve issues pertaining to their minor child's custody, care, and visitation.
9. CHILD CUSTODY.
   When a child has the opportunity to be supported by two loving and fit parents, pursuant to a co-parenting agreement, this opportunity is to be given due consideration and must not be foreclosed on account of the parents being of the same sex.

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

This appeal concerns the establishment of custodial rights over a minor child born to former female partners, appellant Sha'Kayla St. Mary and respondent Veronica Lynn Damon. The couple became romantically involved and decided to have a child. They drafted a co-parenting agreement, and eventually, St. Mary gave birth to a child through in vitro fertilization, using Damon's egg and an anonymous donor's sperm. Thereafter, their relationship ended, leading to the underlying dispute concerning the parties' custodial rights over the child.

The district court, apparently relying on a previous order that recognized Damon as the child's legal mother and granted her the right to be added as a mother to the child's birth certificate, concluded that St. Mary was a mere surrogate. The district court refused to uphold the parties' co-parenting agreement or consider whether St. Mary was a parent entitled to any custodial rights. St. Mary appealed, challenging the district court's conclusion that she was a surrogate and its refusal to uphold the co-parenting agreement.

We first conclude that the district court erred in determining, without holding an evidentiary hearing on the issue, that St. Mary was a surrogate lacking any legal rights to parent the child. The version of NRS 126.041(1) that existed at the time of the district court's determinations, as well as the version that exists now, provides that a mother-child relationship may be established by ''proof of [the mother] having given birth.''[1] *See* NRS 126.041(1) (2009); 2013 Nev. Stat., ch. 213, § 34, at 812. Here, the parties agree that St. Mary gave birth to the child but disagree about whether they intended for St. Mary to be a mother to the child or a mere surrogate. Nothing in either Nevada law or in this case's record, including the birth certificate order, conclusively demonstrates that NRS 126.041(1) does not apply to St. Mary's relationship with the child. Accordingly, a factual issue exists regarding whether St. Mary was a legal mother to the child or was a surrogate or gestational carrier without legal rights to the child, and we remand this matter for an evidentiary hearing on that issue.

Second, we conclude that St. Mary and Damon's co-parenting agreement is not void as unlawful or against public policy. When two parents, presumptively acting in the child's best interest, reach an agreement concerning post-separation custody, that agreement must not be deemed unenforceable on the basis of the parents being of the same sex. In this matter, the parties' co-parenting agreement stated that if their relationship ended, they would continue to share in the responsibilities and privileges of being the child's parent. Thus, if the district court determines on remand that both St. Mary and Damon are the child's legal parents, the district court should consider the co-parenting agreement and its enforceability in determining custody.

FACTS AND PROCEDURAL HISTORY

Approximately one year after entering into a romantic relationship with each other, St. Mary and Damon moved in together. They planned to have a child, deciding that Damon would have her egg fertilized by a sperm donor, and St. Mary would carry the fertilized egg and give birth to the child. In October 2007, Damon's eggs were implanted into St. Mary. Around the same time, Damon drafted a co-parenting agreement, which she and St. Mary signed. The agreement indicated that Damon and St. Mary sought to ''jointly and equally share parental responsibility, with both of

[1]Our opinion implicates NRS Chapter 126, which the Legislature revised in 2013 after the district court made its determinations. *See* 2013 Nev. Stat., ch. 213, §§ 1-36, at 805-13. These amendments do not change our conclusions about the issues on appeal. However, we review the district court's determinations under the law that was in effect at the time of its determinations. When citing to a statute that was amended after the district court's determinations, we identify the amendments and the version of the statute that was in effect at the time of the proceedings below.

[them] providing support and guidance.'' In it, they stated that they would ''make every effort to jointly share the responsibilities of raising [their] child,'' including paying for expenses and making major child-related decisions. The agreement provided that if their relationship ended, they would each work to ensure that the other maintained a close relationship with the child, share the duties of raising the child, and make a ''good-faith effort to jointly make all major decisions affecting'' the child.

St. Mary gave birth to a child in June 2008. The hospital birth confirmation report and certificate of live birth listed only St. Mary as the child's mother. The child was given both parties' last names, however, in the hyphenated form of St. Mary-Damon.

For several months, St. Mary primarily stayed home caring for the child during the day while Damon worked. But, nearly one year after the child's birth, their romantic relationship ended, St. Mary moved out of the home, and St. Mary and Damon disagreed about how to share their time with the child. St. Mary signed an affidavit declaring that Damon was the biological mother of the child, and in 2009, Damon filed an ex parte petition with the district court to establish maternity, seeking to have the child's birth certificate amended to add Damon as a mother. The district court issued an order stating that St. Mary gave birth to the child and that Damon ''is the biological and legal mother of said child.'' The 2009 order also directed that the birth certificate be amended to add Damon's name as a mother.

Thereafter, St. Mary instituted the underlying case by filing a complaint and motion, in a separate district court case, to establish custody, visitation, and child support. In response, Damon contended that, due to her biological connection, she was entitled to sole custody of the child. Damon attached the 2009 order to her opposition.

During a hearing on St. Mary's complaint, the district court orally advised St. Mary that she had the burden of establishing her visitation rights as a surrogate, and the court scheduled an evidentiary hearing regarding her visitation. In a subsequent hearing, the district court ruled that the issues surrounding the parties' coparenting agreement would be addressed at the evidentiary hearing.

Damon filed a motion to limit the scope of the evidentiary hearing to the issue of third-party visitation, excluding any parentage and custody issues. She asserted that the district court had already determined that St. Mary must establish her visitation rights as a surrogate and, as a result, there was no need to provide evidence to determine parentage. St. Mary opposed the motion, arguing that she was entitled to a full evidentiary hearing because limiting the hearing's scope to third-party visitation would, in effect, deny her parental rights without any opportunity to be heard on the matter.

The district court held the evidentiary hearing. Before taking evidence, the district court considered Damon's motion to limit the hearing's scope. Apparently looking to the 2009 birth certificate order and believing that Damon's status as the sole legal and biological mother had already been determined, the court decided that it would only consider the issue of third-party visitation. The limitation of the hearing's scope was significant. The district court barred consideration of St. Mary's assertion of custody rights, which concern a parent's legal basis to direct the upbringing of his or her child, *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009), and limited the hearing to a lesser right of third-party visitation. *See* NRS 125C.050.

The hearing moved forward with the parties focusing on the visitation issue. St. Mary and Damon gave conflicting testimonies regarding their relationship, the co-parenting agreement's purpose, and their intentions in using in vitro fertilization to produce the child. St. Mary testified that she and Damon intended to create the child together, wanted the child to be their child, and fertilized and implanted Damon's eggs into St. Mary so that both women would be ''related'' to the child. But Damon testified that she and St. Mary orally agreed that St. Mary would be a mere surrogate. St. Mary further testified that she and Damon created the co-parenting agreement together, believing that it would be required by the fertility clinic as a prerequisite for the performance of the reproductive procedure. St. Mary indicated that despite the fertility clinic not asking for the agreement before the procedure, she and Damon completed the agreement after the procedure. Damon asserted that she and St. Mary did not intend to create an enforceable co-parenting agreement but created the agreement to satisfy the fertility clinic's requirements and to seek insurance coverage for the pregnancy.

Following the hearing, in March 2011, the district court issued an order providing that St. Mary was entitled to third-party visitation but not custody. The court reiterated that the scope of the evidentiary hearing had been limited to the issue of third-party visitation and noted that St. Mary could not be awarded custody of the child because previous orders determined that she ''has no biological or legal rights whatsoever under Nevada law.'' Relying on NRS 126.045, which was repealed by the 2013 Legislature, the court also concluded that the co-parenting agreement was null and void because under that statute ''a surrogate agreement is only for married couples, which only include one man and one woman.'' *See* Nev. Stat., ch. 213, § 36, at 813 (repealing NRS 126.045). The 2011 order further provided that although St. Mary gave birth to the child, she ''was simply a carrier for [the child],'' and that she must ''realize that [Damon] is the mother.'' As a result, St.

Mary was granted third-party visitation rights and denied any rights as a legal mother. This appeal from the 2011 order followed.

DISCUSSION

St. Mary argues that the district court erred in determining that, legally, she was a surrogate and not the child's legal mother and in deeming the co-parenting agreement unenforceable as a matter of law. As a result of our de novo review of these legal questions, we agree. *See State Indus. Ins. Sys. v. United Exposition Servs. Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993) (''Questions of law are reviewed de novo.'').

