Justice Elena Kagan recently stated in her dissent in *Yates v. United States* that:

> Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting) (internal quotation omitted). The majority undertook its own design of NRS 40.455. The district court interpreted the statute as written and, in my view, did so correctly. Therefore, I respectfully dissent.

RYAN MITCHELL, D.O., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE, RESPONDENTS, AND ALEC BUNTING, BY AND THROUGH HIS GUARDIAN AD LITEM, STELLA RAVELLA; AND STELLA RAVELLA, INDIVIDUALLY, REAL PARTIES IN INTEREST.

No. 63076

April 30, 2015 359 P.3d 1096

Original petition for a writ of mandamus directing the district court to sustain the privileges asserted by a defendant doctor in a medical malpractice case as to his personal counseling and treatment records.

Patient's guardian ad litem brought action against physician and physician's employer for medical malpractice and negligent hiring and supervision after physician allegedly performed tonsillectomy while impaired by drugs, and guardian subpoenaed physician's counseling and substance abuse treatment records. The district court overruled physician's claim of doctor-patient and family therapist-client privileges. Physician sought writ of mandamus. The supreme court, PICKERING, J., held that: (1) physician did not waive doctor-patient privilege, (2) drug addiction was not element of malpractice claim to invoke patient-litigant exception to doctor-patient privilege, (3) drug addition was element of negligence claims to invoke patient-litigant exception, (4) guardian established basis in fact for invoking patient-litigant exception, (5) physician did not waive

family therapist-client privilege, and (6) counseling treatment was not element of claims to invoke client-litigant exception to family therapist-client privilege.

Petition granted in part and denied in part.

[Rehearing denied July 23, 2015]

DOUGLAS, J., dissented in part. SAITTA, J., dissented.

Mandelbaum, Ellerton & McBride and *Sarah Marie Ellerton, Kim Irene Mandelbaum*, and *Robert C. McBride*, Las Vegas, for Petitioner.

The Law Office of Daniel S. Simon and *Daniel S. Simon*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS; PROHIBITION.
   Extraordinary writs of mandamus and prohibition generally are not available to review discovery orders. NRS 34.170, 34.330.
2. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   A patient who voluntarily puts his physical or mental condition in issue in a lawsuit loses the protection of the doctor-patient privilege for communications with his doctor about that condition. NRS 49.225.
3. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   Since waiver requires an affirmative, voluntary act by the holder of the claim or right to be waived, forced denials of a litigation adversary's allegations about a physical or mental condition normally do not waive the doctor-patient privilege. NRS 49.225, 49.385.
4. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   Physician, who was accused by patient's guardian ad litem of performing tonsillectomy while impaired by drugs, did not waive doctor-patient privilege over his substance abuse treatment records in guardian's action against physician and employer for malpractice and negligent hiring and supervision; physician did not place his drug addiction in issue in underlying malpractice suit, rather guardian ad litem did.
5. MANDAMUS.
   Defendant waived, for his petition for writ of mandamus, his argument that his substance abuse treatment records were confidential and could not be disclosed pursuant to statute protecting records created at alcoholism and substance abuse treatment centers, where defendant did not make argument in the district court. NRS 458.280.
6. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   The patient-litigant exception to the doctor-patient privilege applies regardless of who raised the claim or defense that triggered the exception, provided that there is a confidential communication that is relevant to an issue of the patient's condition in a proceeding in which the condition is an element of a claim or defense. NRS 49.225, 49.245(3).
7. COURTS; STATUTES.
   The anti-absurdity doctrine is usually invoked when a statute, as written, does not parse; it aides interpretation but does not license courts to improve statutes or rules substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved.

8. Privileged Communications and Confidentiality.
Relevance alone does not make a patient's condition an element of a claim or defense for purposes of applying the patient-litigant exception to the doctor-patient privilege; at minimum, the patient's condition must be a fact to which the substantive law assigns significance. NRS 49.225, 49.245(3).

9. Privileged Communications and Confidentiality.
Physician's drug addiction was not an element of patient's guardian ad litem's malpractice claim, based on physician allegedly performing tonsillectomy while impaired by drugs, and therefore, patient-litigant exception to doctor-patient privilege did not apply to physician's substance abuse treatment records; even though drug addiction may have been relevant to malpractice claim, of legal consequence to claim was whether physician's conduct fell below standard of care, rather than why conduct fell below standard of care. NRS 49.225, 49.245(3).

10. Health.
To establish medical malpractice, a plaintiff must show that: (1) the doctor's conduct departed from the accepted standard of medical care or practice, (2) the doctor's conduct was both the actual and proximate cause of the plaintiffs injury, and (3) the plaintiff suffered damages as a result.

11. Privileged Communications and Confidentiality.
Physician's drug addiction was an element of patient's guardian ad litem's negligent hiring and supervision claims against physician's employer, arising out of physician allegedly performing tonsillectomy while impaired by drugs, as required to invoke patient-litigant exception to doctor-patient privilege protecting physician's substance abuse treatment records; guardian's claims required her to establish that employer knew or should have known that physician was unfit for position he held. NRS 49.225, 49.245(3).

12. Privileged Communications and Confidentiality.
For a nonpatient to invoke the patient-litigant exception to the doctor-patient privilege, the nonpatient must establish a basis in fact for the district court to conclude that the condition exists and is an element of a legitimate claim or defense. NRS 49.225, 49.245(3).

13. Privileged Communications and Confidentiality.
Patient's guardian ad litem established a basis in fact for conclusion that physician was in throes of active substance abuse at time he operated on patient, as required to invoke patient-litigant exception to doctor-patient privilege protecting substance abuse treatment records in guardian's negligent hiring and supervision claims against physician's employer; physician's drug-related arrests three and six months after surgery, convictions for offenses, and admissions to being addicted to drugs sufficiently established his addiction and its temporal proximity to surgery to have justified in camera review of medical records to determine which should have been made available to guardian. NRS 49.225, 49.245(3).

14. Privileged Communications and Confidentiality.
Physician, who was accused by patient's guardian ad litem of performing tonsillectomy while impaired by drugs, did not waive family therapist-client privilege over his marriage counseling records in guardian's action against physician and employer for malpractice and negligent hiring and supervision; physician did not place his counseling sessions in issue in underlying malpractice suit. NRS 49.247.

15. Privileged Communications and Confidentiality.
Physician's counseling treatment was not an element of patient's guardian ad litem's malpractice or negligent hiring and supervision claims,

based on physician allegedly performing tonsillectomy while impaired by drugs, and therefore, client-litigant exception to family therapist-client privilege did not apply to physician's counseling records; no issue respecting treatment provided by the physician's marital and family therapist was implicated in guardian's case. NRS 49.247, 49.249(4).

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

This is a medical malpractice case in which the doctor defendant, petitioner Ryan Mitchell, seeks an extraordinary writ directing the district court to protect as privileged counseling and medical records relating to his substance abuse. We conditionally grant the writ. Mitchell's family and marital therapy records are privileged, and his doctor-patient records, though subject to the patient-litigant exception in NRS 49.245(3), should have been reviewed in camera by the district court and appropriate limitations placed on their use before discovery of all or any part of them was allowed.

I.

Alec Bunting experienced heart problems following a tonsillectomy performed by Dr. Mitchell. Bunting's guardian ad litem, Stella Ravella, sued Mitchell and Mitchell's employer for medical malpractice and negligent hiring and supervision, respectively. Ravella's complaint alleges that Mitchell's misadministration of anesthesia during the surgery caused then-seven-year-old Bunting's heart to fail. Bunting survived, but his heart now beats with the help of a pacemaker.

In deposition, Mitchell admitted that at the time he operated on Bunting he was addicted to Ketamine and Valium, which he had abused intermittently for years. Mitchell denies operating on Bunting—or any patient—while under the influence of drugs or alcohol. But, three months after Bunting's tonsillectomy, Mitchell was arrested for domestic violence while high on drugs, and three months after that, Mitchell was arrested for driving under the influence. Mitchell was convicted of both offenses. He disclosed in deposition that, after his arrests, he and his wife pursued marriage counseling and that he was treated for substance abuse by two different doctors, first on an outpatient, then on an inpatient basis.

