BUILDING ENERGETIX CORPORATION, A NEVADA CORPORATION; AND GARY HILL, APPELLANTS, *v.* EHE, LP, A NEVADA LIMITED PARTNERSHIP; JEWEL LEWIS, TRUSTEE OF THE JEWEL LEWIS TRUST; K.M. KROYER, TRUSTEE OF THE K.M. KROYER TRUST; AND JOSEPH S. LOUDEN, RESPONDENTS.

No. 57203

February 14, 2013 294 P.3d 1228

Appeal from a district court order granting a deficiency judgment under NRS 40.455 after foreclosure. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Following nonjudicial foreclosure sale, trust-deed beneficiary brought deficiency action against debtor and guarantor. The district court entered deficiency judgment. Mortgagor and guarantor appealed. The supreme court, PICKERING, C.J., held that: (1) issuance of delinquent-tax certificate did not preclude subsequent nonjudicial foreclosure, and (2) trust-deed beneficiary who purchased property at nonjudicial foreclosure sale was permitted to redeem property from county.

Affirmed.

Robison Belaustegui Sharp & Low and *Mark G. Simons*, Reno, for Appellants.

Jeffrey K. Rahbeck, Zephyr Cove, for Respondents.

1. MORTGAGES.
   A district court's deficiency determination following a foreclosure sale ordinarily receives deferential review on appeal.
2. APPEAL AND ERROR.
   The supreme court reviews issues of statutory interpretation de novo.
3. MORTGAGES; TAXATION.
   Issuance of delinquent-tax certification to the county treasurer did not preclude nonjudicial foreclosure sale by trust-deed beneficiary; until the county gave notice of sale or otherwise finally disposed of the property, any person specified in statute governing such certificates, which included mortgagees and beneficiaries under a note and deed of trust, was entitled to have the property reconveyed upon payment to the county treasurer of the delinquent taxes, plus penalties, interest, and costs, and issuance of delinquent-tax certificate rendered property held in trust by county, rather than rendering county record owner of property. NRS 107.015 *et seq.*, 361.010 *et seq.*, 361.585.
4. TAXATION.
   Reconveyance of property subject to delinquent-tax certification is in the nature of a redemption and divests the county of its title to the property; it does not give the redeeming party any interest greater than the interest he previously held. NRS 361.585.

5. STATUTES.
   It is presumed that the Legislature says in a statute what it means and means in a statute what it says there.
6. TAXATION.
   Object of statute governing issuance of delinquent-tax certificates, like statutory tax collection schemes elsewhere, is not the acquisition of the property, but rather the collection of taxes. NRS 361.570, 361.585.
7. TAXATION.
   It is the settled policy of taxation laws to give a delinquent taxpayer every reasonable opportunity compatible with the rights of the state to redeem his property and to return it to the tax rolls for further governmental support.
8. MORTGAGES; TAXATION.
   Trust-deed beneficiary who acquired property subject to delinquent-tax certificate on credit bid at nonjudicial foreclosure sale was permitted to redeem, or obtain reconveyance of, property from county treasurer after bringing deficiency action against debtor and guarantor; statute's prohibition against ''right of redemption'' referred to a debtor's right of redemption, rather than a purchaser's right of redemption, as provision sought to ensure purchasers at nonjudicial foreclosure sales received the ''title of the grantor,'' unencumbered by a judicial-foreclosure debtor's ''right of redemption.'' NRS 107.080(5).
9. STATUTES.
   The doctrine of ''noscitur a sociis'' teaches that words are known by, or acquire meaning from, the company they keep.
10. MORTGAGES.
    A nonjudicial foreclosure sale terminates the debtor's legal title. NRS 107.080(5).

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

OPINION

By the Court, PICKERING, C.J.:

This appeal from a deficiency judgment after foreclosure raises two questions: (1) whether a valid nonjudicial foreclosure sale may occur under NRS Chapter 107 after a delinquent-tax certificate has issued to the county treasurer under NRS Chapter 361; and (2) whether, consistent with NRS 107.080(5), a trust-deed beneficiary who acquires such property on credit bid at the foreclosure sale can later redeem, or obtain reconveyance of, the property from the county treasurer. We agree with the district court that a nonjudicial foreclosure sale may occur after a delinquent-tax certificate has issued and before the final disposition of the property, and that the property's acquirer can then pay the delinquent taxes and other amounts due to redeem or obtain reconveyance of the property from the court treasurer. Thus, we answer both questions

in the affirmative. Since the foreclosure sale was proper, the deficiency judgment was as well. We therefore affirm.

I.

The parties presented their dispute to the district court on stipulated facts. Appellant Building Energetix Corporation (BE) executed a $490,702 promissory note, secured by a deed of trust on property in Lyon County and guaranteed by appellant Gary Hill, to respondents or their assignors (collectively, EHE). BE did not pay the annual property taxes due, and in June 2007, a delinquent-tax certificate issued under NRS 361.570. The certificate authorized the Lyon County treasurer to hold the property in trust for the State and County for the two-year statutory redemption period.

BE did not make the payments due on the EHE note, either. On June 10, 2008, a year after the Lyon County delinquent-tax certificate issued, EHE, through its trustee, recorded a notice of default and election to sell. A nonjudicial foreclosure sale followed on October 10, 2008, at which time EHE purchased the property by credit bid of $325,000, receiving a trustee's deed in return. On April 8, 2009, EHE brought this action under NRS 40.455 against BE and Hill (hereafter, collectively, BE) for the deficiency.

For some unknown reason, EHE did not record its trustee's deed until October 2009, a year after the foreclosure sale. In the meantime, the two-year period to redeem the property from the 2007 delinquent-tax certificate ran out. NRS Chapter 361 provides for a treasurer's deed to issue after the two-year redemption period expires. *See* NRS 361.585(1); NRS 361.390. A treasurer's deed issued in this matter on June 8, 2009—after EHE had foreclosed on the property and sued BE for a deficiency judgment but before EHE recorded its trustee's deed. The county continued to hold the property in trust under NRS 361.585(2) until EHE paid the back taxes, interest, and penalties due, which occurred in March 2010. In return, on April 19, 2010, the county issued a reconveyance deed to EHE as provided in NRS 361.585(3) and (4).

BE asserted the one-action rule, NRS 40.430, and its associated anti-deficiency statutes, *see* NRS 40.455-40.459, as a defense to EHE's suit for the deficiency remaining due on the note after the foreclosure sale. BE argued that EHE could not validly foreclose while the county treasurer held the property in trust on the delinquent-tax certificate and that, without a valid foreclosure, NRS 40.455 precluded EHE from recovering a deficiency judgment. The district court disagreed. It held that the 2007 delinquent-tax certificate did not diminish EHE's trustee's authority to sell the property at foreclosure in 2008. It awarded EHE a $140,403 deficiency judgment against BE, who now appeals.

II.

BE urges reversal on the grounds that the 2007 delinquent-tax certificate prevented EHE from validly foreclosing on the property in 2008 and that, without a valid foreclosure sale, EHE cannot recover a deficiency judgment under NRS 40.455. BE maintains that once a delinquent-tax certificate issues under NRS 361.570, the subject property must be redeemed before a valid foreclosure sale can occur. Going further, BE argues that EHE is precluded from claiming rights under both the 2008 trustee's deed and the county's 2010 reconveyance deed. As support, BE points to language in Nevada's nonjudicial foreclosure statute, NRS 107.080, to the effect that a nonjudicial foreclosure sale ''vests in the purchaser the title of the grantor . . . without equity or right of redemption.'' NRS 107.080(5). In BE's view, EHE could not have redeemed the property by reconveyance deed in 2010 if it validly acquired the property by credit bid at the 2008 foreclosure sale, because under NRS 107.080(5), title acquired via nonjudicial foreclosure sale is ''without . . . right of redemption.'' Because EHE did redeem the property by reconveyance deed in 2010, BE argues that EHE must not have validly acquired the property by credit bid in 2008. Finally, BE argues that since EHE acquired the property by reconveyance rather than trustee's deed, EHE cannot recover a deficiency judgment under NRS 40.455.[1]

[Headnotes 1, 2]

While a district court's deficiency determination ordinarily receives deferential review, *Tahoe Highlander v. Westside Fed. Sav.*, 95 Nev. 8, 11, 588 P.2d 1022, 1024 (1979), here the parties do not

[1]BE also urged in the district court and at oral argument that EHE's delay in recording its October 2008 trustee's deed prevented completion of the foreclosure sale, such that Lyon County's later-issued but first-recorded June 2009 tax deed nullified the trustee's deed. The district court rejected this contention based on *In re Grant*, 303 B.R. 205 (Bankr. D. Nev. 2003), which holds, consistent with early Nevada cases, that a trustee's sale is complete when the gavel falls. *Id.* at 210 (citing *Dazet v. Landry*, 21 Nev. 291, 297, 30 P. 1064, 1067 (1892), *overruled on other grounds by Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963); *In the Matter of Smith*, 4 Nev. 254 (1868)) (''Notably missing from the Nevada foreclosure procedures is the requirement that a trustee's deed must be recorded in order for the sale to be complete or the transfer to be effective.''). BE did not address this issue in its opening brief, so neither do we. *See State of Nevada v. Glusman*, 98 Nev. 412, 428, 651 P.2d 639, 649 (1982). Nor do we address the effect of the 2009 amendments to NRS 107.080, which require recordation of the trustee's deed following a nonjudicial foreclosure sale within 30 days of the sale or impose specified civil penalties, as both parties conceded at oral argument that the 2009 amendments to NRS 107.080 do not apply to a foreclosure sale set in motion before their effective date. *See* 2009 Nev. Stat., ch. 247, § 1, at 1005.

dispute the district court's findings but only whether EHE was statutorily entitled to a deficiency judgment at all. Statutory interpretation involves law, not fact, so de novo review applies. *Walters v. Dist. Ct.*, 127 Nev. 723, 727, 263 P.3d 231, 234 (2011).

A.

[Headnote 3]

The county's 2007 delinquent-tax certificate did not prevent EHE from purchasing the property at the 2008 foreclosure sale. BE's argument to the contrary proceeds from the premise that, once a delinquent-tax certificate issues under NRS 361.570, the county becomes the owner of the property, meaning the tax certificate must be extinguished before title can transfer, whether by foreclosure sale or otherwise. But this is not what NRS 361.570 says or what NRS Chapter 361 contemplates.

In NRS Chapter 361, the Legislature has established a statutory scheme for the collection of property taxes that, while amended from time to time, has endured since 1957. *See Casazza v. A-Allstate Abstract Co.*, 102 Nev. 340, 344, 721 P.2d 386, 389 (1986) (describing the statutory framework NRS Chapter 361 establishes for collecting property taxes). The issuance of a delinquent-tax certificate is only a first step in the tax collection process. If property taxes become delinquent, NRS 361.570(1) provides that a tax certificate shall issue, ''authoriz[ing] the county treasurer, as trustee for the State and county, to hold [the] property described in the certificate for the period of 2 years . . . unless sooner redeemed.'' Assuming the 2 years pass with no redemption, the next step is issuance of a tax deed of the property, again to the county treasurer ''in trust for the use and benefit of the State and county . . . .'' NRS 361.585(1). But even then, the Legislature gives ''owners and others holding interests in property conveyed to the county treasurer following the two-year redemption period an additional opportunity to protect their interests.'' *Casazza*, 102 Nev. at 344, 721 P.2d at 389 (citing NRS 361.585(3) and (4)).