St. Mary may be the child's legal mother

[Headnotes 1-3]

To determine parentage in Nevada, courts must look to the Nevada Parentage Act, which is modeled after the Uniform Parentage Act (UPA). The Nevada Parentage Act is ''applied to determine legal parentage.'' *Russo v. Gardner*, 114 Nev. 283, 288, 956 P.2d 98, 101 (1998). Absent an ambiguity, we focus on the statutory language and ''give effect to the plain and ordinary meaning of the words.'' *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). Our ultimate goal in interpreting the Nevada Parentage Act ''is to give effect to the legislature's intent.'' *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513 (2000).

As the Legislature's adoption of the UPA recognizes, the relationship between a parent and a child is of fundamental societal and constitutional dimension. *Willerton v. Bassham, State, Dep't of Human Res.*, 111 Nev. 10, 19-20, 889 P.2d 823, 828-29 (1995) (explaining that the model act and Nevada's adoption of it were in response to constitutionally unequal treatment of children born out of wedlock and compelling social policies); *see also In re Parental Rights as to Q.L.R.*, 118 Nev. 602, 605, 54 P.3d 56, 58 (2002) (discussing the relationship between parental rights, society, and the United States Constitution). In Nevada, all of the ''rights, privileges, duties and obligations'' accompanying parenthood are conferred on those persons who are deemed to have a parent-child relationship with the child, regardless of the parents' marital status. NRS 126.021(3); *see* NRS 126.031(1) (''The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.''). Surrogates who bear a child conceived through assisted conception for another, on the other hand, are often not entitled to claim parental rights. *See* NRS 126.045 (2009) (defining ''[s]urrogate'' as ''an adult woman who enters into an agreement to bear a child conceived through assisted conception for the intended parents,'' who are treated as the natural parents); 2013 Nev. Stat., ch. 213, §§ 10, 23, 27 at 807-

08, 810-11 (replacing the term ''surrogate'' with ''[g]estational carrier'' and defining such as a woman ''who is not an intended parent and who enters into a gestational agreement,'' wherein she gives up ''legal and physical custody'' of the child to the intended parent or parents and may ''relinquish all rights and duties as the parent[ ] of a child conceived through assisted reproduction''); *Black's Law Dictionary* 1036 (8th ed. 2004) (defining surrogate as ''[a] woman who carries out the gestational function and gives birth to a child for another''). Accordingly, whether St. Mary is treated as someone other than a legal mother, such as a surrogate, is of the upmost significance.

The multiple ways to prove maternity

Given the medical advances and changing family dynamics of the age, determining a child's parents today can be more complicated than it was in the past. To this end, although perhaps not encompassing every possibility, the Nevada Parentage Act provides several ways to determine a child's legal mother: a mother with a parent-child relationship with the child ''incident to which the law confers or imposes rights, privileges, duties, and obligations.'' NRS 126.021(3). Under the pre-2013 and current versions of NRS 126.041(1), a woman's status as a legal mother can be established by ''proof of her having given birth to the child.'' *See* NRS 126.041 (2009); 2013 Nev. Stat., ch. 213, § 34, at 812. In maternity actions under NRS Chapter 126, the statutes under which paternity may be determined apply ''[i]nsofar as practicable.'' NRS 126.231. Paternity may be established in a variety of ways, including through presumptions based on marriage and cohabitation, NRS 126.051(1)(a)-(c), presumptions based on receiving the child into the home and openly holding oneself out as a parent, NRS 126.051(1)(d), genetic testing, NRS 126.051(2), and voluntary acknowledgment, NRS 126.053. Hence, a determination of parentage rests upon a wide array of considerations rather than genetics alone. *See Love v. Love*, 114 Nev. 572, 578, 959 P.2d 523, 527 (1998) (providing that the Nevada Parentage Act ''clearly reflects the legislature's intent to allow nonbiological factors to become critical in a paternity determination'').

This case presents a situation where two women proffered evidence that could establish or generate a conclusive presumption of maternity to either woman. St. Mary testified that she gave birth to the child, thereby offering proof to establish that she is the child's legal mother. *See* NRS 126.041(1) (2009); 2013 Nev. Stat., ch. 213, § 34, at 812. Damon showed that her egg was used to produce the child, demonstrating a genetic relationship to the child that may be a basis for concluding that she is the child's legal mother. *See* NRS 126.051(2) (providing a conclusive presumption that a man is the natural father upon unrebutted evidence of a ge-

netic relationship between the father and the child); NRS 126.231 (stating that the statutes under which paternity may be determined apply ''[i]nsofar as practicable'' to maternity actions); *see also K.M. v. E.G.*, 117 P.3d 673, 678 (Cal. 2005) (noting that, under a statutory scheme based on the UPA, evidence of genetic relationship could be a basis for a determination of maternity). By dividing the reproductive roles of conceiving a child, St. Mary and Damon each assumed functions traditionally used to evidence a legal maternal relationship. Hence, this matter raises the issue of whether the Nevada Parentage Act and its policies preclude a child from having two legal mothers where two women split the genetic and physical functions of creating a child.

The law does not preclude a child from having two legal mothers

[Headnote 4]

When the district court apparently referenced the 2009 birth certificate order to conclude that Damon's status as the exclusive legal and biological mother was determined and that, as a result, it would not consider St. Mary's assertions of maternity or custody at the evidentiary hearing, it impliedly operated on the premise that a child, created by artificial insemination through an anonymous sperm donor, may not have two mothers under the law.[2] However, contrary to this premise, the Nevada Parentage Act and its policies do not preclude such a child from having two legal mothers.

Although NRS 126.051(3) contains procedures for rebutting paternity presumptions by clear and convincing evidence or ''a court decree establishing *paternity* . . . by another *man*,'' (emphases added), and while NRS 126.051(3) arguably applies in maternity cases, we decline to read this provision of the statute as conveying clear legislative intent to deprive a child conceived by artificial insemination of the emotional, financial, and physical support of an intended mother who ''actively assisted in the decision and process of bringing [the child] into this world.'' *In re T.P.S.*, 978 N.E.2d 1070, 1077 (Ill. App. Ct. 2012). In Nevada, as in other states, the best interest of the child is the paramount concern in determining the custody and care of children. *See* NRS 125.480(1) (in custody disputes, the child's best interest is the ''sole consideration of the court''); NRS 125.500(1) (allowing custody to be awarded to a nonparent if ''an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve

[2]Before being repealed in 2013, NRS 126.061(2) provided that a sperm donor was treated as if he were not the child's legal father, at least when that sperm is used to artificially inseminate a married woman. Under the 2013 version of NRS Chapter 126, a sperm donor ''relinquishes all present and future parental . . . rights and obligations to any resulting child.'' 2013 Nev. Stat., ch. 213, § 6, at 806.

the best interest of the child''); NRS 127.150(1) (providing that the court may grant adoption upon finding that it is the child's best interest); NRS 128.105 (providing that a parent-child relationship may be severed upon findings of parental fault and that such severance would serve the child's best interest). Both the Legislature and this court have acknowledged that, generally, a child's best interest is served by maintaining two actively involved parents. *See Mosley v. Figliuzzi*, 113 Nev. 51, 62-65, 930 P.2d 1110, 1117-18 (1997). To that end, the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents. *See* NRS 122A.300(1) (indicating that NRS Chapter 125 applies to registered domestic partners terminating their relationship); NRS 122A.300(3)(b) (recognizing former domestic partners' custody agreements). Certainly, the Legislature has not instructed that children born to unregistered domestic partners bear any less rights to the best-interest considerations set forth in these statutes than children born to registered domestic partners, married persons, and unmarried persons. Ultimately, ''the preservation and strengthening of family life is a part of the public policy of this State.'' NRS 128.005(1).