Ravella posits that Mitchell was impaired when he operated on Bunting and that Mitchell's employer should have recognized his addictive behavior and prevented him from treating patients. Seeking support for her position, Ravella subpoenaed Mitchell's

counseling and substance abuse treatment records. Mitchell objected, citing the doctor-patient and family therapist-client privileges. The district court overruled Mitchell's privilege claims. It held that Ravella's claims and Mitchell's and his employer's defenses to them placed Mitchell's drug addiction in issue in the litigation, thereby terminating the privileges that originally attached to his communications with his doctors and with his and his wife's family therapist.[1]

II.

[Headnote 1]

The law reserves extraordinary writ relief for situations "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170 (mandamus); NRS 34.330 (prohibition). Because most discovery rulings can be adequately reviewed on appeal from the eventual final judgment, extraordinary writs "[g]enerally . . . are not available to review discovery orders." *Clark Cnty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986). But when a discovery order directs disclosure of privileged information, a later appeal may not be an effective remedy. *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995) ("If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal."); *see Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 515, 874 P.2d 762, 763 (1994). Thus, we have occasionally granted extraordinary writ relief from orders allowing pretrial discovery of privileged information, especially when the petition presents an unsettled and important issue of statutory privilege law. *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000); *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993).

Our cases do not address whether and, if so, how the at-issue waiver doctrine and/or the patient-litigant exception to the doctor-patient and family therapist-client privileges apply when it is the defendant who claims the privilege and the plaintiff who has put the defendant's physical or mental condition in issue. And, without writ relief, compelled disclosure of Mitchell's assertedly privileged

[1]This is Mitchell's second writ petition. Argument on the first petition was canceled after Mitchell's bankruptcy triggered the automatic stay in 11 U.S.C. § 362. After a series of reports on the bankruptcy case, we dismissed the first petition without prejudice to avoid having it linger indefinitely on the docket. When Ravella obtained relief from the bankruptcy stay, she returned to district court, which again denied Mitchell's privilege claims, prompting this second writ proceeding. A three-judge panel heard argument on the petition, then transferred it to the en banc court pursuant to IOP 13(b).

communications will occur before a final appealable judgment is reached.[2] Together, these considerations persuade us that our intervention by way of extraordinary writ is appropriate in this matter.

III.

NRS 49.225 and NRS 49.247 protect as privileged confidential communications between a patient and his doctor and between clients and their marriage and family therapist. These privileges initially attached to Mitchell's doctor-patient and marriage and family therapist-client communications. The question we face is whether these confidential communications lost their privileged status when Mitchell's drug addiction became relevant to Ravella's malpractice and negligent hiring and supervision claims. This is a legal question that we decide de novo, without deference to the district court. *See Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 650, 331 P.3d 905, 909-10 (2014). Since the analysis differs for the two privileges, we discuss them separately, taking the doctor-patient privilege first.

A.

[Headnote 2]

A patient who voluntarily puts his physical or mental condition in issue in a lawsuit loses the protection of the doctor-patient privilege for communications with his doctor about that condition. 1 Kenneth S. Broun et al., *McCormick on Evidence* § 103, at 631 (7th ed. 2013). Variously referred to as waiver by placing in issue or the in-issue or at-issue waiver doctrine, this judicially developed rule promotes fairness, *see* 8 John Henry Wigmore, *Evidence* § 2388, at 855 (McNaughton rev. 1961), and discourages abuse of the privilege; it "prevents the patient from putting his physical or mental condition in issue and then asserting the privilege to prevent an adversary from obtaining evidence that might rebut the patient's claim." 25 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5543, at 320 (1989). Today, many states, including Nevada, have amended their doctor-patient privilege statutes to create an express patient-litigant exception that, depending on the form of the exception statute, directs the same or a similar result as the at-issue waiver doctrine. *See* NRS 49.245(3); Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.13.3 (2d ed. 2014).

[2]Although one of Mitchell's doctors produced his records before Mitchell could object, Mitchell asks that, if we sustain his privilege claims, we direct the district court to enter an order in limine prohibiting reference to the produced records at trial and requiring that all copies of the records be returned to Mitchell or destroyed. The other two providers have yet to produce their records, as the district court's production order has been stayed.

1.

[Headnote 3]

Citing out-of-state case law, e.g., *Chung v. Legacy Corp.*, 548 N.W.2d 147 (Iowa 1996); *Shamburger v. Behrens*, 380 N.W.2d 659 (S.D. 1986), Mitchell insists that neither the at-issue waiver doctrine nor the patient-litigant exception properly applies unless the patient is the one who puts his physical or mental condition in issue. And, indeed, this is the law stated in *Chung*, *Shamburger*, and other like cases. *See also* NRS 49.385 (providing that a privilege is waived if the holder "voluntarily discloses or consents to disclosure of any significant part of the [privileged] matter"). If the holder of the privilege denies a litigation adversary's allegations about his physical or mental condition, he has not voluntarily put his condition in issue. Since waiver requires an affirmative, voluntary act by the holder of the claim or right to be waived, *see Mill-Spex, Inc. v. Pyramid Precast Corp.*, 101 Nev. 820, 822, 710 P.2d 1387, 1388 (1985) ("[W]aiver is the intentional relinquishment of a known right."), such forced denials normally do not waive the privilege. *See* Broun, *supra*, § 103, at 633 ("With respect to defenses, a distinction is clearly to be seen between the allegation of a physical or mental condition, which will effect the waiver [of the doctor-patient privilege], and the mere denial of such a condition asserted by the adversary, which will not."); *see also Leavitt v. Siems*, 130 Nev. 503, 511, 330 P.3d 1, 7 (2014) ("Bringing a claim for personal injury or medical malpractice results in a limited waiver of the physician-patient privilege with regard to directly relevant and essential information necessary to resolve the case.").

[Headnotes 4, 5]

Mitchell did not place his drug addiction in issue in the underlying malpractice suit; Ravella did. Analyzed purely as a matter of waiver, Mitchell's doctor-patient privilege thus remains intact and is not affected by Ravella's malpractice and negligent supervision claims. But our analysis does not end with the at-issue waiver doctrine. We still must consider Nevada's statutory patient-litigant exception.[3]

2.

[Headnote 6]

NRS 49.245(3) states the patient-litigant exception to Nevada's doctor-patient privilege as follows:

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[3]Mitchell cites NRS 458.280 in support of his petition for writ relief, which provides that records created at an alcoholism and substance abuse treatment center are confidential and "must not be disclosed without consent of the patient." Mitchell did not make this argument in the district court and it is therefore waived. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

> There is no privilege under NRS 49.225 . . . [a]s to [communications][4] relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense.

A plain reading of the statute's text does not support a requirement that the patient must place his condition in issue for the exception to terminate the privilege. Rather, the statute seems to say that, all other conditions being met—i.e., there is: a confidential communication; that is relevant; to an issue of the patient's condition; in a proceeding; in which the condition is an element of a claim or defense—the exception applies, regardless of who raised the claim or defense that triggered it.

Essentially, Mitchell treats NRS 49.245(3) as a codification of the at-issue waiver doctrine. He asks us to import into the statute a requirement that the patient must assert the condition-based claim or defense for the exception to apply. But we cannot enlarge the doctor-patient privilege by judicially narrowing one of its principal exceptions without running afoul of NRS 49.015, which constrains nonconstitutional privileges to those the Legislature has authorized. *Cf. Rogers v. State*, 127 Nev. 323, 326, 255 P.3d 1264, 1266 (2011) (Nevada's doctor-patient privilege depends on statute, not common law). And the sparse legislative history that exists does not support Mitchell's position. If anything, the historical context suggests its studied rejection.