[Headnote 4]

Until the county gives notice of sale or otherwise finally disposes of the property, ''any person specified in subsection 4 [of NRS 361.585] is entitled to have the property reconveyed upon payment to the county treasurer'' of the delinquent taxes, plus penalties, interest, and costs. NRS 361.585(3). Subsection 4 of NRS 361.585 provides for reconveyance to

> one or more of the [following] persons . . . , as their interests may appear of record:
>
> (a) The owner.
>
> (b) The beneficiary under a note and deed of trust.

(c) The mortgagee under a mortgage.
(d) The creditor under a judgment.
. . . .
(f) The person holding a contract to purchase the property before its conveyance to the county treasurer.
. . . .
(h) The successor in interest of any person specified in this subsection.

Reconveyance under NRS 361.585, as distinct from conveyance under 361.595, ''is in the nature of a redemption, and divests the county of its title to the property.'' *Casazza*, 102 Nev. at 347, 721 P.2d at 391. It does not give the redeeming party ''any interest greater than the interest he previously held.'' *Id.* at 347, 721 P.2d at 390.

Under these statutes, although the Lyon County treasurer held the property in trust pursuant to the 2007 delinquent-tax certificate and thereafter the 2009 tax deed, it did not thereby become the ''owner'' of the property, such that BE's ownership could not be extinguished by nonjudicial foreclosure sale in 2008. On the contrary, NRS 361.570 and NRS 361.585 both repeatedly refer to ''the owner'' as the title holder of record, not the county, and contemplate successorship despite the existence of the tax certificate or deed. Thus, NRS 361.570(2)(c) requires the tax certificate to state ''the name of the owner or taxpayer of each property, if known.'' NRS 361.570(4) states, ''Before the owner or his or her successor redeems the property, he or she must also pay the county treasurer holding the certificate any additional taxes, penalties and costs . . . .'' And NRS 361.585(4)(a) and (h) list the ''owner'' and ''successor in interest of any person specified in this subsection'' as among the persons entitled to reconveyance.

[Headnote 5]

''The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' '' *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). NRS 361.570 and NRS 361.585 both recognize that the ''owner'' remains the title holder of record until the right to redeem or obtain reconveyance has expired. *Cf. Shelledy v. Lore*, 836 P.2d 786, 788 (Utah 1992) (applying analogous Utah law, the court observed that ''following the preliminary tax sale, the property owner, although he is delinquent in his real estate taxes, maintains the underlying ownership interest in the property''). These statutes acknowledge that post-certificate and post-deed transfers might occur when ''successors'' are named as potential redemptioners. And they say nothing about freezing all foreclosures or other transfers

until the property is redeemed from, or reconveyed by, the county treasurer.

[Headnotes 6, 7]

BE argues that ''allowing a valid nonjudicial foreclosure process to proceed during the pendency of a Tax Certificate would create absurd results'' and defeat ''the purpose of the Tax Certificate[:] to impede marketability of title until taxes are paid.'' But Chapter 361's object, like statutory tax collection schemes elsewhere, ''is not the acquisition of the property, but rather the collection of taxes.'' *Little v. United States*, 704 F.2d 1100, 1105-06 n.5 (9th Cir. 1983) (applying an analogous California tax collection statute). ''[I]t is the settled policy of [such laws] to give a delinquent taxpayer every reasonable opportunity compatible with the rights of the State to redeem his property and to return it to the tax rolls for further governmental support.'' *Id.*

Neither Chapter 361's text nor its apparent purpose supports BE's argument that the 2007 delinquent-tax certificate prevented a valid foreclosure sale from occurring in 2008. At least one court has held, under similar circumstances, that a valid foreclosure sale can occur notwithstanding the state's acquisition of the property, subject to a still-open right of redemption. *Potter v. Entler*, 163 P.2d 490, 491-92 (Cal. Ct. App. 1945) (interpreting an analogous tax collection statute). Contrary to BE's assertion, this result is not absurd; in fact, it appears to be the norm. *See* 47 Am. Jur. 2d *Judicial Sales* § 177 (2006); Marianne M. Jennings, *From the Courts*, 37 Real Est. L. J. 175 (2008). Therefore, we conclude that the 2008 foreclosure sale was valid.[2]

B.

[Headnote 8]

BE next argues that there is a fatal inconsistency between EHE acquiring BE's title through the 2008 nonjudicial foreclosure sale and thereafter, in 2010, obtaining a reconveyance deed from the county. In essence, BE maintains a party cannot both purchase property at a nonjudicial foreclosure sale and later redeem it from the county by paying the back taxes due. Again, the applicable statutes contemplate this exact scenario.

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[2]This conclusion assumes that the foreclosure sale was complete in 2008, when the gavel fell. *See supra* note 1. The result does not change even if the foreclosure sale did not conclude until October 2009, when the trustee's deed was recorded. Although the tax deed was issued in June 2009, BE still had an interest in the property, if only in obtaining its reconveyance, such that EHE could validly foreclose. *Compare Casazza*, 102 Nev. at 347, 721 P.2d at 391 (holding that reconveyance pursuant to NRS 361.585 restores the redemptioner's interest, whatever it may be, in the property), *with Potter*, 163 P.2d at 491-92 (holding that an unexpired right of redemption is a property interest that may be foreclosed).

Nevada law provides for both judicial and nonjudicial foreclosure sales. NRS 40.430; NRS 107.080. A principal difference between them is that a judicial foreclosure sale ''must be conducted in the same manner as the sale of real property upon execution,'' NRS 40.430(4), meaning the ''property shall be subject to redemption'' under NRS Chapter 21. *See* NRS 21.190. Under NRS 21.210,[3] the debtor has an absolute one-year right to redeem the property from the purchaser at the execution- or judicial-foreclosure sale. A nonjudicial foreclosure sale, by contrast, does not give the debtor the right to redeem the property from the purchaser. Thus, NRS 107.080(5) states, ''Every sale made under the provisions of this section and other sections of this chapter [107 governing nonjudicial foreclosure sales] vests in the purchaser the title of the grantor and any successors in interest *without equity or right of redemption*.'' (Emphasis added.)

BE seizes on NRS 107.080(5)'s words ''without . . . right of redemption.'' It argues that they curtail not only redemption by a debtor from a purchaser at a nonjudicial foreclosure sale but also redemption by the foreclosure-sale purchaser from the county treasurer under NRS 361.570 and NRS 361.585. BE misreads NRS 107.080(5). The phrase ''without . . . right of redemption'' immediately follows and modifies the words ''title of the grantor and any successors in interest.'' It addresses potential redemption rights of the debtor—the grantor of the deed of trust being foreclosed—not rights acquired by the purchaser at the nonjudicial foreclosure sale as against a county treasurer under NRS Chapter 361.

[Headnotes 9, 10]

The doctrine of *noscitur a sociis* teaches that ''words are known by—acquire meaning from—the company they keep.'' *Ford v. State*, 127 Nev. 608, 622 n.8, 262 P.3d 1123, 1132 n.8 (2011) (citing *Orr Ditch Co. v. Dist. Ct.*, 64 Nev. 138, 146, 178 P.2d 558, 562 (1947)). NRS 107.080(1) confers upon the trustee, when real property is used to secure the performance of an obligation, a power of sale when that obligation is breached. NRS 107.080(5) deprives the debtor (BE) of rights of redemption against the pur-

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[3]NRS 21.210 reads:

> The judgment debtor or redemptioner may redeem the property from the purchaser any time within 1 year after the sale on paying the purchaser the amount of his or her purchase price with 1 percent per month thereon in addition, to the time of redemption, together with:
>
> 1. The amount of any assessment, taxes or payments toward liens which were created prior to the purchase, which the purchaser may have paid thereon after purchase, and interest on such amount; and
>
> 2. If the purchaser is also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which the purchase was made, the amount of such lien, with interest.

chaser at a nonjudicial foreclosure. The remainder of NRS 107.080(5) and (6) make this clear. Thus, NRS 107.080(5)(a)-(c) and NRS 107.080(6) enumerate the limited instances in which a nonjudicial foreclosure sale may be made void, *i.e.*, lack of substantial compliance with NRS Chapter 107 under NRS 107.080(5)(a) or lack of proper notice to the grantor or other person entitled to notice of default and election to sell under NRS 107.080(6). With these exceptions, a nonjudicial foreclosure sale terminates the debtor's legal title. *See Charmicor, Inc. v. Bradshaw Finance Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). NRS 107.080(5)'s ''right of redemption'' language ensures that purchasers at nonjudicial foreclosure sales receive the ''title of the grantor,'' unencumbered by a judicial-foreclosure debtor's ''right of redemption.'' Nothing in the statute suggests, however, that the beneficiary of a deed of trust who takes title by credit bid at a nonjudicial foreclosure sale does not do so subject to whatever property tax liens may exist, which it thereafter may pay off, whether by redemption, reconveyance, or otherwise. *See* NRS 361.450.

In sum, the 2010 reconveyance deed to EHE was valid and did not undermine the legitimacy of the 2008 trustee's deed. Since EHE was the legitimate grantee of both deeds, BE's final argument that a party who acquires title by means of reconveyance deed cannot maintain a suit for a deficiency under NRS 40.455 fails.

We affirm.

HARDESTY and CHERRY, JJ., concur.

BILAL ABDULLAH, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57818

February 14, 2013 294 P.3d 419

Appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Defendant petitioned for habeas relief from conviction by guilty plea to attempted robbery claiming trial counsel had failed to file notice of appeal on his behalf. The district court granted petition in part and ordered the court clerk to file a notice of appeal from judgment of conviction and sentence on defendant's behalf. The supreme court, HARDESTY, J., held that the district court clerk lacked authority to file notice of appeal on defendant's behalf.

Dismissed with instructions to district court clerk.

Sandra L. Stewart, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   The district court clerk did not have authority to file a notice of appeal on defendant's behalf, and thus the notice could not invoke the supreme court's jurisdiction to consider issues related to the order denying in part the post-conviction petition, although the notice of appeal could be construed as a notice of appeal from the order denying in part defendant's post-conviction petition for a writ of habeas corpus; circumstances did not fit within either statute recognizing the two specific instances in which a district court clerk is authorized to prepare and file a notice of appeal on a criminal defendant's behalf. NRS 177.075(2); NRAP 4(c)(1)(B)(i), (iii).
2. Criminal Law.
   The decision to take an appeal rests squarely with the appellant.
3. Criminal Law.
   Statutes recognizing the two specific instances in which a district court clerk is authorized to prepare and file a notice of appeal on a criminal defendant's behalf recognize the two circumstances in which there is a significant risk that the right to appeal otherwise will be lost; in both instances, the defendant has asserted his right to appeal from the judgment of conviction. NRS 177.075(2); NRAP 4(c)(1)(B)(i), (iii).
4. Criminal Law.
   A judgment or order that is not included in the notice of appeal is generally not considered on appeal. NRAP 3(c)(1)(B).
5. Criminal Law.
   Because the notice of appeal is not intended to be a technical trap for the unwary drafter, the supreme court will not dismiss an appeal where the intent to appeal from a final judgment can be reasonably inferred and the respondent is not misled. NRAP 3(c)(1)(B).
6. Criminal Law.
   When a notice of appeal designates the notice of entry of an order, the supreme court may infer that the appellant intended to appeal from the order identified in the notice of entry. NRAP 3(c)(1)(B).