Of the jurisdictions that have addressed the issue of maternity between two women who created a child through assisted reproduction, California is highly instructive. California, like Nevada, enacted statutes modeled after the UPA. *See K.M.*, 117 P.3d at 678. The California Supreme Court has determined that its laws do not preclude two women from being the legal mothers of a child. *See Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005) (providing that, under the California UPA, there is ''no reason why both parents of a child cannot be women''); *see also K.M.*, 117 P.3d at 675. In *K.M.*, the California Supreme Court dealt with a maternity case that presented facts analogous to the instant case. There, K.M.'s eggs were implanted in E.G., her lesbian partner who gave birth to twins. 117 P.3d at 676. Thereafter, K.M. and E.G.'s relationship ended, and K.M. sought custody and visitation of the twins, but the trial court denied her request, determining that she had relinquished her parental rights. *Id.* at 677. On appeal, the California Supreme Court agreed with K.M.'s contention that she was the twins' legal mother because her eggs were used for the twins' birth. *Id.* at 678. It concluded that because ''K.M.'s genetic relationship with the twins constitutes evidence of a mother and child relationship under the UPA,'' and ''[t]he circumstance that E.G. gave birth to the twins also constitutes evidence of a mother and child relationship[,] . . . both K.M. and E.G. are mothers of the twins under the UPA.'' *Id.* at 680-81. The court held that when a woman provides her eggs to her lesbian partner so that the partner can bear children by in vitro fertilization, both women are the child's legal mothers. *Id.* at 675.

California's precedent is highly persuasive because it pertains to a statutory scheme that is substantially similar to Nevada's and advances the policies that underlie the Nevada Parentage Act—preventing children from ''becom[ing] wards of the state,'' *Willerton v. Bassham, State, Dep't of Human Res.*, 111 Nev. 10, 20, 899 P.2d 823, 829 (1995), minding a child's best interest, *see* NRS 125.480(1); NRS 125.500; NRS 127.150; NRS 128.105, and serving a child's best interest with the support of two parents. *See Mosley*, 113 Nev. at 62-65, 930 P.2d at 1117-18. As other jurisdictions have acknowledged, recognizing two legal parents, such as two legal mothers, supports these policies. *See, e.g.*, *Elisa B.*, 117 P.3d at 669 (concluding that a woman was a legal mother with an obligation to pay child support to her former lesbian partner; although the woman was not a genetic or gestational mother, she held the children out as her own, and concluding otherwise ''would leave [the children] with only one parent and would deprive them of the support of their second parent''); *Chatterjee v. King*, 280 P.3d 283, 292 (N.M. 2012) (explaining that a child can have two legal mothers under the New Mexico UPA because ''the state has a strong interest in ensuring that a child will be cared for, financially and otherwise, by two parents''); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) (determining that two women were both legal mothers of a child where, among other things, concluding otherwise ''would leave [the child] with only one parent'').

Hence, there is no legal or policy-based barrier to the establishment under NRS Chapter 126, as it existed at the time of the district court's determinations and as it exists now, of a legal parent and child relationship with both St. Mary and Damon. Rather, the Nevada Parentage Act and its policies permit a child created by artificial insemination, where one woman had her egg fertilized by a sperm donor and implanted into her female partner, to have two legal mothers.

Nonetheless, the district court determined that St. Mary was not the child's legal mother. The court appears to have grounded this conclusion on the 2009 order, which provided that Damon was the child's legal mother and required Damon's name to be added to the child's birth certificate. But while that order stated that Damon was ''the biological and legal mother'' of the child, it in no way purported to undo or deny St. Mary's parent-child relationship with the child. The order did not require the removal of St. Mary's name from the birth certificate or provide that St. Mary was not the child's legal mother. Rather, it acknowledged Damon's relationship with the child without denying the same of St. Mary. Moreover, whether St. Mary had rights to the child was not an issue that Damon's 2009 petition sought to resolve because it re-

quested that ''maternity be established'' and ''[t]hat the birth certificate be amended to add the biological mother's name of . . . D[amon].''

Further, the district court's finding that St. Mary was a mere surrogate went beyond the limited scope of the hearing, which the district court prefaced by confirming that it would not consider parentage. Because this argument was not resolved by the 2009 order or any other prior determination, and since the Nevada Parentage Act did not bar a consideration of the evidence regarding St. Mary's claims for maternity and custody rights, the district court erred in refusing to consider the parentage issue and limiting the scope of the evidentiary hearing based on its conclusion that St. Mary was a surrogate—which was a conclusion that was made without an evidentiary hearing on that issue.

St. Mary asserts that she is a legal mother of the child in addition to Damon, not instead of Damon. This claim must be given consideration under the Nevada Parentage Act, which does not preclude the child from having two legal mothers. Because the district court erroneously concluded that St. Mary was a mere surrogate and limited the scope of the evidentiary hearing to third-party visitation issues, the district court did not consider the parentage statutes with respect to St. Mary's and Damon's testimonies regarding their intent in creating the child and the nature of their relationship to one another and the child. Although St. Mary's parentage can be established by virtue of her having given birth to the child, *see* NRS 126.041(1) (2009); 2013 Nev. Stat., ch. 213, § 34, at 812, the parties dispute whether they intended for St. Mary to be the child's parent or simply a surrogate or gestational carrier who lacked a legal parent-child relationship to the child. Therefore, upon remand, the district court must hold an evidentiary hearing to determine whether St. Mary is the child's legal mother or if she is someone without a legal relationship to the child, during which the court may consider any relevant evidence for establishing maternity under the Nevada Parentage Act.

The co-parenting agreement was not a surrogacy agreement and was consistent with Nevada's public policy

[Headnote 5]

St. Mary asserts that the co-parenting agreement demonstrates the parties' intent regarding parentage and custody of the child and that the district court erred in determining that the co-parenting agreement was an unenforceable surrogacy agreement under NRS 126.045. Damon responds that, because the agreement was between an unmarried intended parent and a surrogate and purported to resolve issues of parentage and child custody, the district court correctly deemed that the co-parenting agreement was prohibited by NRS 126.045 (2009).

At the time of the district court's determinations, NRS 126.045 (2009) governed contracts between two married persons and a gestational carrier, or surrogate, for assisted reproduction. It required such contracts to specify the parties' rights, including the ''[p]arentage of the child,'' the ''[c]ustody of the child in the event of a change of circumstances,'' and the ''respective responsibilities and liabilities of the contracting parties.'' NRS 126.045(1)(a)-(c) (2009). Additionally, the statute defined a ''[s]urrogate'' as ''an adult woman who enters into an agreement to bear a child conceived through assisted conception for the intended parents,'' and ''[i]ntended parents'' were defined as ''a man and woman, married to each other,'' who agree to ''be the parents of a child born to a surrogate through assisted conception.'' NRS 126.045(4)(b), (c) (2009). Here, St. Mary and Damon's co-parenting agreement was not within the scope of NRS 126.045. The agreement lacked any language intimating that St. Mary acted as a surrogate, such as language indicating that she surrendered custody of the child or relinquished her rights as a mother to the child. Rather, the agreement expressed that St. Mary would share the parental duties of raising the child and would jointly make major parenting decisions with Damon.[3]

Nevertheless, Damon insists that, because the agreement covered issues of parentage and child custody, it necessarily addressed issues contemplated by NRS 126.045 and, as a result, is void for failing to meet the statute's other terms. In other words, Damon argues that outside of NRS 126.045, agreements (at least those with a non-parent) concerning parentage, custody, and responsibilities over a child are void. But, as explained above, parentage is governed by NRS Chapter 126. In the event that both parties are determined to be the child's parents, nothing in Nevada law prevents two parents from entering into agreements that demonstrate their intent concerning child custody.

[Headnotes 6-8]

''Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy.'' *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009). It is presumed that fit parents act in the best interest of their children. *Troxel v. Granville*, 530 U.S. 57, 68 (2000). Thus, public policy favors fit parents entering agreements to re-

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[3]In 2013, the Legislature repealed NRS 126.045, substituted the term ''surrogate'' with ''gestational carrier,'' and defined ''[g]estational carrier'' as one ''who is not an intended parent and who enters into a gestational agreement'' under which she ''[s]urrender[s] legal and physical custody'' of the child to the intended parent or parents and may ''relinquish all rights and duties as the parent[ ] of a child.'' 2013 Nev. Stat., ch. 213, §§ 10, 23, 27, 36, at 807-08, 810, 813. The language of St. Mary and Damon's co-parenting agreement does not appear to be within the scope of this new statute.

solve issues pertaining to their minor child's ''custody, care, and visitation.'' *See Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011); *Rivero*, 125 Nev. at 417, 216 P.3d at 219 (permitting parents to create their own custody agreements, which are generally enforceable); *see also Rico v. Rodriguez*, 121 Nev. 695, 701, 120 P.3d 812, 816 (2005) (providing that a child's best interest is the primary concern in custody matters).