Nevada adopted its current evidence code in 1971. *See* 1971 Nev. Stat., ch. 402. The Nevada Commission that was tasked with proposing a modern draft evidence code drew on the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates submitted by the Advisory Committee on Federal Rules of Evidence (Draft Federal Rules), *reprinted in* 46 F.R.D. 161 (1969).[5] *See* Legislative Commission of the Nevada Legislative Counsel Bureau, *A Proposed Evidence Code*, Bulletin No. 90, at 1 (Nev. 1970) [hereinafter Bulletin No. 90]. It also consulted the

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[4]The current version of NRS 49.245(3) uses the phrase "written medical or hospital records," rather than the word "communications" that appeared in the original version of the statute. *Compare* 1971 Nev. Stat., ch. 402, § 53, at 785, *with* 1987 Nev. Stat., ch. 449, § 1, at 1036. This change was made in 1987 to prevent a defense lawyer from interviewing a personal injury plaintiff's doctor privately, without the plaintiff's counsel present. *See Leavitt*, 130 Nev. at 511-12, 330 P.3d at 7. The 1987 amendment does not affect the issues addressed in this opinion but does complicate their discussion. To facilitate comparison of Nevada's version of the patient-litigant exception with the model from which it was drawn and those enacted in other states, this opinion substitutes the original "communications" for "written medical or hospital records."

[5]It was not until July 1, 1975, four years after Nevada adopted its evidence code, that the Federal Rules of Evidence went into effect. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

Model Rules of Evidence proposed by the National Conference of Commissioners on Uniform State Law and the ABA in 1953 (the Uniform Act), the California Evidence Code, and existing Nevada law. Bulletin No. 90 at 1. The Draft Federal Rules proposed to eliminate the general doctor-patient privilege altogether, for policy reasons. 46 F.R.D. at 259-60. In its place, Draft Federal Rule 5-04 offered a much narrower psychotherapist-patient privilege. *See id.* at 257-59. The Nevada Commission did not agree with eliminating the doctor-patient privilege, so it "adapted" the psychotherapist-patient privilege in Draft Federal Rule 5-04 by "enlarg[ing it] to embrace all doctors of medicine, dentistry and osteopathy as well as licensed psychologists." Bulletin No. 90, § 53, at 24 cmt.

Draft Federal Rule 5-04(d)(3) included a patient-litigant exception, as follows:

> There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

46 F.R.D. at 259. Unlike NRS 49.245(3), Draft Federal Rule 5-04(d)(3) limited the patient-litigant exception to conditions on which the *patient* relied as an element of *his* claim or defense (except for a deceased patient's condition, on which any party's reliance terminates the privilege). To convert Draft Federal Rule 5-04(d)(3) to NRS 49.245(3) (1971) required the following changes to the former:

> There is no privilege under ~~this rule~~ [NRS 49.225] as to communications relevant to an issue of the ~~mental or emotional~~ condition of the patient ~~in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death,~~ in any proceeding in which ~~any party relies upon~~ the condition ~~as~~ [is] an element of ~~his~~ [a] claim or defense.

This comparison dispels any notion that the Nevada Legislature, through its Legislative Commission, meant but somehow forgot to limit the exception in NRS 49.245(3) to claims the patient initiated. On the contrary, it suggests that contemporary drafters knew how to limit the exception to patient-raised claims or defenses,[6] but that

[6]The Uniform Act and California Evidence Code, which the Nevada Legislative Commission also consulted, *see* Bulletin No. 90 at 1, likewise limited their patient-litigant exceptions to claims or defenses the patient initiated. Uniform Act Rule 223(3) ("There is no privilege under Rule 221 in an action in which the condition of the patient is an element or factor of the

Nevada's evidence code authors, for whatever reason, chose a different path.

Comparable differences in statutory text also distinguish *Shamburger* and *Chung*, referenced above as among Mitchell's primary authorities. Like Draft Federal Rule 5-04(d)(3) but unlike NRS 49.245(3), the patient-litigant exception considered in *Shamburger*, S.D. Codified Laws § 19-13-11 (1986), read: "There is no privilege under § 19-13-7 as to a communication relevant to an issue of the physical, mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense." 380 N.W.2d at 662 n.4. And the exception in *Chung*, Iowa Code § 622.10 (1993), only applied in "a civil action in which the condition of the person in whose favor the [privilege runs] is an element or factor of the claim or defense of the person or of any party claiming through or under the person," 548 N.W.2d at 149. *Shamburger* and *Chung* thus do not offer much interpretive guidance, since the statutes they addressed *expressly* adopted the limitation Mitchell asks us to *imply* into NRS 49.245(3).

We have not found another patient-litigant exception exactly like Nevada's, but Texas's and Utah's are close. Tex. R. Evid. 509(e)(4) (2003) (the doctor-patient privilege does not apply if "any party relies upon the [patient's physical, mental, or emotional] condition as a part of the party's claim or defense [and the communication or record is relevant to that condition]"); Utah R. Evid. 506(d)(1) (2013) (no privilege exists "[f]or communications relevant to an issue of the physical, mental, or emotional condition of the patient: [(A)] in any proceeding in which that condition is an element of any claim or defense, or [(B)] after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense"). By dispensing with the requirement that the patient initiate the claim or defense, these statutes expand the patient-litigant exception and abrogate the patient's control over the privilege.

[Headnote 7]

Even so, the exceptions are not unlimited. To terminate the privilege, the condition must be more than merely relevant to a litigated claim or defense; it must be a *part* (Texas) or an *element* (Nevada and Utah) of the claim or defense. Reading the exceptions as written, without requiring that the patient initiate the claim or defense to trigger them, thus does not reduce the privileges to the point of

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claim or defense *of the patient* or of any party claiming through or under the patient." (emphasis added)); Cal. Evid. Code § 996(a) (West 2009) ("There is no [medical] privilege . . . as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by . . . [t]he patient.").

absurdity,[7] as Mitchell suggests. *See R.K. v. Ramirez*, 887 S.W.2d 836, 841-42 (Tex. 1994) (disapproving of cases holding that the patient must raise the claim to which the condition relates or the privilege would cease to exist; by its terms, the patient-litigant exception requires more than mere relevance of the condition to a claim or defense to trigger the exception); *State v. Worthen*, 222 P.3d 1144, 1151-52, 1158 (Utah 2009) (recognizing that "[i]f feelings themselves were to constitute a mental or emotional condition [for purposes of the rule], the exception to the psychotherapist-patient privilege would devour the privilege" but nonetheless concluding, on the record presented, that the victim's pathological hatred of her parents formed an element of the defendant's fabrication defense, subjecting the victim's therapy records to in camera review and carefully circumscribed disclosure).

Mitchell protests that it is unfair and bad policy to allow Ravella to gain access to his doctor-patient records based on claims she alone raised. But from Ravella's perspective, it is equally unfair to allow Mitchell to suppress evidence by claiming a privilege to which the patient-litigant exception, as written in Nevada, applies. As a policy matter, the debate is not as one-sided as Mitchell assumes.

> While it is true that the defendant did not have "the litigating initiative", it may be the case that his or her out-of-court behavior is what triggered the lawsuit. . . . Is not a person who says "I was not drunk at the time I operated on the plaintiff" and then claims the privilege to prevent inquiry into his alcoholism as much abusing the privilege as the plaintiff who seeks to close his physician's mouth while asserting serious injury? . . . It is only when one assumes that the person seeking to destroy the status quo is in the poorer moral status than the person allegedly responsible for the status quo that the policy argument for defensive use of the privilege takes on much power. At least the contrary arguments are strong enough to suggest why some people have favored a "qualified" exception that would permit the court to see what justice requires before applying the exception.

Wright & Graham, *supra*, § 5543, at 328 n.65.

The policy lines here were drawn by the Legislature, which omitted any requirement that the patient make an issue of his condition for the patient-litigant exception to apply. We decline to read into NRS 49.245(3) a limitation it does not state.

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[7]The anti-absurdity doctrine is usually invoked when a statute, as written, does not parse; it aides interpretation but "does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved." *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005).

3.

Regardless of who raised the issue of the patient's condition, for the patient-litigant exception to apply, the party seeking to overcome the privilege still must show that the "condition of the patient" is "*an element of a claim or defense*" in the proceeding. NRS 49.245(3) (emphasis added). The term "element" is not defined in NRS Chapter 49. Generally, an "element" of a claim is a "part of a claim *that must be proved for the claim to succeed*." *Black's Law Dictionary* 559 (8th ed. 2004) (emphasis added); *see* Wright & Graham, *supra*, § 5543, at 330 ("Though 'element' is not defined, the term is usually used to refer to those fundamental assertions of fact that were required to be pleaded under the old system of code pleading." (footnote omitted) (discussing the successor to Draft Federal Rule 5-04(d)(3))).