Before Pickering, C.J., Hardesty and Saitta, JJ.

OPINION

By the Court, Hardesty, J.:

In this appeal, we address the district court clerk's authority to prepare and file a notice of appeal on an appellant's behalf. We conclude that the district court clerk lacks authority to prepare and

file a notice of appeal on an appellant's behalf unless authorized by statute or court rule. There are two relevant examples. First, NRS 177.075(2) authorizes the district court clerk to prepare and file a notice of appeal on a criminal defendant's behalf when the defendant proceeded to trial without counsel and has requested an appeal after being advised of the right to appeal at sentencing. Second, NRAP 4(c) authorizes the district court clerk to prepare and file a notice of appeal from a judgment of conviction on a criminal defendant's behalf when the district court directs the clerk to do so after finding that the defendant established a valid appeal-deprivation claim and is entitled to a direct appeal.

The district court clerk prepared and filed the notice of appeal in this case on appellant's behalf designating the notice of entry of the district court's order denying a post-conviction petition for a writ of habeas corpus, but the clerk lacked authority to do so because NRS 177.075(2) does not apply here and the notice does not comply with NRAP 4(c). As the notice of appeal does not specify the judgment of conviction and the district court clerk may not prepare and file a notice of appeal from the denial of a post-conviction petition for a writ of habeas corpus, we dismiss the appeal with instructions to the district court clerk to prepare and file a notice of appeal on appellant's behalf from the judgment of conviction, as directed by the district court pursuant to NRAP 4(c).

FACTS AND PROCEDURAL HISTORY

Appellant Bilal Abdullah pleaded guilty to one count of attempted robbery, and the district court entered a judgment of conviction on March 9, 2010. No appeal was filed from the judgment of conviction. Abdullah later filed a timely proper person post-conviction petition for a writ of habeas corpus in which he asserted, among other claims, that he asked counsel to file an appeal from the judgment of conviction and counsel refused to file the requested appeal. After conducting an evidentiary hearing, the district court granted the petition in part, finding that Abdullah had been deprived of his right to a direct appeal due to ineffective assistance of counsel, *see Toston v. State*, 127 Nev. 971, 267 P.3d 795 (2011); *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994), and ordered the district court clerk ''to prepare and file a Notice of Appeal from the Judgment of Conviction and Sentence on Defendant's behalf.'' *See* NRAP 4(c). The district court denied the remainder of Abdullah's claims. The court's written order was entered on January 14, 2011.

The district court clerk filed a notice of entry of the decision and order on February 24, 2011, as required under NRS 34.830(2) and (3). The same day, the district court clerk prepared and filed a no-

tice of appeal on Abdullah's behalf. The notice of appeal designates ''the Order entered in this action on February 24, 2011.''

DISCUSSION

[Headnote 1]

Abdullah raises some issues that would be appropriate on appeal from the judgment of conviction and others that would be appropriate on appeal from the order denying in part his post-conviction petition for a writ of habeas corpus. Although the State responds to the merits of all the issues raised by Abdullah, it also asserts that this court lacks jurisdiction to consider any issues related to the order denying in part the post-conviction petition because the district court clerk did not have authority to prepare and file a notice of appeal on Abdullah's behalf from that order and Abdullah failed to file a notice of appeal from that order. In Abdullah's reply, which this court ordered, he argues that as he was proceeding in proper person at the time that the district court clerk prepared and filed the notice of appeal, he should not be required to have known that he had to file his own notice of appeal from the order denying in part his post-conviction petition.

[Headnote 2]

To resolve the jurisdictional issue presented, we first must determine whether the district court clerk had authority to prepare and file the notice of appeal on Abdullah's behalf. The decision to take an appeal rests squarely with the appellant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *see also* NRS 177.075(2)-(3) (requiring notice of appeal to be signed by appellant, appellant's attorney, or district court clerk where defendant who proceeded to trial without counsel requests an appeal after being informed of the right to appeal when the court imposes the sentence); NRAP 3C(c) (''When an appellant elects to appeal from a district court order or judgment governed by this Rule, appellant's trial counsel shall serve and file a notice of appeal pursuant to applicable rules and statutes.''); NRAP 4(c)(1)(B)(iii) (providing district court clerk may file notice of appeal where petitioner has demonstrated that he was deprived of a direct appeal).[1] The district court clerk is authorized to prepare and file a notice of appeal on a criminal defendant's behalf in two specific situations: (1) when a defendant ''who has not pleaded guilty or guilty but mentally ill and who is without counsel'' has been informed at sentencing of his right to appeal and requests an appeal, NRS 177.075(2); and (2) when the

[1]Nevada law provides for an automatic appeal without any action by a criminal defendant or his counsel in only one circumstance. When a defendant has been convicted following a trial and is sentenced to death, the appeal from the judgment of conviction is automatic unless the defendant or his counsel affirmatively waives the appeal. NRS 177.055(1).

district court finds that a post-conviction petitioner has demonstrated that he was deprived of his right to appeal from a judgment of conviction and orders the clerk to prepare and file a notice of appeal from the judgment of conviction as provided in NRAP 4(c)(1)(B)(i), (iii).

[Headnote 3]

These provisions ensure that a notice of appeal from a judgment of conviction is prepared and filed on behalf of a defendant in two circumstances in which there is a significant risk that the right to appeal otherwise will be lost. In both instances in which the clerk has authority to prepare and file a notice of appeal from a judgment of conviction on a defendant's behalf, the defendant has asserted his right to appeal from the judgment of conviction. These provisions therefore are consistent with the notion that the defendant has the ultimate authority to decide whether to take such an appeal. No statute or court rule permits the district court clerk to prepare and file a notice of appeal on a defendant's behalf in any other circumstance. In particular, NRS Chapter 34, which governs post-conviction habeas petitions and appeals therefrom, has no provision directing the court or clerk to prepare and file a notice of appeal on an aggrieved litigant's behalf.

Here, the notice of appeal was prepared and signed by the district court clerk on Abdullah's behalf. Because the district court clerk only has that authority in limited circumstances, we must determine whether any of those circumstances are present in this case. NRS 177.075(2) does not apply because Abdullah was represented by counsel and entered a guilty plea. Although NRAP 4(c) clearly applies because Abdullah filed a post-conviction petition for a writ of habeas corpus alleging that he was deprived of his right to a direct appeal and the district court found that that claim had merit and ordered the district court clerk to prepare and file a notice of appeal from the judgment of conviction and sentence, the notice of appeal prepared by the clerk does not designate the judgment of conviction and sentence. We therefore must determine whether the intent to appeal from the judgment of conviction can be inferred from the notice prepared and filed by the clerk.

[Headnotes 4, 5]

A notice of appeal must ''designate the judgment, order or part thereof being appealed.'' NRAP 3(c)(1)(B). Generally, a judgment or order that is not included in the notice of appeal is not considered on appeal. *Collins v. Union Fed. Savings*, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981). This general rule is not inflexible. Because ''[t]he notice of appeal is not . . . intended to be a technical trap for the unwary draftsman,'' this court will not dismiss an appeal ''[w]here . . . the intent to appeal from a final judgment

can be reasonably inferred and the respondent is not misled.'' *Lemmond v. State*, 114 Nev. 219, 220, 954 P.2d 1179, 1179 (1998); *see also Collins*, 97 Nev. at 90, 624 P.2d at 497 (explaining that court will not dismiss an appeal for failure to designate the correct judgment ''where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the respondent''). Other courts have similarly looked beyond the face of the notice to determine the order it intends to appeal. *See Trustees of Const. Industry v. Hartford Fire Ins.*, 578 F.3d 1126, 1128 (9th Cir. 2009) (holding that opposing party was not prejudiced by incorrect docket number on notice of appeal where judgment attached to notice had correct docket number); *U.S. v. Morales*, 108 F.3d 1213, 1223 (10th Cir. 1997) (providing that court may look beyond the face of the notice of appeal to supporting papers filed with it to determine judgment it intends to appeal).

[Headnote 6]

Even with that somewhat flexible approach, we cannot infer the intent to appeal from the judgment of conviction based on the notice of appeal prepared and filed by the district court clerk in this case. In our decisions, we have only looked beyond the notice of appeal to the order directly referenced by the notice to determine what order the appellant intended to appeal. *See Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) (looking at referenced judgment notwithstanding the verdict to construe notice of appeal as referring to underlying verdict); *Lemmond*, 114 Nev. at 220, 954 P.2d at 1179 (looking at referenced notice of entry of order to construe notice of appeal as referring to underlying order). The notice in this case designates an order entered on February 24, 2011. No order was entered on that date. However, the notice of entry of the order denying the post-conviction petition was filed on that date. When a notice of appeal designates the notice of entry of an order, the court may infer that the appellant intended to appeal from the order identified in the notice of entry. *Lemmond*, 114 Nev. at 220, 954 P.2d at 1179. But to infer an intention to appeal from the judgment of conviction based on the notice in this case, we would have to look beyond the text of the notice of appeal *and* the notice of entry designated in the notice of appeal to the text of the order referenced in the notice of entry. That goes beyond our prior decisions and would undermine the general rule that an appealable judgment or order that is not designated in the notice cannot be considered on appeal. Although the State was not misled by the notice of appeal as it responded to Abdullah's arguments concerning the judgment of conviction, it is difficult to reasonably infer from the text of the notice of appeal and the notice of entry of order designated in the notice of appeal that the intent was to appeal from the judgment of conviction.

CONCLUSION

We conclude that this appeal is not properly before us. The notice of appeal prepared and filed by the district court clerk on Abdullah's behalf does not indicate that it is, and cannot be construed as, an appeal from a judgment of conviction as ordered by the district court pursuant to NRAP 4(c). Although the notice could be construed as a notice of appeal from the order denying in part Abdullah's post-conviction petition for a writ of habeas corpus, the district court clerk does not have authority to file such a notice; therefore, the notice may not invoke this court's jurisdiction to consider issues related to the order denying in part the post-conviction petition. Accordingly, we dismiss this appeal and direct the district court clerk to file a notice of appeal from the judgment of conviction consistent with the district court's order and NRAP 4(c).

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

FRANK KEVIN BLACKBURN, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 58255

February 14, 2013 294 P.3d 422

Appeal from a judgment of conviction, pursuant to an *Alford* plea, for attempted sexual assault. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

While awaiting sentencing on conviction for attempted sexual assault, defendant filed motion to strike psychological risk assessment evaluation in which social worker concluded that the risk assessment tools underestimated defendant's risk to reoffend. The district court denied motion. The supreme court reversed and remanded for the district court to conduct an evidentiary hearing on whether the social worker's evaluation comported with currently accepted standards of assessment. On remand, the district court entered an order finding that the evaluation was proper, and defendant appealed. The supreme court, PICKERING, C.J., held that: (1) risk assessment statutes did not mandate reliance on actuarial tools alone, but instead allowed for social worker's professional judgment; and (2) the district court could rely upon risk assessment based on social worker's clinical judgment in addition to psychological tests.

Affirmed.

Almase Law Group, LLC, and *Caesar V. Almase*, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Danielle K. Pieper*, Deputy District Attorney, Clark County, for Respondent.