[Headnote 9]

When a child has the opportunity to be supported by two loving and fit parents pursuant to a co-parenting agreement, this opportunity is to be given due consideration and must not be foreclosed on account of the parents being of the same sex. *See Kristine H. v. Lisa R.*, 117 P.3d 690, 696 (Cal. 2005) (stating that, in the context of a child being parented by two women, ''public policy favor[s] that a child has two parents rather than one''); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892-93 (Mass. 1999) (engaging in an analysis that indicated that a same-sex couple's co-parenting agreement could be enforceable insofar as it was in the child's best interest); *A.C. v. C.B.*, 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (finding that child visitation provisions of a co-parenting agreement between two women are enforceable if they are in the child's best interest). To bar the enforceability of a co-parenting agreement on the basis of the parents' genders conflicts with the Nevada Parentage Act's policies of promoting the child's best interest with the support of two parents. *See Mosley v. Figliuzzi*, 113 Nev. 51, 62-65, 930 P.2d 1110, 1117-18 (1997).

St. Mary and Damon's co-parenting agreement was aligned with Nevada's policy of allowing parents to agree on how to best provide for their child. Within their co-parenting agreement, St. Mary and Damon sought to provide for their child's best interest by agreeing to share the responsibilities of raising the child, even if the relationship between St. Mary and Damon ended. The agreement's language provides the indicia of an effort by St. Mary and Damon to make the child's best interest their priority. Thus, in the event that St. Mary is found to be a legal mother, the district court must consider the parties' co-parenting agreement in making its child custody determination.

CONCLUSION

The district court, in issuing its 2011 order, erred in determining that St. Mary lacked ''legal rights'' to the child because it misinterpreted the 2009 order, which recognized Damon's relationship to the child without affecting the same of St. Mary. The Nevada Parentage Act does not preclude St. Mary and Damon from both being legal mothers of the child. Hence, the district court abused its discretion in limiting the evidentiary hearing to the issue of third-party visitation. The district court also erred in deeming the

co-parenting agreement unenforceable under NRS 126.045. The agreement's plain language indicated that it was not a surrogacy arrangement within the scope of that statute. Moreover, the parties' co-parenting agreement aligns with Nevada's policy of encouraging parents to enter into parenting agreements that resolve matters pertaining to their child's best interest.

As a result, we reverse the 2011 order. We remand this matter to the district court for further proceedings to determine the child's parentage, custody, and visitation.[4]

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

WARREN MARKOWITZ, AN INDIVIDUAL; AND JACQUELINE MARKOWITZ, AN INDIVIDUAL, APPELLANTS, *v.* SAXON SPECIAL SERVICING; AND DEUTSCHE BANK NATIONAL TRUST COMPANY, RESPONDENTS.

No. 58761

October 3, 2013 310 P.3d 569

Appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program matter. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Mortgagors petitioned for judicial review of statement of mediator in Foreclosure Mediation Program. The district court dismissed petition. Mortgagors appealed. The supreme court held that: (1) 60-day appraisal requirement for mediation was directory rather than mandatory, (2) submission of 83-day-old appraisal substantially complied with requirement, and (3) loan servicer had authority to participate in mediation.

Affirmed.

[Rehearing denied January 24, 2014]

Law Office of Jacob L. Hafter & Associates and *Jacob L. Hafter* and *Michael K. Naethe*, Las Vegas, for Appellants.

McCarthy & Holthus, LLP, and *Kristin A. Schuler-Hintz*, Las Vegas, for Respondents.

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[4]In light of this opinion, we decline to address St. Mary's remaining arguments. We note that, as addressed in the parties' supplemental briefs, upon remand, it may be necessary to join the child as a party to this action under NRS 126.101(1).

1. COURTS.
   To determine if a rule's provisions require strict or substantial compliance, the supreme court looks to the rule's language, and the court also considers policy and equity principles.
2. COURTS.
   A rule may contain both mandatory and directory provisions.
3. COURTS.
   A rule is generally mandatory and requires strict compliance when its language states a specific time and manner for performance; time and manner refers to when performance must take place and the way in which the deadline must be met.
4. COURTS.
   Form and content provisions of a rule dictate who must take action and what information that party is required to provide; because they do not implicate notice, form and content-based rules are typically directory and may be satisfied by substantial compliance sufficient to avoid harsh, unfair, or absurd consequences.
5. COURTS.
   When substantial compliance with a rule is sufficient, a party's literal noncompliance with a rule is excused provided that the party complies with respect to the substance essential to every reasonable objective of the rule.
6. COURTS.
   When a party accomplishes actual compliance with a rule as to matters of substance, technical deviations from form requirements do not rise to the level of noncompliance.
7. STATUTES.
   Deciding whether a rule is intended to impose a mandatory or directory obligation is a question of statutory interpretation.
8. APPEAL AND ERROR.
   The supreme court reviews de novo issues of statutory construction.
9. COURTS.
   The supreme court's objective when interpreting a rule is to determine and implement its purpose.
10. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
    Requirement of Foreclosure Mediation Program Rules that, in mediation pursuant to Foreclosure Mediation Program, the deed-trust beneficiary submit an appraisal and/or a broker's price opinion prepared no more than 60 days before the commencement date of the mediation that provided a valuation for the home that was the subject of the mediation was directory regarding the age of the appraisal, rather than mandatory, and thus, substantial compliance with the 60-day provision satisfied the mediation rule; although rule used the word ''shall'' in describing the requirement, the purposes of the current appraisal or broker's price opinion was to facilitate good-faith mediation negotiations.
11. STATUTES.
    The word ''shall'' is generally regarded as mandatory.
12. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
    Submission of 83-day-old appraisal substantially complied with requirement of Foreclosure Mediation Program Rules that, in mediation pursuant to Foreclosure Mediation Program, the deed-trust beneficiary submit an appraisal and/or a broker's price opinion prepared no more than 60 days before the commencement date of the mediation that provides a

valuation for the home that is the subject of the mediation, where there was no suggestion that the appraisal was inaccurate.

13. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

Loan servicer of deed-trust beneficiary was a valid representative of beneficiary for purposes of participating in mediation pursuant to the Foreclosure Mediation Program, where servicer had authority to modify the loan, mortgagors had made their mortgage payments to servicer, and mortgagors had entered into stipulation that specifically recited servicer as servicing agent for beneficiary. NRS 107.086(5).

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

OPINION

Per Curiam:

Under Nevada's Foreclosure Mediation Program Rules, the deed-trust beneficiary must submit an appraisal and/or a broker's price opinion prepared ''no more than 60 days before the commencement date of the mediation'' that provides a valuation for the home that is the subject of the mediation. Saxon Special Servicing attended the underlying mediation and provided a broker's price opinion that was 83 days old at the time of mediation. We are asked to decide whether the mediation rule requiring an appraisal or broker's price opinion that is no more than 60 days old at the time of the mediation mandates strict or substantial compliance. We conclude that because a current appraisal or broker's price opinion is intended to facilitate good-faith mediation negotiations, the rule's content-based provision governing the appraisal's age is directory rather than mandatory, and thus, substantial compliance with the 60-day provision satisfies the mediation rule. Because the broker's price opinion here contained a recent appraisal of the home's value adequate to facilitate negotiations, and the homeowners did not demonstrate that they were prejudiced by the 23-day age differential between the price opinion provided and the rule's age provision, Saxon Special Servicing substantially complied with the foreclosure mediation rule requiring a current appraisal, and we therefore affirm the district court's order denying the petition for judicial review.

I.

Appellants Warren and Jacqueline Markowitz obtained a home loan from Fremont Investment & Loan, for which they executed a promissory note in Fremont's favor. The note was later assigned to respondent Deutsche Bank National Trust Company and serviced on Deutsche Bank's behalf by respondent Saxon Special Services.

After the Markowitzes stopped making payments to Saxon, a notice of default was recorded. The Markowitzes then elected to mediate in Nevada's Foreclosure Mediation Program (FMP).

The mediation occurred on December 28, 2010. Warren attended the mediation in person along with counsel, and Jacqueline attended by telephone. Saxon, purporting to represent Deutsche Bank, appeared through counsel. Saxon provided all of the required documents for the mediation, including an 83-day-old broker's price opinion (BPO).[1] During the mediation, the Markowitzes raised concerns about Saxon's authority to participate. Saxon's counsel explained that she had the authority to negotiate a loan modification. The mediator spoke by telephone with a representative of Saxon who confirmed that Saxon was the servicer of the loan. Despite this confirmation, the Markowitzes were not convinced that Saxon had authority to negotiate a loan modification, and they elected to terminate the mediation.