[Headnote 8]

Relevance alone does not make a patient's condition an element of a claim or defense. At minimum, the patient's condition must be a fact "to which the substantive law assigns significance." *Ramirez*, 887 S.W.2d at 842 (applying the more expansive "part" of a claim or defense requirement of Tex. R. Evid. 509(d)). A defendant who pleads not guilty by reason of insanity, for example, has asserted a defense that has, as one of its elements, his insanity. *See* Wright & Graham, *supra*, § 5543, at 330-31. Similarly, a disinherited child who challenges her father's will on the grounds he was incompetent has asserted a claim about her father's condition to which legal consequences attach: If proved, the condition alleged invalidates the will. *Ramirez*, 887 S.W.2d at 842-43. In both instances, the patient's condition is an *element* of the claim or defense—not merely *relevant*—because the claim or defense fails unless the condition asserted is established in fact.

[Headnotes 9, 10]

Mitchell's drug addiction is not an element of Ravella's malpractice claim against him. To establish medical malpractice a plaintiff must show that: "(1) . . . the doctor's conduct departed from the accepted standard of medical care or practice; (2) . . . the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3) . . . the plaintiff suffered damages" as a result. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Ravella counts Mitchell's drug addiction as an element of her malpractice claim because his "mental, emotional and physical condition contributed to his negligence and falling below the standard of care." This argument misses the mark. Of legal consequence to a medical malpractice claim is *whether* the practitioner's conduct fell below the standard of care, not *why*. *See Ramirez*, 887 S.W.2d at 845 (Enoch, J., dissenting). Put another way, Ravella wins if she shows

that Mitchell's misadministration of the anesthetic fell below the standard of care and caused Bunting's injuries; legally, Mitchell's diminished capacity doesn't matter. While Mitchell's drug addiction may be relevant to, it is not an element of, Ravella's medical malpractice claim.[8]

[Headnote 11]

We reach the opposite conclusion with respect to Ravella's negligent hiring and supervision claims. Unlike her malpractice claim against Mitchell, Ravella's negligent hiring and supervision claims against his employer require her to establish that the clinic knew or should have known that Mitchell was unfit for the position he held. *See Hall v. SSF, Inc.*, 112 Nev. 1384, 1392-93, 930 P.2d 94, 99 (1996). For purposes of NRS 49.245(3), this makes Mitchell's condition an *element* of Ravella's negligent hiring and supervision claims. *See Hosey v. Presbyterian Church (U.S.A.)*, 160 F.R.D. 161, 163-64 (D. Kan. 1995) (holding that a deceased priest's pedophilia, for which he received psychiatric treatment, was an element of a plaintiff's negligent hiring and supervision claim against the church that employed him; thus, the patient-litigant exception terminated the doctor-patient privilege (similar to Draft Federal Rule 5-04(d)(3), Kansas law dispensed with the requirement that the patient initiate the claim for the exception to apply if the patient was deceased)); *see also Ramirez*, 887 S.W.2d at 843-44 (holding that the Texas patient-litigant exception terminated the doctor-patient privilege as to communications relevant to a doctor's unfitness in a case alleging that the defendant hospital and clinic "knew or should have known of the [doctor's] condition and because of that condition should have supervised him better or not selected him at all").

4.

[Headnote 12]

Although not limited to patient-initiated claims or defenses, the Nevada patient-litigant exception demands close scrutiny when the claim or defense triggering it is asserted by or on behalf of someone other than the patient. A patient presumably will not base a claim or defense on his physical or mental condition unless that condition in fact exists. A stranger to the doctor-patient relationship, by contrast, may be tempted to speculate as to the physical or mental condition of his or her adversary, especially if that will open the door to embarrassing or painful revelations. To invoke the patient-litigant exception, therefore, the nonpatient must establish a basis in fact

[8]Ravella also argues that Mitchell's drug addiction is an element of Mitchell's defense that he exercised due care. But just as Ravella need not prove Mitchell's addiction to show his breach, Mitchell need not disprove it to show that he met the requisite standard of care.

for the district court to conclude that the condition exists and is an element of a legitimate claim or defense. *Cf. Worthen*, 222 P.3d at 1149-50 (a nonpatient must demonstrate to a "reasonable certainty" that the records sought contain evidence material to the claim or defense asserted for the district court to proceed with an in camera review of them).

[Headnote 13]

Ravella's charge that Mitchell was in the throes of active substance abuse at the time he operated on Bunting goes well beyond speculation. Mitchell's arrests, convictions, and admissions in deposition sufficiently establish his addiction and its temporal proximity to the surgery to have justified the district court in undertaking an in camera review of the medical records relating to Mitchell's treatment for substance abuse to determine which should be made available to Ravella and the conditions appropriate to their production. *Ramirez*, 887 S.W.2d at 843 (after a prima facie showing is made that the nonpatient has fairly invoked the exception, the district court should undertake an in camera review of the medical records to "ensure that the production of documents ordered, if any, is no broader than necessary, considering the competing interests at stake"); *see Worthen*, 222 P.3d at 1156 (in camera review appropriate to restrict production of unprivileged but nonetheless private documents); *see also* NRCP 26(c) ("Upon motion by a party or by the person from whom discovery is sought, . . . the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.").

Mitchell and Ravella litigated the privilege issues in this case on an all-or-nothing basis in the district court. Not surprisingly, therefore, the district court did not conduct an in camera review of the medical records relating to Mitchell's substance abuse treatment. We therefore conditionally grant the writ and direct the district court to review the doctor-patient records in camera and enter such orders respecting their production and use as are consistent with this opinion.

B.

[Headnotes 14, 15]

No basis exists, however, to overcome the privilege that attached to Mitchell's and his wife's confidential communications with their marital and family therapist under NRS 49.247. Neither Mitchell nor his wife put their counseling sessions in issue in the litigation by Ravella against Mitchell and Mitchell's employer. The at-issue waiver doctrine, therefore, does not apply, for the same reasons

it does not apply to Mitchell's medical records. And, while NRS 49.249(4) creates a client-litigant exception to the marital and family therapist-client privilege provided in NRS 49.247, that exception is much narrower than the patient-litigant exception in NRS 49.245(3). It provides simply that "[t]here is no privilege under NRS 49.247 . . . [a]s to communications relevant to an issue of *the treatment* of the client in any proceeding in which the treatment is an element of a claim or defense." (Emphasis added.) No issue respecting the treatment provided by the Mitchells' marital and family therapist is implicated, much less an element of a claim or defense, in this case. For that reason, the exception does not apply and the district court is ordered to grant a protective order interdicting discovery of the Mitchells' marriage and family therapy sessions.

We therefore issue a writ of mandamus directing the district court to rescind its order rejecting the claims of privilege in this case, to protect as privileged the confidential communications between the Mitchells and their marital and family therapist, and to proceed as outlined in this opinion as to the doctor-patient communications and records.

Hardesty, C.J., and Parraguirre, Cherry, and Gibbons, JJ., concur.

Douglas, J., concurring in part and dissenting in part:

I join the majority opinion except as to the discussion in section III(A)(3) respecting Mitchell's addiction as an element of Ravella's malpractice claim against him pursuant to NRS 49.245(3). In my view, the majority's reading and interpretation of NRS 49.245(3) and *Prabhu v. Levine*, 112 Nev. 1538, 930 P.2d 103 (1996), is too strident of an application.