1. Sentencing and Punishment.
   Statutes governing presentence psychological risk assessments did not mandate reliance on psychological tests and other actuarial tools alone for purpose of completing presentence psychological risk assessment, but instead allowed social worker to rely on his professional opinion in conducting the evaluation and assigning defendant a high risk to reoffend, which rendered defendant ineligible for probation for conviction by guilty plea to attempted sexual assault. NRS 176.139(3), 176A.110(1)(a).
2. Criminal Law.
   Questions of statutory interpretation are reviewed de novo.
3. Statutes.
   Statutory analysis begins and ends with the statutory text if it is clear and unambiguous.
4. Statutes.
   Statutes must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.
5. Statutes.
   When interpreting a statute, words that have a technical or special meaning are presumed to carry their technical or special meaning.
6. Sentencing and Punishment.
   Psychological risk assessment evaluators should review as much existing documentation on point as is available, such as prior mental health records, school reports, and hospitalization files; this limits over-reliance on psychological testing or clinical interviewing as the only sources for findings and conclusions for sentencing purposes.
7. Sentencing and Punishment.
   Statutes governing presentence psychological risk assessments do not mandate reliance on actuarial tools alone, and a clinician may rely on his or her professional opinion in conducting a psychosexual evaluation; when a clinician's professional opinion departs from the quantifiable test results, the district court should acknowledge the discrepancy and make specific findings about the deviation in its determination of whether a psychosexual evaluation is based upon a currently accepted standard of assessment. NRS 176.139, 176A.110.
8. Sentencing and Punishment.
   Psychological risk assessment evaluation completed by licensed social worker, which relied on social worker's professional opinion in addition to psychological tests in assigning defendant a high risk to reoffend, which rendered defendant ineligible for probation for conviction by guilty plea to attempted sexual assault, was valid as based on currently accepted standards of assessment; risk assessment statutes did not contemplate a single acceptable standard of assessment but instead authorized a professional to make his or her assessment ''based upon a currently accepted standard of assessment,'' and social worker's ultimate assessment was

based on a detailed document review and his extensive professional expertise. NRS 176A.110(1)(a).

9. SENTENCING AND PUNISHMENT.
An appellant must show that the district court relied solely on impalpable or highly suspect evidence to render the court's sentencing decision invalid.

10. SENTENCING AND PUNISHMENT.
Before a district court can accept a presentence psychosexual evaluation, it has an obligation to determine whether the evaluator was qualified and whether the evaluation is based on currently accepted standards of assessment; in making these determinations, the district court also must articulate specific findings so that the supreme court can properly review its reasoning. NRS 176.139(2).

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

OPINION

By the Court, PICKERING, C.J.:

In this appeal we address psychosexual evaluations and consider whether a risk assessment based on clinical judgment, in addition to psychological tests, comports with Nevada law. Because NRS 176A.110 and NRS 176.139 call for the use of clinical judgment in tandem with diagnostic tools, we affirm.

I.

Appellant Frank Blackburn pleaded guilty to attempted sexual assault pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Before sentencing, John Pacult, a licensed social worker, performed a psychosexual evaluation of Blackburn as required by NRS 176.139.

Pacult interviewed Blackburn. During the evaluation, Pacult used four assessment tools: the Vermont Assessment of Sex-Offender Risk (VASOR); the Rapid Risk Assessment of Sexual Offender Recidivism (RRASOR); the STATIC-99; and the STATIC-2002 (collectively, actuarial tools). Each actuarial tool resulted in a different raw score. After categorization, these scores fell within a range predicting a low-to-moderate risk to reoffend. Additionally, Pacult considered various documents provided by the Division of Parole and Probation, including Blackburn's plea agreement, multiple police reports, and Blackburn's SCOPE and arrest records. Pacult also spoke with Blackburn's wife, his daughter, the author of his presentence investigation (PSI) report, and the physician who had treated Blackburn's bipolar disorder for ten years.

Pacult concluded that the risk assessment tools underestimated Blackburn's risk to reoffend, primarily because Blackburn had no prior criminal history. The offense dynamics, combined with

Blackburn's reported history of sexual and physical aggression and mental health issues, led Pacult to conclude that Blackburn had a high risk to reoffend.

Unhappy with Pacult's opinion, Blackburn filed a motion to strike the psychosexual evaluation and to order a new psychosexual evaluation and PSI report. The district court denied Blackburn's motion and sentenced him to prison. Blackburn appealed, and this court reversed and remanded for the district court to conduct an evidentiary hearing on whether Pacult's evaluation comported with currently accepted standards of assessment. *Blackburn v. State*, Docket No. 56246 (Order of Reversal and Remand, November 5, 2010).

As ordered, the district court held an evidentiary hearing. At the hearing, Blackburn's expert, Dr. Mark Chambers, testified that he did not dispute how Pacult utilized the actuarial tools, nor how he scored Blackburn. Instead, Dr. Chambers opined that Pacult violated NRS 176A.110 and NRS 176.139 by using clinical judgment to override the tool-generated findings.

Pacult also testified at the hearing. After stating that he had completed thousands of evaluations, he explained that he helped the Nevada Legislature craft the language of NRS 176A.110 and NRS 176.139, and was therefore familiar with those statutes. In his view, the statutes require the evaluator to use ''all relevant documents,'' including victim statements and interviews with victims and their families, in addition to the actuarial tools.[1]

The district court ultimately held that the Pacult evaluation was proper because it was conducted using currently accepted standards of assessment pursuant to NRS 176.139. The court then reinstated the judgment of conviction and Blackburn appealed once again.

II.

[Headnotes 1-3]

This court reviews questions of statutory interpretation de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). Our analysis begins and ends with the statutory text if it is clear and unambiguous. *Id*.

NRS 176A.110(1)(a) provides that a court shall not grant probation to a person convicted of a sexual offense, including at-

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[1]Though neither party questioned the appropriateness of a medical expert opining on the meaning of a statute, courts normally ''exclude testimonial opinion on the state of the law.'' *United Fire Insurance Co. v. McClelland*, 105 Nev. 504, 509, 780 P.2d 193, 196 (1989); *cf. A-NLV Cab Co. v. State, Taxicab Authority*, 108 Nev. 92, 95, 825 P.2d 585, 587 (1992) (disapproving the use of a legislator's statement of opinion as a means of divining legislative intent or deciphering statutory text). In resolving the statutory construction issue at the heart of this appeal, we rely on the statutes' text and conventional principles of statutory interpretation, not the opinions of Dr. Chambers or Pacult.

tempted sexual assault, unless ''the person who conducts the psychosexual evaluation [required by NRS 176.139] certifies in the report prepared pursuant to NRS 176.139 that the person convicted of the offense does not represent a high risk to reoffend based upon *a currently accepted standard of assessment*.'' (Emphasis added.) Under NRS 176.139(3), the person who prepares this report ''must use *diagnostic tools* that are *generally accepted* as being within the standard of care for the evaluation of sex offenders . . . .'' (Emphasis added.) Additionally,

> 3. . . . the psychosexual evaluation of the defendant must include:
>
> (a) A comprehensive clinical interview with the defendant; and
>
> (b) A review of all investigative reports relating to the defendant's sexual offense and all statements made by victims of that offense.
>
> 4. The psychosexual evaluation of the defendant may include:
>
> (a) A review of records relating to previous criminal offenses committed by the defendant;
>
> (b) A review of records relating to previous evaluations and treatment of the defendant;
>
> (c) A review of the defendant's records from school;
>
> (d) Interviews with the defendant's parents, the defendant's spouse or other persons who may be significantly involved with the defendant or who may have relevant information relating to the defendant's background; and
>
> (e) The use of psychological testing, polygraphic examinations and arousal assessment.

NRS 176.139(3)-(4).

Blackburn emphasizes the phrase ''currently accepted standard of assessment'' and extracts the words ''standard'' and ''assessment'' from the rest of NRS 176A.110. Blackburn asserts that the word ''standard'' refers to an objective measurement that practitioners can quantify and use. He continues that an ''assessment'' is the testing used to predict an outcome, which in the field of psychology is limited to tools such as the VASOR, RRASOR, STATIC-99, and STATIC-2002.

Similarly, he maintains that a clinician's professional opinion is not a generally accepted diagnostic tool as required by NRS 176.139(3). He then argues that ''diagnostic tools'' must use standardized principles of measurement to be ''generally accepted''—which again refers only to the VASOR, RRASOR, STATIC-99, STATIC-2002, and similar actuarial tools.

[Headnote 4]

We disagree. Blackburn's approach focuses on a single phrase in NRS 176A.110 to the exclusion of its remaining text and that of its associated statute, NRS 176.139. This violates the basic rule of statutory interpretation that holds that statutes ''must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.'' *Butler v. State*, 120 Nev. 879, 892-93, 102 P.3d 71, 81 (2004) (internal quotations omitted). '' 'A statute cannot be dissected into individual words, each one being thrown onto the anvil of dialectics to be hammered into a meaning which has no association with the words from which it has violently been separated.' '' 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 46:5 n.10 (7th ed. 2008) (quoting *Bertera's Hopewell Foodland, Inc. v. Masters*, 236 A.2d 197, 204 (Pa. 1967), *overruled on other grounds by Goodman v. Kennedy*, 329 A.2d 224, 231 (Pa. 1974)).

Examining the words that precede the phrase ''standard of assessment'' in NRS 176A.110 reveals that the statute does not contemplate a single acceptable standard of assessment. The statute allows a professional to make his or her assessment ''based upon *a* currently accepted standard of assessment.'' NRS 176A.110(1)(a) (emphasis added). If the word ''a'' in this statute were ''the,'' then the statute might indicate only a single standard exists. The sentence as written, however, requires only that the basis of the psychosexual report be some currently accepted standard that satisfies the requirements of NRS 176.139.

NRS 176.139(3) defines what the evaluation *must* include, NRS 176.139(4) sets forth what the evaluation *may* include, and NRS 176.139(5) indicates that the person conducting the evaluation *must* be given access to all the records needed to conduct the evaluation. Psychological testing is one factor that *may* be included in an evaluation, NRS 176.139(4)(e), but the plain meaning of ''may'' does not indicate that actuarial tools are the only generally accepted diagnostic tools or standards of assessment that an evaluator can use. *See Butler*, 120 Nev. at 893, 102 P.3d at 81 (' 'May,' as it is used in legislative enactments, is often construed as a permissive grant of authority . . . .''). Further, Blackburn's argument that actuarial tools are the only valid source of information would make the other articulated sources in NRS 176.139(3)-(5) superfluous. This approach is inconsistent with the rule against reading statutes in a way that makes some of their words or phrases superfluous. *Butler*, 120 Nev. at 892-93, 102 P.3d at 81.

[Headnotes 5, 6]

Even taken alone, the term ''diagnostic tools'' used in NRS 176.139(3) cannot be construed to mean only actuarial tools be-

cause ''words that have a technical or special meaning are presumed to carry their technical or special meaning.'' *Savage v. Pierson*, 123 Nev. 86, 94, 157 P.3d 697, 702 (2007). In the context of mental health care, there are an ''enormous number of psychometric instruments commercially available,'' all of which constitute diagnostic tools. Thomas A. Powell & John C. Holt, *Forensic Psychological Evaluations: The Methods in Our Madness*, 31 Vt. Bar J., no. 4, 2005, at 40. We acknowledge that mental health professionals are increasingly dependent on actuarial tools. However, ''[e]valuators should review as much existing documentation on point as is available, such as prior mental health records, school reports, and hospitalization files. This limits over-reliance on psychological testing or clinical interviewing as the only sources for findings and conclusions.'' *Id.* at 42. Therefore, the technical term ''diagnostic tools,'' when understood in the proper context of mental health, does not refer exclusively to actuarial tools.