The mediator issued a statement indicating that the Markowitzes failed to provide certain documents for the mediation and that Saxon failed to bring a current BPO. The mediator's statement did not indicate that any party lacked authority to negotiate or failed to attend the mediation. The Markowitzes filed a petition for judicial review, which, after briefing and argument, the district court denied, concluding that the parties had negotiated in good faith with valid authority and that there was no reason to withhold the FMP certificate. This appeal followed.

II.

A.

The primary issue in this appeal concerns the 83-day-old BPO that Saxon provided for the mediation. The relevant foreclosure rule in place at the time of this dispute required that

> [t]he beneficiary of the deed of trust or its representative shall produce an appraisal done no more than 60 days before the commencement date of the mediation with respect to the real property that is the subject of the notice of default and shall prepare an estimate of the ''short sale'' value of the residence that it may be willing to consider as a part of the negotiation if loan modification is not agreed upon.

FMR 8(3) (2010). The rule also permitted the mediator, in his or her discretion, to ''accept a broker's price opinion letter (BPO) in addition to or in lieu of the appraisal.'' FMR 8(4) (2010). These

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[1]A broker's price opinion is a ''written analysis, opinion or conclusion . . . relating to the estimated price for a specified parcel of real property.'' NRS 645.2515(8).

rules have since been amended,[2] but the amendments do not change our analysis.

While the mediator here reported that Saxon failed to provide an ''appraisal within 60 days of mediation,'' the district court, in its de novo review, concluded that although the BPO was not prepared within 60 days of the mediation, neither party acted in bad faith and there was no reason to withhold the FMP certificate. The Markowitzes maintain that document production at mediation requires strict compliance and that a BPO prepared beyond the 60-day limit precludes the issuance of an FMP certificate and mandates the imposition of sanctions. Respondents counter that the purpose of providing a BPO or appraisal is to ''substantiate the short sale value'' that the parties may agree to in the event that a loan modification cannot be reached. Respondents insist that the BPO provided at mediation set forth the value of the property that they would accept in a short sale, and that the Markowitzes were not prejudiced by the age of the BPO. In any case, respondents argue that because no short sale was ever discussed, as the Markowitzes elected to terminate the mediation, the BPO's age was of no relevance.

[Headnotes 1-6]

To determine if a rule's provisions require strict or substantial compliance, this court looks to the rule's language, and we also consider policy and equity principles. *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475-76, 255 P.3d 1275, 1278 (2011). A rule may contain both mandatory and directory provisions. *See Leven v. Frey*, 123 Nev. 399, 408 n.31, 168 P.3d 712, 718 n.31 (2007); *see also Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012); 3 Norman J. Singer, *Statutes and Statutory Construction* § 57:19 (6th ed. 2001). Generally, a rule is mandatory and requires strict compliance when its language states a specific ''time and manner'' for performance. *Leven*, 123 Nev. at 407 n.27, 408, 168 P.3d at 717 n.27, 718. Time and manner refers to when performance must take place and the way in which the deadline must be met. *See Village League to Save Incline Assets, Inc. v. State Bd. of Equalization*, 124 Nev. 1079, 1088, 194 P.3d 1254, 1260 (2008) (discussing statutory deadlines); *Leven*, 123 Nev. at 407-08, 168 P.3d at 717-18 (addressing three-day recording statute's deadline). ''[F]orm and content'' provisions, on the other hand, dictate who must take action and what information that party is required to provide, *Einhorn*, 128 Nev. at 696, 290 P.3d at 254 (stating that ''who brings which documents . . . is a matter of 'form' ''). Because they do not im-

[2]FMR 8 was renumbered to FMR 11, and the relevant portion of the rule currently provides that the trust-deed beneficiary or its representative must provide an ''Appraisal and/or Brokers Price Opinion (BPO) not more than 60 days old (prior to the date of mediation).'' FMR 11(7)(e) (2013).

plicate notice, form and content-based rules are typically directory and may be satisfied by substantial compliance, *id.*, ''sufficient to avoid harsh, unfair or absurd consequences.'' *Leven*, 123 Nev. at 407, 168 P.3d at 717 (quotation omitted). When substantial compliance is sufficient, a party's literal noncompliance with a rule is excused provided that the party complies with ''respect to the substance essential to every reasonable objective'' of the rule. *Stasher v. Harger-Haldeman*, 372 P.2d 649, 652 (Cal. 1962); *see also* 3 *Sutherland Statutory Construction* § 57:26 (7th ed. 2012). When a party accomplishes such actual compliance as to matters of substance, technical deviations from form requirements do not rise to the level of noncompliance. *Stasher*, 372 P.2d at 652.

[Headnotes 7-9]

Deciding whether a rule is intended to impose a mandatory or directory obligation is a question of statutory interpretation. *See Village League*, 124 Nev. at 1088, 194 P.3d at 1260 (interpreting a statutory time limit); *see also Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006) (applying rules of statutory construction to the interpretation of a court rule). We review de novo issues of statutory construction. *Leven*, 123 Nev. at 402, 168 P.3d at 714. Our objective when interpreting a rule is to determine and implement its purpose. *Village League*, 124 Nev. at 1088, 194 P.3d at 1260; *see Leyva*, 127 Nev. at 476, 255 P.3d at 1278-79.

1.

[Headnotes 10, 11]

FMR 8(3)'s language embraces both a mandatory time provision and a directory content provision related to the age of the appraisal used for negotiation purposes at the mediation. The rule states that the deed of trust beneficiary or its representative ''shall prepare such papers and provide to the mediator, and exchange the items required to be exchanged with each other party . . . at least 10 days prior to the mediation.''[3] FMR 8(1) (2010). One such paper is an appraisal and/or a BPO, which the deed-trust beneficiary ''shall produce,'' and in so doing, ''shall prepare an estimate of the 'short sale' value of the residence that it may be willing to consider as a part of the negotiation if loan modification is not agreed upon.'' FMR 8(3) (2010). The word ''shall'' is generally regarded as mandatory. *Leyva*, 127 Nev. at 476, 255 P.3d at 1279. Here, the rule provides that the deed-trust beneficiary or its representative ''shall produce an appraisal'' and ''shall prepare an estimate of the 'short sale' value,'' FMR 8(3) (2010), and it ''shall'' do so ten

[3]The current rule provides that ''[t]he beneficiary of the deed of trust must prepare and submit, at least 10 days prior to the mediation'' various documents to be provided to the homeowner and mediator. FMR 11(7) (2013).

days in advance of the mediation. FMR 8(1) (2010). The purpose of FMP mediation is to bring the parties ''together to participate in a meaningful negotiation'' to resolve the dispute. *Einhorn*, 128 Nev. at 691, 290 P.3d at 250 (citing *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 893, 266 P.3d 602, 607 (2011)). As the rule explains, the value of the home is key to the negotiation, FMR 8(3) (2010), and providing the appraisal is one indicator that the trust-deed beneficiary participated in the mediation in good faith. *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 466, 255 P.3d 1281, 1284 (2011). Thus, the rule's mandatory language weighs in favor of requiring strict compliance, as the appraisal is a necessary document for the mediation and good-faith negotiations therein.

2.

But the rule also provides that the appraisal or BPO shall be prepared ''no more than 60 days before the commencement date of the mediation.'' FMR 8(3) (2010). Separating the rule into its procedural and substantive parts, the ''shall prepare such papers . . . at least 10 days prior to the mediation'' language refers to the time when the deed of trust beneficiary is required to give the mediator and the homeowners the appraisal or BPO. This provision governs the time and manner for the deed of trust beneficiary to perform one of its duties to negotiate in good faith. Such provisions generally must be complied with strictly. *Leven*, 123 Nev. at 408, 168 P.3d at 718. The rule's ''no more than 60 days'' old language, however, refers to the age of the appraisal or BPO, so that the parties may negotiate based on the home's present value, and thus, addresses form and content. Such requirements may generally be satisfied by substantial compliance. *Id*.

The policy behind providing a recent appraisal and/or BPO at the mediation is to ensure that the fair market value of the property is known to both parties to the mediation at the time when they are negotiating a potential loan modification or determining whether a short sale would be appropriate. FMR 8(3) (2010). This allows for fully informed negotiations to occur and ensures that offers made are based on the present economic reality concerning the property and are consistent with the FMP's purpose of bringing the parties together for meaningful negotiation. *Einhorn*, 128 Nev. at 691, 290 P.3d at 250 (citing *Holt*, 127 Nev. at 893, 266 P.3d at 607).