In this case, Mitchell admitted that at the time he operated on Bunting he was addicted to Ketamine and Valium, which he had abused intermittently for years. However, Mitchell denies operating on Bunting—or any patient—while under the influence of drugs or alcohol. But, three months after Bunting's tonsillectomy, Mitchell was arrested for domestic violence while high on drugs, and three months after that, Mitchell was arrested for driving under the influence. Mitchell was convicted of both offenses. He disclosed in the deposition that, after his arrests, he and his wife were treated for substance abuse. Additionally, Ravella's charge that Mitchell was in the throes of active substance abuse at the time he operated on Bunting goes well beyond speculation. Mitchell's arrests, convictions, and admissions in deposition sufficiently establish his addiction and its temporal proximity to the surgery to have justified the district court in undertaking an in camera review of the medical records

relating to Mitchell's treatment for substance abuse to determine which should be made available to Ravella and the conditions appropriate to their production. *R.K. v. Ramirez*, 887 S.W.2d 836, 843 (Tex. 1994) (after a prima facie showing is made that the nonpatient has fairly invoked the exception, the district court should undertake an in camera review of the medical records to "ensure that the production of documents ordered, if any, is no broader than necessary, considering the competing interests at stake").

I submit that Mitchell's admitted addiction is relevant and should be considered as an element of Ravella's malpractice claim as to whether it contributed to his negligence and whether his conduct fell below the standard of care. This made Mitchell's addiction an element of Ravella's direct malpractice claim against him and independently justified the discovery she sought, with or without the added negligent supervision or hiring claim against Mitchell's employer. Almost the identical issue confronted the Texas Supreme Court in *Ramirez*, where, construing Texas's comparable patient-litigant exception statute, the majority held that the direct malpractice claim against the addicted doctor triggered application of the patient-litigant exception. *Ramirez*, 887 S.W.2d at 838, 844. I recognize that Texas uses "part" instead of "element" of the claim or defense in its statute, but to me that is a distinction without a difference. Concern for the addicted doctor's privilege and privacy interests is accommodated by requiring in camera review of the documents pre-production, and the fashioning of a protective order, if appropriate, under NRCP 26(c) before their production is ordered. Rather than parse between the elements of the malpractice and negligent hiring/supervision claims, I would hold that the patient-litigant exception is triggered by Ravella's claims against Mitchell and his employer and let the in camera review and protective order afford the safeguards to prevent abuse of the exception.

SAITTA, J., dissenting:

I dissent.

ALLEN VEIL, IN HIS OFFICIAL CAPACITY AS THE DULY ELECTED SHERIFF OF LYON COUNTY, APPELLANT, *v.* ROBERT J. BENNETT, IN HIS OFFICIAL CAPACITY AS THE DULY ELECTED JUSTICE OF THE PEACE OF CANAL TOWNSHIP JUSTICE COURT; AND CAMILLE VECCHIARELLI, IN HER OFFICIAL CAPACITY AS THE DULY ELECTED JUSTICE OF THE PEACE OF DAYTON TOWNSHIP JUSTICE COURT, RESPONDENTS.

No. 63644

April 30, 2015 348 P.3d 684

Appeal from a district court order issuing a writ of mandamus that directed appellant to enter warrant information into electronic databases. Third Judicial District Court, Lyon County; Robert E. Estes, Judge.

Justices of the peace petitioned for writ of mandamus to compel sheriff to enter information from all arrest warrants delivered to sheriff's office into electronic databases. The district court granted petition. Sheriff appealed. The supreme court, PARRAGUIRRE, J., held that statute requiring sheriff to execute arrest warrants did not require sheriff to enter warrant information into electronic databases.

Reversed.

Keith Loomis, Reno, for Appellant.

Virgil D. Dutt, Reno, for Respondents.

1. SHERIFFS AND CONSTABLES.
   Statute that required sheriff to execute warrants did not impose upon sheriff the duty to enter warrant information into electronic databases; the task commanded by an arrest warrant was performed or completed upon the arrest of the defendant, and statute required sheriff to do nothing more than execute arrest warrants. NRS 248.100(1)(c).
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. NRS 34.160.
3. MANDAMUS.
   The supreme court generally reviews a district court's decision regarding a petition for a writ of mandamus for an abuse of discretion.
4. MANDAMUS.
   When a petition for writ of mandamus includes questions of statutory construction, the supreme court will review the district court's decision de novo.
5. STATUTES.
   Statutory language must be given its plain meaning if it is clear and unambiguous.
6. STATUTES.
   A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked whether NRS 248.100(1)(c), which requires sheriffs to "execute" warrants, also imposes upon sheriffs the duty to enter warrant information into electronic databases. We conclude that the statute neither contemplates nor imposes such a duty on sheriffs. Therefore, we reverse.

RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant Allen Veil became Sheriff of Lyon County in 2007. At that time, Sheriff's Office employees entered information from all arrest warrants delivered to the Sheriff's Office into various electronic databases. In 2009, Sheriff Veil began trying to shift part of this task to the justice courts of Lyon County. Sheriff Veil proposed that Sheriff's Office employees continue to enter information into the databases from arrest warrants issued by the justice courts based on Sheriff's Office investigations. Sheriff Veil further proposed, however, that the justice courts enter information into the databases from all other justice court-issued arrest warrants, such as warrants arising from defendants' failure to appear. The Justice of the Peace of Walker River Township, who is not a party to this appeal, agreed to this arrangement. Respondents Robert Bennett and Camille Vecchiarelli, Justices of the Peace of Canal Township and Dayton Township, respectively, did not. At some point, the Sheriff's Office ceased entering information into the databases from arrest warrants issued by the justice courts that were not based on Sheriff's Office investigations.

Acting in their official capacities as Justices of the Peace, Bennett and Vecchiarelli petitioned the district court for a writ of mandamus to compel Sheriff Veil to enter information from all arrest warrants delivered to the Sheriff's Office into the databases. The district court granted the petition, explaining that NRS 248.100 imposed on Sheriff Veil a duty to execute warrants, and that in the modern age, this duty included entering warrant information into electronic databases. Sheriff Veil now appeals.

DISCUSSION

[Headnotes 1-4]

"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." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. Gener-

ally, we review a district court's decision regarding a petition for a writ of mandamus for an abuse of discretion. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010). "However, when the writ petition includes questions of statutory construction, this court will review the district court's decision de novo." *Id.*

[Headnotes 5, 6]

Statutory language must be given its plain meaning if it is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.*

According to NRS 248.100(1)(c), "[t]he sheriff shall . . . *execute* the process, writs or warrants of courts of justice . . . when delivered to the sheriff for that purpose." (Emphasis added.) NRS Chapter 248 does not define "execute," but the word is defined elsewhere as "[t]o perform or complete." *Black's Law Dictionary* 649 (9th ed. 2009). An arrest warrant is "[a] warrant . . . directing a law-enforcement officer to arrest and bring a person to court." *Black's Law Dictionary* 1722 (9th ed. 2009). Thus, the task commanded by an arrest warrant is performed or completed upon the arrest of the defendant. *See* NRS 171.122(1) (stating that an arrest "warrant must be *executed* by the arrest of the defendant" (emphasis added)); *Hayes v. State*, 106 Nev. 543, 548, 797 P.2d 962, 965 (1990) (stating that "police may enter a residence to *execute* an arrest warrant" (emphasis added)), *overruled on other grounds by Ryan v. Eighth Judicial Dist. Court*, 123 Nev. 419, 429, 168 P.3d 703, 710 (2007). In light of the plain meaning of "execute" as that term relates to arrest warrants, we conclude that NRS 248.100(1)(c) unambiguously requires sheriffs to arrest defendants named in arrest warrants but imposes no duty to enter warrant information into electronic databases.

We note that Sheriff Veil must act diligently in the performance of his official duties, including his duty to execute arrest warrants by arresting defendants. *See* NRS 248.060; 63C Am. Jur. 2d *Public Officers and Employees* § 243 (2009) ("Every public officer is bound to . . . . use reasonable skill and diligence in the performance of official duties."). It is within Sheriff Veil's discretion, however, to determine how best to execute arrest warrants under NRS 248.100(1)(c), and the district court improperly attempted to control the exercise of that discretion.

Entering warrant information into electronic databases may further the objectives of both law enforcement and the justice system, but NRS 248.100(1)(c) neither contemplates nor assigns this task. It is the role of the Legislature—not this court—to determine which entity is best suited to this task. *See Galloway v. Truesdell*, 83 Nev. 13, 20, 522 P.2d 237, 242 (1967). We therefore cannot graft this additional duty onto the unambiguous language of NRS 248.100(1)(c).