[Headnote 7]

Thus, NRS 176A.110 and NRS 176.139 do not mandate reliance on actuarial tools alone, and a clinician may rely on his or her professional opinion in conducting a psychosexual evaluation. When a clinician's professional opinion departs from the quantifiable test results, as here, the district court should acknowledge the discrepancy and make specific findings about the deviation in its determination of whether a psychosexual evaluation is based upon a currently accepted standard of assessment.

III.

[Headnotes 8, 9]

Next, we consider whether the district court abused its discretion in accepting Pacult's evaluation of Blackburn in making its sentencing determination. *See Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). An appellant must show that the district court relied solely on impalpable or highly suspect evidence to render the court's sentencing decision invalid. *See Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[Headnote 10]

Before a district court can accept a psychosexual evaluation, it has an obligation to determine whether the evaluator was qualified under NRS 176.139(2) and whether the evaluation is based upon currently accepted standards of assessment. In making these determinations, the court also must articulate specific findings so that this court can properly review its reasoning. *See Webb v. Shull*, 128 Nev. 85, 93, 270 P.3d 1266, 1271 (2012).

Here, Pacult, a licensed social worker, demonstrated his qualifications to perform psychosexual evaluations, *see Austin v. State*, 123 Nev. 1, 2, 151 P.3d 60, 60 (2007), and the district court cor-

rectly sought guidance in NRS 176.139. The court erred, however, by failing to make specific findings regarding the justification offered for Pacult's deviation from the psychological test results. Despite this omission, the district court did not abuse its discretion because the record supports its decision.

As the district court found, Pacult's evaluation included the mandatory items articulated in NRS 176.139(3)(a) and (b). Pacult also utilized additional information, as allowed by NRS 176.139(4), and as discussed above, evaluators should review as much existing documentation as is available to ensure accuracy. Although Pacult deviated from the test-based results, his ultimate assessment was based on a detailed document review and Pacult's extensive professional expertise. Further, Blackburn's expert witness, Dr. Chambers, did not claim that actuarial tools are the only acceptable method of assessment or that Pacult's evaluation fell below the standard of care required for psychosexual evaluations. In fact, Dr. Chambers acknowledged that clinical judgment is the only way to synthesize multiple actuarial scores into a single risk to reoffend. More notably, Dr. Chambers also admitted that deviation from standardized tests may be warranted, particularly when the actuarial tools do not adequately address important variables—as Pacult found was the case here. Thus, we conclude that the evidence in the record supports the district court's decision to deny Blackburn's request for a new psychosexual evaluation and to reinstate the judgment of conviction.

For these reasons, we affirm.

HARDESTY and SAITTA, JJ., concur.

RICK SOWERS, AN INDIVIDUAL, APPELLANT, *v.* FOREST HILLS SUBDIVISION; ANN HALL AND KARL HALL, INDIVIDUALLY, RESPONDENTS.

No. 58609

February 14, 2013 294 P.3d 427

Appeal from a district court order granting a permanent injunction in a tort action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Landowners and subdivision filed complaint, claiming that subdivision resident's proposed residential wind turbine posed a potential nuisance and seeking permanent injunction. The district court granted permanent injunction, and resident appealed. The supreme court, HARDESTY, J., held that: (1) substantial evidence supported the district court's conclusion that the proposed residential wind turbine was a nuisance in fact; and (2) although the

district court's grant of permanent injunction enjoining resident from constructing wind turbine did not specifically state the reasons for its issuance, as required by civil procedure rule, the reasons for the injunction were sufficiently clear to permit meaningful review by the supreme court.

Affirmed.

[Rehearing denied April 15, 2013]

[En banc reconsideration denied June 20, 2013]

Fahrendorf, Viloria, Oliphant & Oster, LLP, and *Patrick R. Millsap*, Reno, for Appellant.

Karl S. Hall, Reno; *Bowen Hall* and *Ann O. Hall*, Reno, for Respondents.

1. NUISANCE.
   Aesthetics of a residential wind turbine alone are not grounds for finding a nuisance, but a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value.
2. NUISANCE.
   A nuisance is anything that is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
3. NUISANCE.
   ''Nuisance at law,'' also called a ''nuisance per se,'' is a nuisance at all times and under any circumstances, regardless of location or surroundings.
4. NUISANCE.
   ''Nuisance in fact,'' also called a ''nuisance per accidens,'' is one that becomes a nuisance by reasons of circumstances and surroundings.
5. NUISANCE.
   Residential wind turbines are not severe interferences in all circumstances, and thus, wind turbines are not nuisances at law. NRS 278.02077.
6. NUISANCE.
   Even when a structure or act is not a nuisance per se, nuisance may arise from a lawful activity conducted in an unreasonable and improper manner.
7. NUISANCE.
   Residential wind turbine may be or may become a nuisance by reason of the improper or negligent manner in which it is conducted, or by reason of its locality, as where it is done or conducted in a place where it necessarily tends to damage another's property.
8. NUISANCE.
   Fair test as to whether a business or a particular use of a property in connection with the operation of the business constitutes a nuisance is the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all existing circumstances.
9. NUISANCE.
   When deciding whether one's use of his or her property is a nuisance to his neighbors, it is necessary to balance the competing interests of the landowners using a commonsense approach.

10. EVIDENCE; NUISANCE.
    Substantial evidence supported the district court's conclusion that the proposed residential wind turbine in subdivision was a nuisance in fact; subdivision was quiet, and renewable energy expert testified that the noise created by the turbine would be similar to that of the hum on a nearby highway, subdivision resident testified that wind turbine would create a shadow flicker on his property, height of the proposed turbine exceeded 75 feet, and evidence concerning the noise, diminution in property value, shadow flicker, and aesthetics far outweighed any potential utility of the proposed wind turbine within subdivision.
11. NUISANCE.
    Determination of whether an activity constitutes a nuisance is generally a question of fact.
12. APPEAL AND ERROR.
    The supreme court will uphold the factual findings of the district court as long as the findings are not clearly erroneous and are supported by substantial evidence.
13. NUISANCE.
    To sustain a claim for private nuisance, an interference with one's use and enjoyment of land must be both substantial and unreasonable.
14. NUISANCE.
    Interference is substantial, for purposes of private nuisance claim, if normal persons living in the community would regard the alleged nuisance as definitively offensive, seriously annoying, or intolerable. Restatement (Second) of Torts § 821F.
15. NUISANCE.
    Interference is unreasonable, for purposes of private nuisance claim, when the gravity of the harm outweighs the social value of the activity alleged to cause the harm.
16. NUISANCE.
    Aesthetics alone cannot form the basis of a private nuisance claim.
17. NUISANCE.
    Aesthetics-based complaints can be one of several factors to consider with respect to a nuisance claim; unsightly things may be necessary in carrying on the proper activities of organized society, but such things should be properly placed and not so located as to be unduly offensive to neighbors or to the public.
18. NUISANCE.
    While large proportions of the residential wind turbine alone could not form the basis of a nuisance finding, the district court could properly consider the enormity of the object as one factor in its decision.
19. NUISANCE.
    The district court could consider the aesthetics of residential wind turbine, for purposes of determining if it was a private nuisance, only if factors other than unsightliness or obstruction of views were claimed.
20. NUISANCE.
    It was not clearly erroneous for the district court to consider shadow flicker when determining if landowner's proposed residential wind turbine was a private nuisance, nor was it error for the district court to consider the size of the proposed wind turbine.
21. APPEAL AND ERROR.
    The supreme court typically reviews the district court's decision to grant a permanent injunction for an abuse of discretion.
22. APPEAL AND ERROR.
    Purely legal questions surrounding the issuance of an injunction are reviewed de novo.

23. PLEADING.
Nevada is a notice-pleading jurisdiction where courts liberally construe pleadings so long as claims are fairly noticed to the adverse party.

24. INJUNCTION.
Although the district court's grant of permanent injunction, enjoining landowner from constructing a wind turbine on his residential property, did not specifically state the reasons for its issuance, as required by civil procedure rule, the reasons for the injunction were readily apparent in the record and were sufficiently clear to permit meaningful review by the supreme court. NRCP 65(d).

25. INJUNCTION.
Lack of a statement of reasons does not necessarily invalidate a permanent injunction so long as the reasons for the injunction are readily apparent elsewhere in the record and are sufficiently clear to permit meaningful review by the supreme court. NRCP 65(d).

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

OPINION

By the Court, HARDESTY, J.:

In this appeal, we address whether the district court properly concluded that, under the particular circumstances and surroundings of the case, a proposed residential wind turbine would constitute a nuisance warranting a permanent injunction against its construction. Below, respondents Forest Hills Subdivision, Ann Hall, and Karl Hall (collectively, the Halls) sought to permanently enjoin their neighbor, appellant Rick Sowers, from constructing a wind turbine on his residential property, asserting that the proposed turbine would constitute a nuisance.[1] The district court agreed and granted the permanent injunction.

[Headnote 1]

We conclude that, in this case, substantial evidence exists to support the district court's conclusion that the proposed wind turbine constitutes a nuisance. We also determine that the wind turbine at issue would create a nuisance in fact. In reaching our conclusion, we hold that the aesthetics of a wind turbine alone are not grounds for finding a nuisance. However, we conclude that a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value. In this case, the district court heard testimony about the aesthetics of the proposed wind turbine, the noise and shadow flicker

[1]Though respondents and the district court refer to the wind turbine generally as ''a nuisance,'' there are different types of legally defined nuisances. As addressed in detail below, this particular proposed wind turbine constitutes a nuisance in fact.

it would create, and its potential to diminish surrounding property values. Based on this evidence, we conclude that substantial evidence supports the district court's finding that the proposed residential wind turbine would be a nuisance in fact. Thus, we affirm the order granting a permanent injunction prohibiting its construction.

FACTS AND PROCEDURAL HISTORY

Sowers informed residents of the Forest Hills Subdivision that he planned to construct a wind turbine on his residential property. After this announcement, Sowers' neighbors, the Halls, and the Forest Hills Subdivision filed a complaint in district court claiming that the proposed wind turbine posed a potential nuisance because it would generate constant noise and obstruct the views of neighboring properties.[2] The Halls sought to permanently enjoin construction of the wind turbine and requested preliminary injunctive relief.

At the preliminary injunction hearing, the district court heard testimony that the subdivision was a very quiet area, and that the turbine would obstruct Mr. Hall's view and create noise and shadow flicker.[3] Another resident, who was also a licensed realtor, testified that the proposed wind turbine would diminish property values in the neighborhood. A renewable energy specialist testified that the proposed wind turbine would likely generate the same level of noise as ''the hum of a highway,'' and a contractor hired to construct the turbine testified that there was no way to mitigate the shadow flicker caused by the wind turbine.

The district court then conducted a site visit to the location of a comparable wind turbine. At this site visit, Sowers brought a decibel-reading machine that indicated that the noise from the wind turbine did not exceed 5 decibels from 100 feet away. A neighbor to that wind turbine testified that it produced some noise and shadow flicker, but that the turbine did not bother him. The district court also visited Sowers' home in Forest Hills, the proposed site for his wind turbine, but noted there was no way for Sowers to test the possible decibel level at that location.