Requiring an appraisal or BPO to be no more than 60 days old facilitates informed negotiation based on accurate information, and this purpose may be met through substantial compliance, as a slightly older BPO may be just as accurate as a 60-day-old BPO. *See Leyva*, 127 Nev. at 475-76, 255 P.3d at 1279. By contrast, a 200-day-old BPO would likely reflect very different market valuations than a BPO that was reasonably close to the FMR's 60-day valuation window. Providing a BPO that is so old that it has be-

come inaccurate frustrates the FMP's goal. Therefore, the policy concern regarding the age of an appraisal or BPO is a matter of content, which is directory, and the requirement may be satisfied by substantial compliance. *Leven*, 123 Nev. at 408, 168 P.3d at 718.

3.

[Headnote 12]

In terms of equity concerns, despite the fact that the underlying 83-day-old BPO was beyond the 60-day limit, the Markowitzes made no effort to demonstrate that it was inaccurate. As such, there appears to be no prejudice or harm to the Markowitzes in having an 83-day-old BPO from which to negotiate a loan modification, *see Einhorn*, 128 Nev. at 697, 290 P.3d at 254, and the goal of providing accurate information to ensure meaningful negotiations was accomplished. *Id*. at 691, 290 P.3d at 250. Thus, in weighing the equities, where the Markowitzes have not shown any prejudice in their ability to negotiate a loan modification based on the BPO age, and respondents would be denied the ability to exercise their contractual remedy of foreclosure for want of a strictly compliant 60-day or younger BPO, we conclude that withholding the FMP certificate would be an inequitably harsh consequence, and equity favors reviewing the BPO for substantial compliance. *See Holt*, 127 Nev. at 893-94, 266 P.3d at 606-07 (recognizing consequences of denial of the ability to foreclose).

We therefore hold that an appraisal or BPO older than 60 days may nevertheless substantially comply with the FMR sufficient to avoid the imposition of sanctions when there is no evidence that the BPO is so old that it would impair the FMP's policy of facilitating good-faith negotiations or the BPO's content is inaccurate to the extent that the homeowners would be prejudiced. Such is the situation in the present matter, and thus, the district court therefore correctly declined to impose sanctions and denied judicial review based on respondents' stale BPO. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 521, 286 P.3d 249, 260 (2012).

B.

[Headnote 13]

One other issue remains for our consideration: whether respondents properly participated in the mediation session with the requisite authority to negotiate a loan modification. The Markowitzes argue that the mediation was flawed because Saxon did not establish valid authority to negotiate the loan. Respondents contend that Saxon, as Deutsche Bank's servicer, is a valid representative of Deutsche Bank for purposes of participating in the FMP and that the Markowitzes were aware of the relationship between Saxon and Deutsche Bank.

The deed-trust beneficiary may participate in the FMP mediation directly or through a representative with proper authority to negotiate a loan modification. NRS 107.086(5). The record before us establishes Saxon's status as Deutsche Bank's loan servicer and its authority to modify the loan in its capacity as Deutsche Bank's representative. The record contains the publicly recorded substitutions of trustee, which the Markowitzes included as exhibits to their petition for judicial review, and which demonstrate Saxon's status as the loan servicer and Deutsche Bank's status as the beneficiary of the deed of trust. Further, the evidence submitted in their judicial review proceeding shows that, until the Markowitzes ceased paying their mortgage, they made payments to Saxon, and thus, they recognized Saxon's role as the loan servicer. And before the Markowitzes defaulted on the loan, they entered into a stipulation that specifically recited that Saxon was the servicing agent for Deutsche Bank. Saxon therefore properly attended the mediation as Deutsche Bank's representative. *See* NRS 107.086(5); *see also Edelstein*, 128 Nev. at 521 n.11, 286 P.3d at 260 n.11 (stating that a servicer is a valid representative under NRS 107.086(5)).

The Markowitzes also contend that respondents lacked authority to participate in the FMP because MERS was incapable of acting as a beneficiary of the deed of trust, and thus, it could not have validly transferred the mortgage note to Deutsche Bank. This court rejected this argument in *Edelstein*, 128 Nev. at 521, 286 P.3d at 260-61 (holding that a MERS assignment of the deed of trust validly transfers the note), and based on the record in this matter, we conclude that through the valid MERS assignment, Deutsche Bank was the beneficiary of the deed of trust and holder of the promissory note, with authority to participate in FMP mediation and modify the loan.[4] The district court therefore did not err in determining that respondents validly appeared at the mediation with authority to negotiate a loan modification. *Id.* at 521-22, 286 P.3d at 260 (explaining that the district court's factual and legal conclusions are reviewed for error, while the choice of sanction is committed to the district court's discretion).

IV.

We discern no violation that would preclude the FMP certificate from issuing, and we therefore affirm the district court's order.

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[4]Appellants also argue that the MERS assignment is invalid because it was executed in March 2009, but not notarized until June 2009. Appellants do not cite to any Nevada authority that requires an assignment of a deed of trust to be acknowledged in front of a notary on the date it is generated. *See Einhorn*, 128 Nev. at 694 n.4, 290 P.3d at 252 n.4.

IN RE CITYCENTER CONSTRUCTION AND LIEN MASTER LITIGATION.

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

No. 61130

October 3, 2013 310 P.3d 574

Original petition for a writ of mandamus challenging a district court order denying petitioner's motion to dismiss real parties in interest's third- and fourth-party complaints.

After being brought into commercial construction litigation as defendants, subcontractors filed third- and fourth-party complaints against construction inspector to recover damages that allegedly arose from the deficient performance of its services. The district court denied inspector's motions to dismiss. Inspector petitioned for writ of mandamus. The supreme court, SAITTA, J., held that: (1) inspector's challenge to trial court's refusal to dismissal complaint was appropriate matter for mandamus, (2) subcontractors' claims involved nonresidential construction, (3) inspector constituted a design professional, and (4) noncompliance with expert report pleading requirements mandated dismissal of subcontractors' claims.

Petition granted.

Wilson Elser Moskowitz Edelman & Dicker, LLP, and *Michael M. Edwards* and *J. Scott Burris*, Las Vegas, for Petitioner.

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

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

1. MANDAMUS.

Commercial construction inspector's challenge to trial court's refusal to dismiss subcontractors' amended complaint seeking damages from inspector, due to alleged performance of deficient services, because of fail-

ure to comply with statutory attorney affidavit and expert report pleading requirements was appropriate matter for consideration on petition for writ of mandamus, where the determination of issue was not fact-bound and involved unsettled issues of law that were likely to recur, and resolving issue at early stage of the underlying litigation promoted judicial economy. NRS 11.258, 34.160.

2. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. APPEAL AND ERROR.
   The supreme court reviews issues of statutory interpretation de novo.
4. STATUTES.
   The ultimate goal of interpreting statutes is to effectuate the Legislature's intent.
5. STATUTES.
   The supreme court interprets clear and unambiguous statutes based on their plain meaning.
6. STATUTES.
   When a statute is ambiguous, the supreme court consults sources other than the language of the statute, such as legislative history, reason, and policy to identify and give effect to the Legislature's intent.
7. NEGLIGENCE; PLEADING.
   Subcontractors' claims against commercial construction inspector seeking damages for alleged deficient performance of services constituted an action involving nonresidential construction, and therefore were subject to statutory attorney affidavit and expert report pleading requirements for actions involving nonresidential construction against design professionals; construction of a building involved inspection of the ongoing construction activity, and claims that a quality control and assurance inspector made misrepresentations about the construction's quality or was at fault for defective conditions concerned the construction of the building. NRS 11.2565(1), 11.258.
8. NEGLIGENCE; PLEADING.
   Commercial construction inspector constituted a design professional, and therefore subcontractors' claims for damages against inspector for alleged deficient performance of services were subject to statutory attorney affidavit and expert report pleading requirements for actions involving nonresidential construction against design professionals, where subcontractors alleged that inspector was required to inspect steel work for irregularities and deficiencies and make certain that the installation of the steel comported with construction plans and specifications, and that inspector's services included, but were not limited to, inspections of the steel, conducting tension tests, and quality assurance services. NRS 11.2565(2)(b).
9. APPEAL AND ERROR.
   The supreme court generally does not consider matters outside the pleadings in reviewing an order denying a motion to dismiss.
10. PRETRIAL PROCEDURE.
    Subcontractors' failure to comply with statutory attorney affidavit and expert report pleading requirements for actions involving nonresidential construction against design professional warranted dismissal of claims against commercial construction inspector for damages due to alleged deficient performance of services, where statute expressly provided for mandatory dismissal of the individual claims, rather than the entire action, for noncompliance with pleading requirements. NRS 11.259(1).