Accordingly, we conclude that the district court abused its discretion by ordering Sheriff Veil to enter warrant information into electronic databases, and we reverse the district court order granting the petition for a writ of mandamus.

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

PICKERING, J., with whom HARDESTY, C.J., and CHERRY, J., agree, concurring in the result only:

I concur in the result but not the reasoning of the majority. This is an appeal from a writ of mandamus compelling Sheriff Veil to enter all warrants issued by the two justices of the peace who are the real parties in interest into "whatever databases there are." But the real parties in interest did not demonstrate in the district court, and have not demonstrated on appeal, a statutory or other basis to say Sheriff Veil has a clear, ministerial duty to enter all warrants in "whatever databases there are." This being so, the writ must be vacated. I would stop there and leave for another day the broader question of Sheriff Veil's discretionary duties, or the duties he may owe based on sources besides NRS 248.100, in respect to entering warrants in electronic databases.

NRS 248.100(1)(c) obligates a sheriff in a county the size of Sheriff Veil's to "execute" justice court warrants. In 1861, when the statute was originally enacted, as today, the word "execute" means "to carry into complete effect," Noah Webster, *An American Dictionary of the English Language* 476 (1865), or "[t]o perform or complete." *Black's Law Dictionary* 609 (8th ed. 1999). And NRS 248.130, the companion to NRS 248.100, says that, on being delivered "any process, writ, order or paper"[1] the sheriff "shall . . . [e]xecute the same *with diligence*," which is to say, by making "[a] continual effort to accomplish something," *Black's Law Dictionary* 488 (8th ed. 1999) (defining "diligence"), here, the arrest of the person named in the warrant.

In this day and age, "[e]lectronic databases form the nervous system of . . . criminal justice operations." *Herring v. United States*, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting). Nevada, like all states, works with the FBI's National Crime Information Center. *National Crime Information Center*, FBI, http://www.fbi.gov/about-us/cjis/ncic (last visited Apr. 2, 2015). Nevada also has joined interstate compacts such as the Nation-

[1]Although Sheriff Veil argues to the contrary, warrants, including "fail-to warrants," i.e., bench warrants, by definition are "processes," "writs," and "papers." *See Black's Law Dictionary* 1242 (8th ed. 1999) ("process" is a "summons or writ, esp. to appear or respond in court"); *id.* at 164-65 (defining "bench warrant" as "[a] writ issued directly by a judge to a law-enforcement officer, esp. for the arrest of a person who . . . has failed to appear for a hearing or trial"); *id*. at 1142 ("paper" is "[a]ny written or printed document or instrument").

al Crime Prevention and Privacy Compact Council, *List of Compact/MOU States*, FBI, http://www.fbi.gov/about-us/cjis/cc/compact-mou-participation/list_of_compact_mou_states (last visited Apr. 2, 2015), to which our agencies of criminal justice must submit reports, and which we may in turn use, *see* 42 U.S.C. § 14616 (2012); NRS 179A.800, and it is one of thirteen states that is a full point of contact for the National Instant Criminal Background Check System.[2] *See* NRS 179A.163. Under Nevada law, "[e]ach agency of criminal justice shall submit the information relating to records of criminal history that it creates or issues" to the Central Repository for Nevada Records of Criminal History. NRS 179A.075(3); *see also* NRS 179A.070(1) ("record[s] of criminal history" include, amongst other things, "summons in a criminal action, [and] warrants"). Given all this, and being tasked with "executing" warrants "with diligence," I am not prepared to say, as the majority does, that without legislative action, Sheriff Veil has no duty to enter warrants delivered to him into the databases likely to produce an eventual arrest to accomplish that task, specifically, those specified in NRS Chapter 179A.

But the problem in this case is that it is an appeal from *a writ of mandamus* commanding Sheriff Veil to enter all justice court warrants "into *whatever data bas*[*es*] there are." It is well established that "[m]andamus is an *extraordinary* remedy," *Jones v. Eighth Judicial Dist. Court*, 130 Nev. 493, 497, 330 P.3d 475, 478 (2014) (emphasis added), and that "mandamus against an officer is an appropriate remedy only where he refuses to perform *a definite present duty imposed upon him by law*," *State ex rel. Conklin v. Buckingham*, 58 Nev. 450, 453, 83 P.2d 462, 463 (1938) (emphasis added). For mandamus to lie, in other words, the duty must be ministerial, not discretionary. *State v. Eighth Judicial Dist. Court (Zogheib)*, 130 Nev. 158, 161, 321 P.3d 882, 884 (2014); *State ex rel. Mighels v. Eggers*, 36 Nev. 364, 367, 136 P. 104, 105 (1913). Here, while it certainly appears that the sheriff, in performing his duty to execute warrants "with diligence," should enter the warrants at minimum into databases required by NRS Chapter 179A, the respondents did not demonstrate a nondiscretionary mandate that he must enter all warrants into "whatever databases there are" or be in default of a ministerial duty. In this case, therefore, extraordinary writ relief is not justified. *State v. Mack*, 26 Nev. 85, 86, 63 P. 1125, 1125 (1901) ("This court has held that the writ should be awarded only in a case when the party applying shows a clear right to have the respondent do the thing which he is sought to be compelled to do."). Thus, while the majority seems to say NRS 248.100 imposes

[2]*National Instant Criminal Background Check System*, FBI, http://www.fbi.gov/about-us/cjis/nics/general-information/participation-map (last visited Apr. 2, 2015).

no duty to enter the warrants into appropriate electronic databases, I would say that the real parties in interest failed to establish the existence of a *ministerial* duty to enter warrants into "whatever databases exist."

I also disagree with the majority's suggestion that until the Legislature acts in this matter, writ relief cannot lie. All three branches of government play vital roles in our criminal justice system. *See generally* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989 (2006); *see also NV Criminal Justice Agencies*, Nevada Commission on Peace Officers' Standards and Training, http://post.nv.gov/General/Agencies/Lyon_County/ (last visited Apr. 2, 2015) (listing Dayton Justice Court, Fernley Justice Court, *and* the Lyon County Sheriff's Office as criminal justice agencies). So, for example, it is not clear that the Third Judicial District Court could not direct the Sheriff to enter the justice court warrants into specified databases, whether pursuant to NRS 248.100(1)(b) ("The sheriff shall . . . [o]bey all the lawful orders and directions of the district court in his or her county."), or as an extension of the court's power over the sheriff who attends court on behalf of the executive branch. *Wis. Prof'l Police Ass'n v. Dane Cnty.*, 439 N.W.2d 625, 628 (Wis. Ct. App. 1989) ("When the sheriff attends the court, he attends as an officer of the court. . . . It is the duty of the sheriff to . . . carry out the court's orders." (internal quotations omitted)); *see Bd. of Cnty. Comm'rs v. Devine*, 72 Nev. 57, 60, 294 P.2d 366, 367 (1956) (observing that "the court or the judge has inherent power to secure an attendant for his court" to carry out the court's directions); *see also State v. Graham*, 203 N.W.2d 600, 603 (Iowa 1973) ("Where, as in this case, an officer such as a sheriff or his deputy is, in his official capacity, engaged in the performance of his duties required of him by a court order, judgment or decree, . . . he is unquestionably a part of the judicial machinery . . . ."). If such directions were given and defied, writ relief very well might lie—without any action by the Legislature. So, too, the executive branch may or might already have directed sheriffs to enter particular warrants in particular databases, we just don't know. *See Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) ("The executive power[,]" of which the sheriff is a member, "extends to the carrying out and enforcing the laws enacted by the Legislature"); *Wis. Prof'l Police Ass'n*, 439 N.W.2d at 629 ("[I]t is the court's warrant which initiates the process by which a prisoner is ultimately returned to face trial."). It is also arguable, though not argued, that the data-entry duty already exists by virtue of NRS Chapter 179A, at least as to information and databases addressed in that Chapter. Thus, I cannot agree with the majority that no such ministerial duty exists or can arise until the Legislature takes further action in this matter.