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[2]The Halls also claimed that the proposed wind turbine violated the CC&Rs of the Forest Hills Subdivision. We agree with the district court that the CC&R subsections attempting to limit wind turbines in the community violate NRS 278.02077. Thus, further analysis into the breach of contract claims associated with the CC&Rs is not needed.

[3]''Shadow flicker'' refers to the alternating pattern of light and dark shadows occurring when the blades of a wind turbine rotate in the line of sight of the sun. These shadows often create a flickering or strobe effect. *See Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879, 891 (W. Va. 2007); *Residents Opposed Turbines v. State EFSEC*, 197 P.3d 1153, 1160 n.4 (Wash. 2008).

Following the preliminary injunction hearing, the district court granted the permanent injunction.[4] The district court heavily considered its visit to the site of the comparable turbine and its observation that it ''was astonished by the size of the structure and the 'overwhelming impression of gigantism.' '' The district court also considered that the Forest Hills Subdivision had panoramic views and was a very quiet neighborhood, and that the proposed wind turbine would likely lower property values in the area. Based on these findings and the site visits, the district court held that the proposed wind turbine constituted a nuisance because the turbine would substantially interfere with the neighboring residents' enjoyment and use of their property. As such, the district court ordered a permanent injunction enjoining construction of the wind turbine. Sowers now appeals.

DISCUSSION

On appeal, Sowers argues that the district court improperly concluded that the proposed wind turbine constituted a nuisance and improperly granted the permanent injunction. We disagree.

[Headnotes 2-4]

A nuisance is ''[a]nything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.'' NRS 40.140(1)(a). There are several kinds of nuisances, two of which are pertinent to this discussion. A nuisance at law, also called a nuisance per se, is ''a nuisance at all times and under any circumstances, regardless of location or surroundings.'' *See* 66 C.J.S. *Nuisances* § 4 (2013). A nuisance in fact, also called a nuisance per accidens, is ''one which becomes a nuisance by reasons of circumstances and surroundings.'' *Id*.

[Headnote 5]

We recognize that the Washoe County Development Code permits the construction of private wind turbines in residential areas if such turbines otherwise comply with the requirements of the Code. *See generally* Washoe County Code Ch. 326 (2010). We are also cognizant of this state's aggressive policy favoring renewable energy sources, such as wind turbines. *See* NRS 278.02077. We further acknowledge the testimony from the neighbor of the person owning the comparable wind turbine who said that the turbine did not bother him. Based on these considerations, we do not believe

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[4]At the preliminary injunction hearing, the parties stipulated to advance the hearing into a trial on the merits of the Halls' claim for a permanent injunction pursuant to NRCP 65(a)(2).

that wind turbines are severe interferences in all circumstances, and thus wind turbines are not nuisances at law.

[Headnotes 6-8]

However, even when a structure or act is not a nuisance per se, ''[a] nuisance may arise from a lawful activity conducted in an unreasonable and improper manner.'' 66 C.J.S. *Nuisances* § 16 (2012) (footnote omitted). Thus, a wind turbine may ''be or become a nuisance by reason of the improper or negligent manner in which it is conducted, or by reason of its locality, as where it is done or conducted in a place where it necessarily tends to the damage of another's property.'' *Id.* Accordingly, ''a fair test as to whether a business or a particular use of a property in connection with the operation of the business constitutes a nuisance[ ] is the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all existing circumstances.'' *Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879, 893 (W. Va. 2007) (internal quotations omitted).

[Headnote 9]

''When deciding whether one's use of his or her property is a nuisance to his neighbors, it is necessary to balance the competing interests of the landowners, using a commonsense approach.'' 66 C.J.S. *Nuisances* § 13 (2012). Although we recognize that preserving a residential neighborhood's character is an important and substantial interest for subdivision homeowners, *see Zupancic v. Sierra Vista Recreation*, 97 Nev. 187, 194, 625 P.2d 1177, 1181 (1981), we have consistently held that a landowner does not have a right to light, air, or view. *See Probasco v. City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969); *Boyd v. McDonald*, 81 Nev. 642, 651, 408 P.2d 717, 722 (1965). Thus, in resolving this issue on appeal, we must determine whether the proposed wind turbine is ''so unreasonable and substantial as to amount to a nuisance and warrant an injunction'' by balancing ''the gravity of the harm to the plaintiff against the utility of the defendant's conduct, both to himself and to the community.'' *Cook v. Sullivan*, 829 A.2d 1059, 1066 (N.H. 2003) (internal quotations omitted).

Substantial evidence supports the district court's conclusion that the proposed wind turbine is a nuisance in fact

[Headnotes 10-12]

The determination of whether an activity constitutes a nuisance is generally a question of fact. *Jezowski v. City of Reno*, 71 Nev. 233, 239, 286 P.2d 257, 260 (1955). This court will uphold the factual findings of the district court as long as these findings are not clearly erroneous and are supported by substantial evidence.

Kockos v. Bank of Nevada, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

[Headnotes 13-15]

To sustain a claim for private nuisance, an interference with one's use and enjoyment of land must be both substantial and unreasonable. *Lied v. County of Clark*, 94 Nev. 275, 278, 579 P.2d 171, 173 (1978). Interference is substantial '' '[i]f normal persons living in the community would regard the [alleged nuisance] as definitively offensive, seriously annoying or intolerable.' '' *Rattigan v. Wile*, 841 N.E.2d 680, 688 (Mass. 2006) (quoting Restatement (Second) of Torts § 821F cmt. d (1979)). Interference is unreasonable when ''the gravity of the harm outweighs the social value of the activity alleged to cause the harm.'' *Burch*, 647 S.E.2d at 887 (internal quotations omitted).

[Headnotes 16-18]

In the small body of national caselaw regarding wind turbines, noise and diminution of property values are the most universally considered factors in determining whether a private nuisance exists. Some states also consider the presence of shadow flicker in combination with noise and property value reduction.[5]

Noise

In a case with similar facts from another jurisdiction, the Superior Court of New Jersey held that a residential wind turbine located in a quiet neighborhood constituted a nuisance solely on the basis of the constant loud noise that the turbine generated. *Rose v. Chaikin*, 453 A.2d 1378, 1381-82 (N.J. Super. Ct. Ch. Div. 1982). In *Rose*, the Superior Court found that the distinctive sound of the wind turbine produced a heightened level of intrusiveness

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[5]We have not previously addressed whether the aesthetics of a wind turbine is a proper consideration in determining the existence of a nuisance. We adopt the view of several jurisdictions that hold aesthetics alone cannot form the basis of a private nuisance claim. *See Wernke v. Halas*, 600 N.E.2d 117, 121-22 (Ind. Ct. App. 1992); *Oliver v. AT&T Wireless Services*, 90 Cal. Rptr. 2d 491, 500 (Ct. App. 1999); *Ness v. Albert*, 665 S.W.2d 1, 1-2 (Mo. Ct. App. 1983). The reason for this general rule, with which we agree, is that ''[a]esthetic considerations are fraught with subjectivity.'' *Ness*, 665 S.W.2d at 2. But we also adopt *Burch v. Nedpower*'s holding that aesthetics-based complaints can be one of several factors to consider, because we agree with the rationale of that court when it stated: '' 'Unsightly things are not to be banned solely on that account. Many of them are necessary in carrying on the proper activities of organized society. But such things should be properly placed, and not so located as to be unduly offensive to neighbors or to the public.' '' 647 S.E.2d at 891 (quoting *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937)). Thus, while Sowers is correct that the large proportions of the turbine alone cannot form the basis of a nuisance finding, the district court may properly consider the enormity of the object as one factor in its decision.

because the neighborhood was quiet, separated from commercial and heavier residential noise, and the residents had specifically chosen to live in the area due to the peacefulness the community afforded. *Id*. We conclude that the citizens who were protected in *Rose* are analogous to the Halls and other Forest Hills residents, as the district court heard testimony of several persons living in the Forest Hills Subdivision that the subdivision was very quiet, and they were concerned that the level of noise from the wind turbine would change the character of the neighborhood they had sought to live in. Since a renewable energy expert testified that the noise created by the turbine would be similar to that of the hum on a nearby highway, there is some evidence that the quiet would most likely be gone. Based on this evidence, the district court could have determined that the proposed wind turbine constitutes a nuisance as a source of excessive noise.

Diminution to property value

Burch also allows for the consideration of potentially diminished property values where it is shown that a landowner's use and enjoyment of his or her property may be infringed. 647 S.E.2d at 892. Since the district court received testimony from subdivision residents that they feared an impact on the use and enjoyment of their property, it was fair for the district court to also take into account potential harm to property values. Thus, it was acceptable to include in its findings and conclusions the opinion of the real estate agent who testified that properties in proximity to wind turbines decreased in value.[6]

Aesthetics and shadow flicker

[Headnotes 19, 20]

As noted in footnote 5, a district court may consider the aesthetics of the wind turbine only if factors other than unsightliness or obstruction of views are claimed. In *Burch*, the West Virginia court noted that shadow flicker was a kind of aesthetic concern that could be considered in conjunction with other factors. *Id*. at 898. It further anticipated how a commercial wind turbine facility abutting a neighborhood could constitute a private nuisance where constant shadow flicker was likely to ruin the enjoyment of residents. Here, Karl Hall testified that the wind turbine would create a shadow flicker on his property, and the contractor hired to con-

[6]While Sowers objected to the real estate agent's qualifications as an expert, he does not raise that issue on appeal. *See Attorney General v. Montero*, 124 Nev. 573, 577 n.9, 188 P.3d 47, 49 n.9 (2008) (an issue raised by the appellant for the first time in the appellant's reply brief need not be considered on appeal).

struct the wind turbine testified that there is no way to mitigate shadow flicker. Thus, it was not clearly erroneous for the district court to consider shadow flicker.

Nor was it error for the district court to consider the size of the proposed wind turbine. Evidence was heard from a representative of the company who was supposed to construct the turbine indicating that the height of the proposed turbine exceeded 75 feet. The district court got to experience just how tall 75 feet is during its site visit to a comparable wind turbine. With this perspective, the site visit to Sowers' property revealed that his proposed turbine would be a significant imposition on the Halls' ability to use their property, as their land, which lays lower than Sowers' land, would now have a sizeable obstacle overshadowing it. Since evidence of other factors was presented, it was proper for the district court to add into its consideration the presence of shadow flicker and the size of the turbine and the impact on views.

As such, we conclude that this evidence concerning the noise, diminution in property value, shadow flicker, and aesthetics far outweighs any potential utility of the proposed wind turbine within the Forest Hills Subdivision.[7] Accordingly, we conclude that the proposed wind turbine constitutes a nuisance in fact.

The district court properly granted the injunction

[Headnotes 21, 22]

A district court may grant a permanent injunction to abate a nuisance. NRS 40.140(1). Typically, we review the district court's decision to grant a permanent injunction for an abuse of discretion. *Commission on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009). Purely legal questions surrounding the issuance of an injunction, however, are reviewed de novo. *Secretary of State v. Give Nevada A Raise*, 120 Nev. 481, 486 n.8, 96 P.3d 732, 735 n.8 (2004).