11. STATUTES.
The supreme court often relies on legislative history to resolve statutory ambiguity.
12. STATUTES.
The supreme court interprets statutes to conform to reason and public policy.
13. STATUTES.
In interpreting statutes, the supreme court avoids interpretations that lead to absurd results.
14. COURTS; STATUTES.
Whenever possible, the supreme court will interpret a rule or statute in harmony with other rules or statutes.

Before the Court EN BANC.[1]

OPINION

By the Court, SAITTA, J.:

''[I]n an action involving nonresidential construction,'' the complainant's attorney ''shall file [an affidavit and expert report] concurrently with the service of the first pleading.'' NRS 11.258(1); *see* NRS 11.258(3). An ''[a]ction involving nonresidential construction'' concerns the construction (and related activities) of a nonresidential building and is against a ''design professional.'' NRS 11.2565(1). The district court ''shall dismiss [the] action'' if NRS 11.258 is violated. NRS 11.259(1). In *Otak Nevada, L.L.C. v. Eighth Judicial District Court*, 127 Nev. 593, 260 P.3d 408 (2011), we held that an amended pleading must be dismissed when it followed an initial pleading that was void ab initio—of no legal effect—because it was filed without the affidavit and expert report required by NRS 11.258. *Id.* at 593, 599, 260 P.3d at 409, 411-12.

Petitioner Converse Professional Group relied on *Otak* in filing motions to dismiss amended complaints that real parties in interest Century Steel, Inc., and Pacific Coast Steel (PCS) filed against it. Century and PCS were subcontractors whose work Converse had inspected. After being brought into commercial construction litigation as defendants, Century and PCS filed third- and fourth-party complaints and amended complaints against Converse to recover damages that allegedly arose from the deficient performance of its services. Converse filed motions to dismiss the amended complaints. It asserted that it was a design professional and that the initial pleadings were void ab initio and could not be cured by the amended pleadings because Century and PCS failed to file the at-

[1]THE HONORABLE KRISTINA PICKERING, Chief Justice, and THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused themselves from participation in the decision of this matter.

torney affidavit and expert report that NRS 11.258 requires for actions involving nonresidential construction. After expressing concern that NRS 11.259(1) may require dismissing the entire litigation, the district court denied the motions.

Converse brings this petition for a writ of mandamus to compel the dismissal of the amended pleadings. We conclude that Century's and PCS's initial causes of action brought actions that were within the scope of NRS 11.2565(1)'s definition of an action involving nonresidential construction. As a result, because their pleadings identified Converse's services that implicated the practice of professional engineering, *see* NRS 625.050(1)(a), their pleadings were against a design professional, *see* NRS 11.2565(2)(b), thereby subjecting them to NRS 11.258's attorney affidavit and expert report requirements. We further conclude that the *Otak* court correctly construed NRS 11.259(1) as requiring the dismissal of an amended pleading—not an entire action—that followed an initial pleading that was filed without adhering to NRS 11.258. Thus, the district court must dismiss the amended pleadings against Converse as they were void ab initio for their failure to comply with NRS 11.258. Accordingly, we grant Converse's petition.

FACTS AND PROCEDURAL HISTORY

Century, and its successor in interest PCS, subcontracted to perform the steel installation on a new building, the Harmon Tower, which was to be part of a large-scale, mixed-use development in Las Vegas known as CityCenter. Converse was hired by the project's owner to render third-party quality control and assurance inspections. According to Century's and PCS's pleadings, Converse's services included inspecting their work for quality assurance and compliance with construction plans and specifications.

After alleged defects were discovered in the Harmon Tower, construction stopped, and litigation between the project's owner, general contractor, and subcontractors began. Century and PCS filed third- and fourth-party complaints against Converse for contribution and/or indemnity allegedly warranted by Converse's negligent inspection work. When these claims were dismissed, Century and PCS were granted leave to file amended complaints against Converse alleging negligent and intentional misrepresentation, contribution, and equitable indemnity. Century and PCS did not file an affidavit or expert report regarding the basis for their claims when the initial complaints or the amended complaints were served. In response, Converse moved to dismiss the amended pleadings pursuant to NRS 11.259(1), arguing that Century and PCS failed to file the attorney affidavit and expert report with their initial complaints, as is required by NRS 11.258 for actions against design professionals involving nonresidential construction.

During a hearing on the motions, the district court expressed its concern that if it agreed with Converse's position, then NRS 11.259(1) may require dismissing the entire action, including pleadings by parties other than Century and PCS. Relying on *Otak*—where only an amended pleading was dismissed because the initial complainant violated NRS 11.258—Converse argued that only Century's and PCS's amended pleadings must be dismissed. *See Otak*, 127 at 599, 260 P.3d at 411-12. The district court summarily denied Converse's motions, and this petition for a writ of mandamus followed.

DISCUSSION

[Headnotes 1, 2]

''A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion.'' *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. Here, Converse argues that the law requires that Century's and PCS's amended pleadings be dismissed as a result of their failure to file the NRS 11.258 attorney affidavit and expert report at the time the initial complaints were served. Because the determination of this issue is not fact-bound and involves unsettled issues of law that will likely recur, and because resolving this issue at this early stage of the underlying litigation promotes judicial economy, our consideration of Converse's writ petition is warranted. *See* NRS 34.330 (providing that a writ of mandamus is available only when no adequate legal remedy exists); *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (recognizing that we may consider a petition for writ relief contesting the denial of a motion to dismiss when ''the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law''); *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59 (noting that the right to appeal from a final judgment is not always an adequate legal remedy that bars writ relief, such as when a case is at an early point in litigation and writ relief advances judicial economy).

The amended pleadings must be dismissed

[Headnotes 3-6]

Resolving the issues raised in this writ petition requires our de novo review of the statutes that govern actions involving nonresidential construction. *See Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006) (providing that de novo review applies to issues of law such as statutory interpretation). The ultimate goal of interpreting statutes is to effectuate the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). We interpret clear and

unambiguous statutes based on their plain meaning. *Id.* But when a statute is ambiguous, we consult other sources, such as legislative history, reason, and policy to identify and give effect to the Legislature's intent. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000).

For actions ''involving nonresidential construction,'' NRS 11.258 requires the complainant's attorney to file, when the first pleading is served, an affidavit and expert report attesting to a reasonable basis for the action.[2] NRS 11.258(1), (3). If the attorney fails to do so, then the district court ''shall dismiss [the] action.'' NRS 11.259(1); *see Otak Nev., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 593, 598, 260 P.3d 408, 411 (2011). An action ''involving nonresidential construction'' is defined, in pertinent part, as an action ''against a design professional'' that pertains to the ''design, construction, manufacture, repair or landscaping'' of a nonresidential building. NRS 11.2565(1).

Thus, as Converse asserts, because Century and PCS did not submit an NRS 11.258 attorney affidavit and expert report concurrently with the initial pleadings, the amended pleadings against Converse must be dismissed if Converse is a design professional and the claims against it contained in the initial pleadings involved the design, construction, manufacture, repair, or landscaping of the Harmon Tower, which concededly is a new nonresidential building. *See Otak*, 127 Nev. at 599, 260 P.3d at 411-12. Century and PCS argue that Converse is not a design professional and that their initial pleadings did not involve the design, construction, or manufacture of the Harmon Tower but, rather, involved Converse's deficient performance and representations about its inspections. We now address whether Century's and PCS's initial pleadings constituted actions ''involving nonresidential construction'' requiring them to comply with the requirements of NRS 11.258.

Century's and PCS's initial pleadings involved the construction of a nonresidential building

[Headnote 7]

Under NRS 11.2565(1), an '' '[a]ction involving nonresidential construction' '' is

> an action that:
>
> (a) Is commenced against a design professional; and
>
> (b) Involves the design, construction, manufacture, repair or landscaping of a nonresidential building or structure . . . .
>
> The term includes, without limitation, an action for professional negligence.

[2]NRS 11.258(2) provides for a late-filed affidavit under certain circumstances not applicable to this case.