But the point is, none of these approaches was adequately briefed or argued. We are given an all-or-nothing proposition: NRS 248.100 imposes a ministerial duty on the sheriff to enter warrants into unspecified databases.[3] NRS 248.100 does not say this and, while other sources of such duty may exist or come to exist, they were not identified or argued. Thus, while I agree with the majority that NRS 248.100 does not impose a ministerial duty to enter warrants into unspecified databases, I would limit the holding to that and leave for another day whether the statute imposes a discretionary duty, or whether such a duty, ministerial in nature, might otherwise exist or be established. I'd also leave for another day whether a district court, by order or direction, or the executive branch, directly or by regulation, can or may already have directed Sheriff Veil to enter bench warrants into law enforcement databases.

For these reasons, I concur but in the result only.

MICHAEL A. MUNOZ AND SHERRY L. MUNOZ, HUSBAND AND WIFE, APPELLANTS, *v.* BRANCH BANKING AND TRUST COMPANY, INC., A NORTH CAROLINA CORPORATION, RESPONDENT.

No. 63747

April 30, 2015 348 P.3d 689

Appeal from a post-judgment deficiency judgment in a judicial foreclosure action. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Assignee creditor instituted an action for judicial foreclosure of secured property and, after the property was sold, filed a motion seeking a deficiency judgment against borrowers for the balance of the loan. The district court awarded creditor the full deficiency amount sought, and borrowers appealed. The supreme court, SAITTA, J., held that state statute that limited the amount an assignee creditor could recover on a deficiency judgment was preempted by the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989.

Affirmed.

Law Offices of John J. Gezelin and *John J. Gezelin*, Reno, for Appellants.

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[3]Sheriff Veil discussed the database systems that the Lyon County Sheriff's Office uses, but the respondents only address the Central Repository for Nevada Records of Criminal History.

Sylvester & Polednak, Ltd., and *Jeffrey R. Sylvester* and *Allyson R. Noto*, Las Vegas, for Respondent.

1. States.
   Under the Supremacy Clause, state laws that conflict with federal law are without effect. U.S. Const. art. 6, cl. 2.
2. Banks and Banking.
   One of the purposes of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 is to facilitate the purchase and assumption of failed banks as opposed to their liquidation. Federal Deposit Insurance Act, § 2[1] *et seq.*, 12 U.S.C. § 1811 *et seq.*
3. Appeal and Error.
   Whether state law is preempted by a federal statute or regulation is a question of law, subject to de novo review.
4. Appeal and Error.
   When reviewing a question of law, the supreme court will affirm the order of the district court if it reached the correct result, albeit for different reasons.
5. States.
   One situation in which federal law can preempt a state law is where a direct conflict between federal and state law exists; this occurs when the state law frustrates the purpose of the national legislation, or impairs the efficiencies of the agencies of the federal government to discharge the duties for the performance of which they were created. U.S. Const. art. 6, cl. 2.
6. Banks and Banking.
   Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 to enable the federal government to respond swiftly and effectively to the declining financial condition of the nation's banks and savings institutions. Federal Deposit Insurance Act, § 2[1] *et seq.*, 12 U.S.C. § 1811 *et seq.*
7. Banks and Banking; States.
   If a state statute limits the market for assets transferred by the Federal Deposit Insurance Corporation (FDIC), it conflicts with the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 because it would have a deleterious effect on the FDIC's ability to protect the assets of failed banks. Federal Deposit Insurance Act, § 2[1] *et seq*., 12 U.S.C. § 1811 *et seq*.
8. Banks and Banking; States.
   State laws that limit the private market for assets of failed banks held by the Federal Deposit Insurance Corporation conflict with the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 and are preempted. Federal Deposit Insurance Act, § 2[1] *et seq.*, 12 U.S.C. § 1811 *et seq*.
9. Banks and Banking; Mortgages; States.
   State statute that limited the amount an assignee creditor could recover on a deficiency judgment to the amount that it paid to acquire the interest in the secured debt, less the amount of the secured property's actual value, conflicted with the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 and, thus, was preempted; by limiting a successor creditor's recovery, the state statute prevented the creditor from realizing a profit on its purchase of a debt from an assignor creditor, making it less likely that a rational creditor would purchase such a loan, limiting the private market for such assets by making it more difficult for the Federal

Deposit Insurance Corporation to dispose of those assets. Federal Deposit Insurance Act, § 2[1] *et seq.*, 12 U.S.C. § 1811 *et seq.*; NRS 40.459(1)(c).

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

[Headnotes 1, 2]

Pursuant to the Supremacy Clause of the United States Constitution, "state laws that conflict with federal law are without effect." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotations omitted). One of the purposes of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), is "to facilitate the purchase and assumption of failed banks as opposed to their liquidation." *FDIC v. Newhart*, 892 F.2d 47, 49 (8th Cir. 1989).

At issue here is whether NRS 40.459(1)(c)'s limitation on the amount of a deficiency judgment that a successor creditor can recover conflicts with FIRREA's purpose of facilitating the transfer of the assets of failed banks to other institutions. Because NRS 40.459(1)(c) limits the value that a successor creditor can recover on a deficiency judgment, its application to assets transferred by the Federal Deposit Insurance Corporation (FDIC) frustrates the purpose of FIRREA. Therefore, we hold that NRS 40.459(1)(c) is preempted by FIRREA to the extent that NRS 40.459(1)(c) limits deficiency judgments that may be obtained from loans transferred by the FDIC.

FACTUAL AND PROCEDURAL HISTORY

In 2007, appellants Michael A. and Sherry L. Munoz borrowed money from Colonial Bank and granted Colonial Bank a security interest in their real property. In 2009, the FDIC placed Colonial into receivership and assigned the Munozes' loan to respondent Branch Banking and Trust Company, Inc. (BB&T). In 2011, NRS 40.459(1)(c), which implements certain limitations on the amount of a deficiency judgment that can be recovered by an assignee creditor, became effective. 2011 Nev. Stat., ch. 311, §§ 5, 7, at 1743, 1748. In 2012, after the Munozes had defaulted on their loan, BB&T instituted an action for a judicial foreclosure of the secured property, which the Munozes did not oppose. The property was sold for less than the value of the outstanding loan at a sheriff's sale in 2013. BB&T then filed a motion seeking a deficiency judgment against the Munozes for the remaining balance of the loan. Reasoning that NRS 40.459(1)(c) did not apply retroactively to the Munozes' loan, which

was originated and assigned before the statute's effective date, the district court awarded a deficiency judgment to BB&T for the full deficiency amount sought. In its order, the district court did not address whether NRS 40.459(1)(c)'s present application was preempted by federal law. The Munozes then filed the present appeal.

DISCUSSION

In addition to addressing whether NRS 40.459(1)(c)'s application in the present case was impermissibly retroactive, the parties briefed several other issues, including whether this statute was preempted by federal law. The Munozes argue that NRS 40.459(1)(c) is not preempted by a conflict with federal law because it does not impair the FDIC's ability to act as the receiver for a failed bank or to transfer a failed bank's assets.

BB&T argues that the application of NRS 40.459(1)(c) to loans acquired from the FDIC is preempted by FIRREA because NRS 40.459(1)(c) interferes with the FDIC's ability to assume and dispose of a failed bank's assets.

Standard of review

[Headnotes 3, 4]

"Whether state law is preempted by a federal statute or regulation is a question of law, subject to our de novo review." *Nanopierce Techs., Inc. v. Depository Trust & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (citation omitted). When reviewing a question of law, "[we] will affirm the order of the district court if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

A state law that conflicts with federal law is preempted and without effect

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Thus, "state laws that conflict with federal law are without effect." *Altria Grp.*, 555 U.S. at 76 (internal quotations omitted).

[Headnote 5]

One situation in which federal law can preempt a state law is where a direct conflict between federal and state law exists. *See*

Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988). This occurs when the state law "frustrates the purpose of the national legislation, or impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created." *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (internal quotations omitted); *see also Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (observing that state and local laws that frustrate federal law are preempted); *Nanopierce Techs.*, 123 Nev. at 375, 168 P.3d at 82 (holding that conflict preemption occurs when a state law frustrates a federal law's purpose).