[Headnotes 23, 24]

Sowers argues that the injunction is void because it does not specifically state the reasons for its issuance as required by NRCP 65(d).[8] Specifically, Sowers complains that the district court judg-

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[7]We recognize that the utility of the wind turbine is the fact that it is an alternative energy source, which Nevada's public policy favors. *See* NRS 278.02077. However, an NV Energy representative informed the court that only Sowers would benefit from this alternative energy source since any energy credit for the turbine's use would only be extended to Sowers' property, and not to the other subdivision residents. Thus, we conclude that the wind turbine's utility within the community is far outweighed by its potential harm to the Forest Hills Subdivision residents.

[8]In addition, Sowers argues that the injunction should not have been granted pursuant to NRS 33.010(1) and (2) because the Halls' complaint merely alleged that the proposed wind turbine will cause inconvenience, annoyance, and

ment only discussed the aesthetics of the proposed wind turbine, and thus, any other factors considered by the district court are not apparent on the face of the judgment.

[Headnote 25]

Pursuant to NRCP 65(d), ''[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .'' However, ''the lack of a statement of reasons does not necessarily invalidate a permanent injunction, so long as the reasons for the injunction are readily apparent elsewhere in the record and are sufficiently clear to permit meaningful appellate review.'' *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 118, 787 P.2d 772, 775 (1990).

While the district court expressed concern with the size of the proposed wind turbine, a review of the record reveals it did consider the anticipated noise level of the proposed wind turbine, the actual noise level of an existing wind turbine, the quietness of the Forest Hills Subdivision community, the effects of shadow flicker, and the diminution in value of surrounding properties that the wind turbine would cause. Since each of these findings is supported by evidence in the record, we conclude that the reasons for the injunction are readily apparent in the record and are sufficiently clear to permit meaningful appellate review.

Accordingly, we affirm the district court's order granting a permanent injunction.

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

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hardship, and did not specifically address how the plaintiffs would prevail on their claims or how Sowers' turbine would produce irreparable and great injury. However, Nevada is a notice-pleading jurisdiction where courts liberally construe pleadings so long as claims are fairly noticed to the adverse party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). In addition, the permanent injunction was based on more than the Halls' complaint. The district court reached its decision based on the evidence presented by both parties. Thus, because the district court's decision was based on the evidence and the district court retains the authority to grant any appropriate relief, *see* NRCP 54(c), Sowers' argument lacks merit.

CRAIG MORROW, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE CYNTHIA DIANNE STEEL, DISTRICT JUDGE, RESPONDENTS, AND KOURTNEY MORROW, REAL PARTY IN INTEREST.

No. 61102

February 14, 2013 294 P.3d 411

Original petition for a writ of mandamus or prohibition challenging a district court order that rejected, as untimely, a peremptory challenge for a change of judge under SCR 48.1.

Wife filed for divorce from husband. Husband filed peremptory challenge for a change of district court judge, and clerk of court reassigned the matter. Thereafter, the district court rejected the peremptory challenge and transferred the matter back to the district court judge to which case had initially been assigned. Husband filed petition for writ of mandamus and prohibition challenging order rejecting his peremptory challenge for a change of judge as untimely. The supreme court held that in a matter of first impression, rule governing computation of time, rather than rule addressing treatment of days when deadline to act falls on a nonjudicial day, applied to determine whether husband's peremptory challenge for a change of judge was timely.

Petition granted.

The Grigsby Law Group and *Aaron Grigsby*, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, and *C. Wayne Howle*, Solicitor General, Carson City, for Respondents.

Law Offices of Eric P. Roy and *Eric P. Roy*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.
   Extraordinary writ petitions are the appropriate means to challenge district court decisions concerning peremptory challenges to judges.
2. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. PROHIBITION.
   A writ of prohibition is available to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the district court's jurisdiction. NRS 34.320.
4. MANDAMUS; PROHIBITION.
   Writ relief in the form of mandamus or prohibition may be warranted when important issues of law need clarification.

5. Appeal and Error; Mandamus.
   Statutory interpretation is a question of law that the supreme court reviews de novo, even in the context of a writ petition.
6. Courts.
   When a rule is clear on its face, the supreme court will not look beyond the rule's plain language.
7. Judges.
   Ten-day period within which husband was required to file peremptory challenge to district court judge in divorce proceeding began to run on date on which husband was properly served with summons and complaint and received notice of hearing. SCR 48.1(3)(a).
8. Time.
   Rule governing computation of time, rather than rule addressing treatment of days when deadline to act falls on a nonjudicial day, applied to determine whether husband's peremptory challenge to district court judge in divorce case was timely; rule addressing treatment of days when deadline to act fell on nonjudicial day did not discuss computation of time but merely addressed treatment of days when deadline to act fell on a nonjudicial day, but rule governing computation of time expressly set forth a method for computing time. NRCP 6(a); SCR 48.1(3)(a).
9. Courts.
   When two rules apply, they are to be harmonized and read so as to provide effect to both whenever possible.
10. Time.
    Rule governing computation of time informs parties how to count prescribed time periods in the district court, while rule addressing treatment of days when deadline to act falls on a nonjudicial day instructs parties what to do if they are required to perform some act in any court on a nonjudicial day when such court is closed. NRCP 6(a); SCR 4.

Before Pickering, C.J., Hardesty and Saitta, JJ.

OPINION

Per Curiam:

At issue in this petition for extraordinary writ relief is the procedure for determining the timeliness of a peremptory challenge of a district judge under Supreme Court Rule (SCR) 48.1. Initially, we must determine whether the time in which to file a peremptory challenge begins to run before a party's first appearance, and whether the time period is capable of expiring before the first appearance. We then must determine the method for computing the time period for bringing a peremptory challenge. By its plain language, SCR 48.1(3)(a) requires that a peremptory challenge must be filed within ten days of notice of a hearing before a judicial officer. Neither SCR 48.1 specifically, nor the SCR generally, states whether the computation of ten days includes or excludes intermediate nonjudicial days. We conclude that the time to file a peremptory challenge begins to run upon proper notice of a hearing and may expire regardless of whether a party has appeared in the action. But because we also conclude that SCR 48.1(3)(a)'s ten-day

window excludes intermediate nonjudicial days, we conclude that the instant peremptory challenge was timely filed, and thus, we grant the petition.

FACTS AND PROCEDURAL HISTORY

On April 18, 2012, real party in interest Kourtney Morrow filed a complaint for divorce from petitioner Craig Morrow and a contemporaneous motion for child custody in the Eighth Judicial District Court. The motion sought temporary child custody and a hearing was set for May 18, 2012, to be heard by the Honorable Robert Teuton. On April 20, 2012, Kourtney properly served Craig with the summons, complaint, and motion. Thereafter, on May 4, 2012, Craig, through counsel, made his first appearance and filed a peremptory challenge against Judge Teuton. On May 8, 2012, the clerk of the court reassigned the matter to the Honorable Cynthia Dianne Steel. On May 11, 2012, Judge Steel rejected the peremptory challenge and transferred the matter back to Judge Teuton, ruling that the time to file a peremptory challenge had expired on April 30, 2012, ten calendar days after Kourtney served Craig with the summons, complaint, and motion. Craig then filed the instant writ petition.

DISCUSSION

[Headnotes 1-4]

This writ petition involves an issue of first impression concerning computing the allowable time for filing a peremptory challenge. Extraordinary writ petitions are the appropriate means to challenge district court decisions concerning peremptory challenges. *State Engineer v. Truckee-Carson Irrig.*, 116 Nev. 1024, 1029, 13 P.3d 395, 398 (2000). ''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted); *see also* NRS 34.160. A writ of prohibition is available to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the district court's jurisdiction. NRS 34.320. Writ relief may be warranted when important issues of law need clarification. *See International Game Tech. v. Dist. Ct.*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006). As there is potential for the district courts to inconsistently apply SCR 48.1(3)(a), we elect to exercise our discretion to entertain the merits of this writ petition and to clarify this issue of law.

Peremptory challenge rule

As a matter of right, each side in a district court civil action is entitled to change the judge assigned to the case, before any hear-

ing is commenced or any ruling is made on a contested matter, by peremptory challenge. SCR 48.1(1); SCR 48.1(5). ''[T]he peremptory challenge shall be filed: (a) [w]ithin 10 days after notification to the parties of a trial or hearing date; or (b) [n]ot less than 3 days before the date set for the hearing of any contested pretrial matter, whichever occurs first.'' SCR 48.1(3)(a) and (b). Judge Steel concluded that Craig had received notification of the hearing on April 20, 2012, when he was served with the summons, complaint, and motion, and thus, the time to file a peremptory challenge ended on April 30, making Craig's May 4 peremptory challenge untimely. Craig argues that the time to file a peremptory challenge cannot expire until a party has made a first appearance, and thus, his May 4 peremptory challenge was timely. Kourtney contends that the time to file a peremptory challenge may expire before a first appearance and that Judge Steel properly determined that the deadline to file a peremptory challenge had lapsed by counting ten calendar days from April 20 to April 30. The first step in determining when the time to file a peremptory challenge expires is to determine when that time begins to run.

[Headnotes 5, 6]

''Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition.'' *International Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. When a rule is clear on its face, we will not look beyond the rule's plain language. *See Beazer Homes Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).

[Headnote 7]

The plain language of SCR 48.1(3)(a) provides only ten days to file a peremptory challenge, and in the face of that plain language, we cannot come to another construction.[1] *Beazer*, 120 Nev. at 579-80, 97 P.3d at 1135. The record shows that Craig was properly served with the summons, complaint, and motion, giving him notice of the hearing on the motion. Thus, although Craig had 20 days to respond to the complaint to avoid a default, NRCP 12(a)(1), there is no legal basis for holding in abeyance all other timelines until Craig appeared; and Craig had only ten days to file his peremptory challenge. SCR 48.1(3)(a). The fact that Craig took several days to retain counsel and did not appreciate that the time period set forth by SCR 48.1(3) had started to run does not alter

[1]Although some jurisdictions specifically provide that the time to file a peremptory challenge only begins to run after an appearance, *see, e.g.*, Cal. Civ. Proc. Code § 170.6(a)(2) (West Supp. 2013) (stating that any challenge to an assigned judge must be made within 15 days after notice of the all-purpose assignment, or, as to a party who has not yet appeared in the action, within 15 days after that party's first appearance), SCR 48.1(3) contains no such provision concerning appearances.

this conclusion. Indeed, in his petition, Craig notes that the warning in the summons specified that the 20-day period to respond was to avoid the entry of default, not that Craig had 20 days to avoid any negative consequence. Further, Craig concedes that he was served with the motion on April 20, 2012, and does not argue that he did not receive notification of the hearing date on that day. Thus, because Craig was properly served with the summons and complaint, and properly notified of the hearing, the ten-day period of SCR 48.1(3)(a) commenced on April 20, 2012.

NRCP 6 controls the computation of time for SCR 48.1(3)

SCR 48.1(3)(a) specifies that a peremptory challenge must be filed within ten days after notice of a hearing date. The district court counted ten calendar days in determining that the challenge was untimely. SCR 4 states that ''[i]f any day on which an act required to be done by anyone by these rules falls on a nonjudicial day, the act may be performed on the next succeeding judicial day.'' SCR 4 does not discuss the computation of time, but merely addresses the treatment of days when the deadline to act falls on a nonjudicial day. By contrast, NRCP 6(a) expressly sets forth a method for ''computing'' time in a subsection titled ''Computation'' in a rule titled ''Time.''[2] Although Kourtney argues that SCR 4 is a timing rule that specifically excludes only nonjudicial days from the computation of time when the day to act falls on the nonjudicial day, and thus, impliedly includes intermediate nonjudicial days, we disagree with this interpretation. SCR 4 does not discuss the computation of time.