NRS 11.2565's definition of an action involving nonresidential construction is expansive; the claims do not have to be directly based on the design, construction, or manufacture of a nonresidential building, but merely ''involve[ ]'' those activities. *Id.* Hence, an action involving nonresidential construction includes *any* cause of action against a design professional that concerns the construction of a nonresidential building. Construction of a building involves inspection of the ongoing construction activity, and claims that a quality control and assurance inspector made misrepresentations about the construction's quality or was at fault for defective conditions concern the construction of the building. Thus, Century's and PCS's claims within their initial pleadings against Converse ''[i]nvolve[d]'' the construction of a nonresidential building. But in order to conclude that they brought actions involving nonresidential construction that triggered NRS 11.258's requirements, Converse must also have been a design professional.

Converse is a design professional

[Headnote 8]

A design professional is someone who holds ''a professional license or certificate issued pursuant to chapter 623 [Architecture, Interior Design and Residential Design], 623A [Landscape Architects] or 625 [Professional Engineers and Land Surveyors] of NRS or a person primarily engaged in the practice of professional engineering, land surveying, architecture or landscape architecture.'' NRS 11.2565(2)(b). Relevant here, '' '[t]he practice of professional engineering' includes, but is not limited to . . . [a]ny professional service which involves the application of engineering principles and data, such as . . . consultation, investigation, evaluation, planning and design, or responsible supervision of construction . . . wherein the public welfare or the safeguarding of life, health or property is concerned . . . .'' NRS 625.050(1)(a). It also includes services that are ''necessary to the planning, progress and completion of any engineering project or to the performance of any engineering service.'' NRS 625.050(1)(b).

[Headnote 9]

To determine whether Converse is a design professional, we accept the allegations within Century's and PCS's pleadings as true. *See Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (providing that, in reviewing an order that pertains to a motion to dismiss, we accept the nonmoving party's factual allegations in the complaint as true). PCS alleged that Converse was required to inspect the steel work for irregularities and deficiencies and make certain that the installation of the steel comported with construction plans and specifications. Century alleged that Converse's services included, but was not

limited to, inspections of the steel, conducting tension tests, and quality assurance services. Both of their amended pleadings referenced the agreement that governed Converse's services, under which Converse was responsible for the sampling and testing of materials as they were being installed and the performance of tensile strength tests on the steel, which involves engineering principles to determine how the steel responds to various amounts of stress.[3] These services implicate the practice of professional engineering as they involve the observation and supervision of a portion of the Harmon Tower's construction. By virtue of engaging in the practice of engineering, as gleaned from the services that were identified in Century's and PCS's pleadings, Converse is a design professional.

Century's and PCS's initial pleadings brought actions involving nonresidential construction against Converse, a design professional, which required Century and PCS to comply with NRS 11.258's attorney affidavit and expert report requirements. Their failure to comply with these requirements rendered their initial pleadings against Converse void ab initio and, therefore, not subject to cure by amendment. *See Otak*, 127 Nev. at 599, 260 P.3d at 411-12.

NRS 11.259(1) and the dismissal of Century's and PCS's amended pleadings

[Headnote 10]

NRS 11.259(1) provides that the district court ''shall dismiss an action involving nonresidential construction'' where the complainant fails to comply with NRS 11.258's attorney affidavit and expert report requirements. In this matter, the disagreement be-

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[3]Although we generally do not consider matters outside the pleading in reviewing an order denying a motion to dismiss, *see Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08, 167 P.3d 408, 409 (2007), in this matter, where the pleadings explicitly referred to the agreement that governed Converse's services, the agreement is within the scope of our review. *See Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 16-17 (1st Cir. 1998) (providing that, with respect to a motion to dismiss, the district court could consider an agreement that the complaint discussed, that was in the record, and that the parties did not contest as being unauthentic); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (''[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.''), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002); *Greene v. Eighth Judicial Dist. Court*, 115 Nev. 391, 393, 990 P.2d 184, 185 (1999) (providing that federal court interpretations of the Federal Rules of Civil Procedure are persuasive authority). Also, PCS contests that Converse's appendices that accompany the petition include documents that were not before the district court. The issues in this petition limit our review to the pleadings and the agreement governing Converse's services, which were before the district court.

tween the district court and Converse about the meaning of the term ''action'' in NRS 11.259(1) reveals an ambiguity. The district court appears to have concluded that an entire case must be dismissed under NRS 11.259(1) based on a strict reading of the term ''action,'' which has been defined by this court in a different context as ''includ[ing] the original claim and any crossclaims, counterclaims, and third-party claims.'' *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 820, 783 P.2d 955, 957 (1989) (discussing NRCP 41(e)'s language giving parties five years to bring an action to trial). Suggesting another reasonable, less restrictive interpretation of the term, in *Otak* we applied NRS 11.259(1) to require the dismissal of an amended third-party complaint only because the first complaint was void ab initio and thus could not be amended. *See Otak*, 127 Nev. at 598-99, 260 P.3d at 409, 411-12. Because ''action'' for NRS 11.259 purposes could be reasonably read either way, it is ambiguous. *See McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986) (providing that a statute is ambiguous if it is ''capable of being understood in two or more senses by reasonably informed persons'').

[Headnote 11]

Although we often rely on legislative history to resolve statutory ambiguity, *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000), the legislative history behind NRS 11.259(1) does not clarify what the Legislature meant in requiring the dismissal of an ''action.'' Thus, we resort to other rules of statutory construction. *See Cromer v. Wilson*, 126 Nev. 106, 109-10, 225 P.3d 788, 790 (2010).

[Headnotes 12-14]

We interpret statutes to ''conform[ ] to reason and public policy.'' *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010). In so doing, we avoid interpretations that lead to absurd results. *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005). ''Whenever possible, [we] will interpret a rule or statute in harmony with other rules or statutes.'' *State Farm*, 116 Nev. at 295, 995 P.2d at 486 (concluding that a statutory ambiguity may be resolved by referring to related statutes); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993); *see also* 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 51:1, at 183 (7th ed. 2012) (''[S]tatutes dealing with the same subject as the one being construed . . . are . . . [an] aid . . . [for] interpretation.'').

In this instance, considering the way in which the Legislature uses the term ''action'' in conjunction with other relevant statutes reveals that the term is used synonymously with ''pleading.''

Under NRS 11.258(3)(e), the required expert report must include ''[a] statement that the expert has concluded that there is a reasonable basis for *filing the action*.'' (Emphasis added.) Other provisions in NRS 11.258 use the verb ''filing'' with the term ''action.'' *See* NRS 11.258(2), (4). The Nevada Rules of Civil Procedure, however, do not provide for the *filing* of an *action*. Instead, they provide for the filing of a complaint, which is a *pleading*, to initiate an action. NRCP 3; NRCP 7(a). Hence, the term ''action'' in NRS 11.258 and NRS 11.259 is used in a fashion that is synonymous with ''pleading.''

Moreover, when litigation includes several parties' pleadings, it is unreasonable to dismiss all the parties' pleadings because two parties filed void complaints. Doing so hinders judicial economy by precluding resolution of the causes of action within the pleadings that are free of procedural or substantive defects. We refuse to construe NRS 11.259(1) in a way that reaches this result. As gleaned from the statutory language, the apparent intent of NRS 11.259(1) and NRS 11.258 is to advance judicial economy and prevent frivolous suits against design professionals by requiring a complaint to include an expert report and attorney affidavit regarding the suit's reasonable basis. In light of this intent, we conclude that the *Otak* court correctly applied NRS 11.259(1) to require the dismissal of a *pleading*—not the entire action. *Otak Nev., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 593, 599, 260 P.3d 408, 409, 411-12 (2011). Accordingly, the district court must dismiss Century's and PCS's amended pleadings that pertain to Converse because their initial pleadings against Converse were void ab initio and of no legal effect for the lack of the attorney affidavit and expert report required by NRS 11.258.

CONCLUSION

We grant Converse's petition for a writ of mandamus to compel the dismissal of the amended pleadings. We direct the clerk of this court to issue a writ of mandamus that instructs the district court to vacate its orders denying Converse's motions to dismiss Century's and PCS's amended pleadings and to grant these motions by dismissing the amended pleadings that pertain to Converse.[4]

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

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[4]In light of our disposition, we need not address the additional issues that Converse raises in its petition that were premised on the initial pleadings not being deemed void ab initio. Additionally, we have considered the parties' remaining contentions and conclude that they lack merit.