[Headnotes 8-10]

When two rules apply, they are to be harmonized and read so as to provide effect to both whenever possible. *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). Read together, SCR 4 and NRCP 6 do not conflict, as SCR 4 simply states that all acts required to be performed by the SCR in any relevant court may be performed on the next judicial day if the day to act is a nonjudicial day.[3] SCR 4 is not a rule of timing,

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[2]NRCP 6(a) states, in pertinent part, that ''[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and nonjudicial days shall be excluded in the computation [of time].''

[3]Many of the provisions of the SCR concern appellate procedure or bar matters and have no applicability to actions in the district court. Insofar as Kourtney contends that SCR 4 is a timing rule that trumps NRCP 6(a) on the basis that they conflict and that SCR 4 is more specific to SCR 48.1, we disagree. Even if we found a conflict between SCR 4 and NRCP 6(a), we would conclude that the 2005 amendment to NRCP 6(a), extending the procedure for computing time excluding intermediate nonjudicial days to time periods less than 11 days is more specific to the time period prescribed by SCR 48.1(3), which is a time period of less than 11 days in a district court civil action. To

and thus, no SCR specifies how to compute the time set forth by SCR 48.1(3). NRCP 6(a), by its own terms, applies to the computation of any period of time prescribed or allowed by the NRCP, local rules of the district court, by an order of the court, or by any applicable statute. The NRCP govern the procedure in any civil action in the district court. NRCP 1. SCR 48.1(1) specifically states that it is a procedure in a civil action in the district court. The plain language of SCR 48.1(1) places it within the ambit of the NRCP.[4] Thus, NRCP 6(a) informs parties how to count prescribed time periods in the district court, while SCR 4 instructs parties what to do if they are required to perform some act in any court on a nonjudicial day when such court is closed.

Having determined that the time for filing a peremptory challenge begins to run upon notice of the hearing, regardless of whether an appearance has been made, and that NRCP 6(a) applies in determining the timeliness of a peremptory challenge under SCR 48.1, we conclude that with the excluded intermediate weekends, Craig's peremptory challenge was timely filed on the tenth day, May 4, 2012. Thus, Judge Steel erred in rejecting the peremptory challenge and returning the matter to Judge Teuton.

CONCLUSION

We grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order rejecting as untimely petitioner's peremptory challenge and instruct the district court clerk to reassign the case to a judge other than Judge Teuton.[5]

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the extent that the two rules could be construed to conflict, a resolution would be better made by a rule amendment. But, we conclude that a harmonious interpretation of the rules is possible, *see Albios*, 122 Nev. at 418, 132 P.3d at 1028, and accordingly, NRCP 6(a) controls.

[4]NRCP 6 has been applied to other rules not covered by the express language of NRCP 6. *See, e.g.*, FMR 1(4) (applying NRCP 6 to the Foreclosure Mediation Rules); *cf.* NAR 4(d) (adopting the same rules for calculation of time as the NRCP, which is NRCP 6, for the Nevada Arbitration Rules).

[5]We deny the alternative request for a writ of prohibition.

DEWEY DAVIS, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DOUGLAS W. HERNDON, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 62260

February 14, 2013 294 P.3d 415

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss an indictment.

Defendant, who had been indicted for multiple counts of robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, conspiracy to commit robbery, and burglary while in possession of a firearm, filed motion to dismiss indictment based on allegedly inadequate grand jury notice. The district court denied motion. Defendant filed petition for writ of mandamus. The supreme court held that service of notice to defendant that his indictment was being considered by grand jury via facsimile of grand jury notice to defendant's counsel satisfied statutory notice requirement.

Petition denied.

Nguyen & Lay and *Rochelle T. Nguyen*, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

1. MANDAMUS.

   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse or arbitrary or capricious exercise of discretion. NRS 34.160.

2. MANDAMUS.

   A writ of mandamus will not issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170.

3. MANDAMUS.

   The decision to entertain an extraordinary writ petition for mandamus relief lies within the supreme court's discretion, and the court must consider whether judicial economy and sound judicial administration militate for or against issuing the writ.

4. COURTS.

   Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by the supreme court's exercise of its original jurisdiction, the court may exercise its discretion to consider a petition for extraordinary mandamus relief.

5. MANDAMUS.
   The supreme court would consider the merits of defendant's petition for a writ of mandamus alleging the district court erred by denying his motion to dismiss indictment for inadequate notice of grand jury hearing, as petition raised an important matter that needed clarification. NRS 172.241(2).
6. STATUTES.
   Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act.
7. GRAND JURY.
   Statute requiring that reasonable notice be served upon a person whose indictment is being considered by a grand jury does not mandate personal service of the grand jury notice. NRS 172.241(2).
8. GRAND JURY.
   Service of notice to defendant that his indictment was being considered by a grand jury via facsimile of grand jury notice to defendant's counsel satisfied statutory notice requirement, as statute mandating notice did not require personal service, and statute governing service of papers by facsimile machine permitted service of grand jury notice on defense counsel via facsimile. NRS 172.241(2), 178.589(1).
9. GRAND JURY.
   Notice to defendant that his indictment was being considered by a grand jury was not defective for failure to include date, time, and place of the grand jury hearing; State was required to include date, time, and place in the grand jury notice but had to forward this information only upon the grand jury target's written request. NRS 172.241(2)(b).

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

OPINION

Per Curiam:

In this original writ proceeding, we consider whether facsimile service of a notice of intent to seek an indictment constitutes adequate service under NRS 172.241(2). We conclude that it does, as NRS 172.241(2) does not require personal service and NRS 178.589(1) permits facsimile transmission of motions, notices, and other legal documents where personal service is not required. We therefore deny the petition.

FACTS AND PROCEDURAL HISTORY

Petitioner Dewey Davis is awaiting trial on multiple counts of robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, conspiracy to commit robbery, and burglary while in possession of a firearm. From the documents submitted, it appears that a criminal complaint was filed against Davis on March 16, 2011. Thereafter, he was represented by at least two counsel who were later allowed to withdraw from their

representation. On August 25, 2011, Richard Tannery was appointed to represent Davis. Notice of the appointment was served on Tannery that day, with confirmation of the appointment apparently occurring on the following day, August 26, 2011. A notice of intent to seek an indictment was served by facsimile transmission to Tannery's office on August 25, 2011. The grand jury met in August and September 2011 and April 2012, ultimately returning an indictment against Davis. Davis subsequently filed a motion to dismiss the indictment because, among other things, he was not provided reasonable notice because NRS 172.241(2) requires personal service of the grand jury notice and the notice did not include the date, time, and place of the grand jury hearing. The district court denied the motion, and this original petition for a writ of mandamus followed.

DISCUSSION

[Headnotes 1-5]

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *see Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); *see State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (defining manifest abuse of discretion and arbitrary or capricious exercise of discretion in context of mandamus). The writ will not issue, however, if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170. Ultimately, the decision to entertain an extraordinary writ petition lies within our discretion, and we must ''consider[ ] whether judicial economy and sound judicial administration militate for or against issuing the writ.'' *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), *limited on other grounds by Hildalgo v. Dist. Ct.*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008). ''Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by this court's exercise of its original jurisdiction, this court may exercise its discretion to consider a petition for extraordinary relief.'' *Schuster v. Dist. Ct.*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007). Because the petition raises an important matter that needs clarification, we exercise our discretion to consider its merits. Further, we have concluded that a writ of mandamus is an appropriate remedy for inadequate notice of a grand jury hearing. *Solis-Ramirez v. District Court*, 112 Nev. 344, 347, 913 P.2d 1293, 1295 (1996).

[Headnote 6]

In his petition, Davis argues that the State's facsimile service of the grand jury notice was inadequate under NRS 172.241(2) be-

cause that statute requires personal service and therefore the district court exercised its discretion in an arbitrary and capricious manner in denying his motion to dismiss the indictment. '' 'Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act.' '' *Speer v. State*, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000) (quoting *Anthony Lee R., A Minor v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997)). The plain language of NRS 172.241(2) provides in relevant part that ''reasonable notice'' shall be served ''upon a person whose indictment is being considered by a grand jury'' and ''[t]he notice is adequate if it: (a) [i]s given to the person, the person's attorney of record or an attorney who claims to represent the person.''

[Headnote 7]

In legal usage, ''personal service'' has a distinct meaning—''[a]ctual delivery of the notice or process to the person to whom it is directed.'' *Black's Law Dictionary* 933 (7th ed. abridged 2000). Several Nevada statutes expressly require that notices regarding a variety of matters must be accomplished by ''personal service'' or some other specified means when personal service cannot be accomplished. *See, e.g.*, NRS 107.085(3) (relating to trust agreements concerning real estate; requiring ''personal service'' of notice of sale to grantor or title holder unless personal service cannot be timely effected); NRS 159.0475(1) (relating to guardianship proceedings and identifying methods of service of citations to appear at guardianship hearing, included certified mail and ''[p]ersonal service in the manner provided pursuant to NRCP 4(d)''); NRS 283.180 (relating to impeachment of public officers; requiring that service of notice to appear and answer articles of impeachment ''shall be made upon the defendant personally''); NRS 696B.200(2) (relating to delinquent insurers requiring that ''personal service of process shall be made as in other civil actions'' when action involves in-state insurers). Nothing in the plain language of NRS 172.241(2) requires personal service upon the person who is the subject of the indictment. Had the Legislature intended to require personal service, it could have expressly done so as it has in other statutes. Because the Legislature did not, we conclude that NRS 172.241(2) does not mandate personal service of the grand jury notice.

[Headnote 8]

Where, as here, personal service is not required, NRS 178.589(1) provides that a person represented by counsel may be served with any motion, notice, or other legal document by facsimile transmission if ''(a) [t]he document is transmitted to the office of the attorney representing the person; and (b) [t]he facsimile machine is operational and is maintained by the attorney

representing the person or the employer of that attorney.'' Here, the documents before us indicate that Tannery was appointed to represent Davis on August 25, 2011, and the State faxed the grand jury notice to Tannery's office that day.[1] Although Tannery may have discovered the grand jury notice at a later time, that circumstance is irrelevant because the notice was properly served upon facsimile transmission that satisfies NRS 178.589(1). And while Davis argues generally that the unreliability of facsimile service makes that method inadequate, nothing in his submissions indicates that the facsimile machine was not operational.

[Headnote 9]

As to Davis's contention that the grand jury notice was deficient because it failed to inform him of the date, time, and place of the grand jury hearing, we disagree. NRS 172.241(2)(b) provides that a grand jury target may testify before the grand jury if he ''submits a written request to the district attorney and includes an address where the district attorney may send a notice of the date, time and place of the scheduled proceeding of the grand jury.'' Therefore, the State is not required to include date, time, and place in the grand jury notice but must forward that information only upon the grand jury target's written request.

Because we conclude that the district court did not manifestly abuse its discretion or exercise its discretion in an arbitrary or capricious manner by denying Davis's motion to dismiss the indictment, we deny the petition.

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[1]To the extent Davis argues that the grand jury notice was deficient because he did not receive it from the State or Tannery, his claim lacks merit as the notice may be served on counsel. *See* NRS 172.241(2)(a).