FIRREA serves to facilitate the sale of a failed bank's assets

[Headnote 6]

" 'Congress enacted [FIRREA] to enable the federal government to respond swiftly and effectively to the declining financial condition of the nation's banks and savings institutions.' " *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 214, 275 P.3d 933, 936 (2012) (alteration in original) (quoting *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9th Cir. 1993)). Under FIRREA, "[w]hen the FDIC is appointed receiver of a failed financial institution, it immediately becomes the receiver of all of that institution's assets, including promissory notes that are in default." James J. Boteler, *Protecting the American Taxpayers: Assigning the FDIC's Six Year Statute of Limitations to Third Party Purchasers*, 24 Tex. Tech L. Rev. 1169, 1172 (1993) (citation omitted). When acting as a receiver for a failed bank, "[t]he FDIC's essential duty is to convert all of the institution's assets to cash to cover the insured depositors." *Id*. One method of this is a purchase and assumption agreement, where "the FDIC tries to arrange for a solvent bank to purchase the assets of the failed bank so as to avoid any interruption and loss to the depositors." *Id*.; *see also Newhart*, 892 F.2d at 49 (observing that one of FIRREA's purposes "is to facilitate the purchase and assumption of failed banks as opposed to their liquidation").

To assist the FDIC in carrying out this duty, federal law provides special status to the FDIC's assignees so as to maintain the value of the assets they receive from the FDIC. *See, e.g.*, *FDIC v. Bledsoe*, 989 F.2d 805, 809-11 (5th Cir. 1993) (providing that FDIC assignees share the FDIC's statutory "super" holder-in-due-course status and are entitled to the benefit of a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations); *see also Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1249 (5th Cir. 1990) (holding that "the FDIC and subsequent note holders enjoy holder in due course status whether or not they satisfy the technical requirements of state law"); *Bell & Murphy & Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754 (5th Cir. 1990) (holding that protections provided to the FDIC from claims or defenses based

on unrecorded side agreements extend to private assignees of the FDIC).

[Headnotes 7, 8]

If a state statute limits the market for assets transferred by the FDIC, it conflicts with FIRREA because it "would have a deleterious effect on the FDIC's ability to protect the assets of failed banks." *Newhart*, 892 F.2d at 50; *see also Bledsoe*, 989 F.2d at 811 (holding that FDIC assignees are afforded a six-year statute of limitations under FIRREA rather than any shorter state statute of limitations, because the shorter state statute of limitations would limit the value of the assets the FDIC is to assign); *Fall v. Keasler*, No. C 90 20643 SW (ARB), 1991 WL 340182, at *4 (N.D. Cal. Dec. 18, 1991) ("The FDIC can only make full use of the market in discharging its statutory responsibilities if the market purchasers have the same rights to pursue actions against recalcitrant debtors as does the FDIC."). Thus, state laws that limit the private market for assets of failed banks held by the FDIC conflict with FIRREA and are preempted.

NRS 40.459(1)(c) is preempted by its conflict with FIRREA

[Headnote 9]

NRS 40.459(1)(c) limits the amount an assignee creditor may recover on a deficiency judgment to the amount that it paid to acquire the interest in the secured debt less the amount of the secured property's actual value. Specifically, the statute provides that

> the amount by which the amount of the consideration paid for that right [to obtain the deficiency judgment] exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs,

shall be the amount of a deficiency judgment. NRS 40.459(1)(c).

Since the statute limits a successor creditor's recovery to no more than it paid for a loan, NRS 40.459(1)(c) prevents a creditor from realizing a profit on its purchase of a debt from an assignor creditor. *See id.* This statute makes it less likely that a rational creditor would purchase such a loan. Therefore, NRS 40.459(1)(c)'s application to failed banks' assets held by the FDIC would limit the private market for such assets by making it more difficult for the FDIC to dispose of these assets. Thus, the application of NRS 40.459(1)(c) to assets transferred by the FDIC would frustrate the purpose of FIRREA and directly conflict with this federal statutory scheme. Consequently, NRS 40.459(1)(c) is preempted by FIRREA as to assets transferred by the FDIC and is without effect in this case. *See Altria Grp.*, 555 U.S. at 76.

CONCLUSION

Although the district court found that NRS 40.459(1)(c) does not apply to BB&T's application for a deficiency judgment for a different reason than the one stated above, it reached the correct result in concluding that NRS 40.459(1)(c) did not shield the Munozes from deficiency judgment liability. Since "[we] will affirm the order of the district court if it reached the correct result, albeit for different reasons," *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987), we affirm the district court's order on the grounds that conflict preemption prevents NRS 40.459(1)(c)'s application in the present case.[1]

Hardesty, C.J., and Parraguirre, Douglas, Cherry, Gibbons, and Pickering, JJ., concur.

In the Matter of L.A.W., a Minor.

L.A.W., Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 63683

May 7, 2015 348 P.3d 1005

Appeal from a district court order adjudicating the minor appellant delinquent on one count of possession of a controlled substance with intent to sell. Eighth Judicial District Court, Family Court Division, Clark County; William O. Voy, Judge.

In juvenile delinquency proceedings, the district court affirmed a hearing master's determination that juvenile was guilty of committing act, which, if committed by an adult, would constitute crime of possession of a controlled substance with intent to sell, and adjudicated juvenile a delinquent. Juvenile appealed. The supreme court, Pickering, J., held that juvenile's concession in behavior contract, which juvenile was required to sign prior to being given "last chance" to enroll in public high school on trial basis, that he realized he was "subject to random searches by school administration," did not amount to free and intelligent consent to otherwise unconstitutional searches.

Reversed and remanded.

[1]Since NRS 40.459(1)(c)'s application in the present case is preempted by its conflict with FIRREA, we do not reach the other issues raised, including whether: (1) NRS 40.459(1)(c)'s application in the present case would be retroactive, (2) this statute's application in the present case violates the Contracts Clause of the United States or Nevada Constitutions, or (3) the FDIC is a person within the meaning of NRS 40.459(1)(c).

Philip J. Kohn, Public Defender, and *Jennifer A. Fraser*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, and *Daniel Westmeyer*, Deputy District Attorney, Clark County, for Respondent.

1. EDUCATION.
   In many ways, public schools act in loco parentis, and school administrations are therefore granted certain authority, which permits a degree of supervision and control that could not be exercised over free adults; this authority is not carte blanche, and students do not shed their constitutional rights at the schoolhouse gate.
2. EDUCATION.
   A warrant- and suspicion-less search of a student is presumptively unreasonable, absent that student's consent or other applicable exception. U.S. CONST. amend. 4.
3. EDUCATION.
   For a student's consent to a warrant- and suspicion-less search to be valid, such consent must be both intelligently and voluntarily given. U.S. CONST. amend. 4.
4. EDUCATION.
   Student's concession in behavior contract, which student was required to sign prior to being given "last chance" to enroll in public high school on trial basis, that he realized he was "subject to random searches by school administration," did not amount to free and intelligent consent to otherwise unconstitutional searches; there was no evidence that public education options beyond public high school were available to student, and student's access to public education could not constitutionally be conditioned on his waiver of right to be free from unreasonable searches and seizures. Const. art. 1, § 18; U.S. CONST. amend. 4.

Before PARRAGUIRRE, SAITTA and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This case presents the question of whether the State can condition a prospective minor student's access to public education on that student's waiver of his right to be free from unreasonable search and seizure under the Fourth Amendment of the Federal Constitution and Article 1, § 18 of Nevada's Constitution. The State claims that the student had educational options open to him that made his consent to random searches of his person and property in order to attend public high school in Las Vegas voluntary, but the record does not support this claim. We therefore reverse and remand to the district court with instructions that the court suppress any evidence resulting from the search of the minor, and to conduct any further proceedings accordingly.

I.

Due to previous behavioral problems, the appellant, L.W., then a minor, was told he was being given a "last chance" to enroll in Legacy High School (Legacy) but only on a trial basis and on the condition that he sign a "Behavior Contract." Among other conditions, the Behavior Contract stipulated that:

> The following information lists the terms and conditions upon which [L.W.'s] enrollment in Legacy High School is based[:]
>
> . . . .
>
> 7. I realize that I am subject to random searches by school administration.

Both L.W. and his father signed the document.

The school's administration decided to conduct a search of all its trial enrollees. During the search of L.W., a Legacy teacher found $129 and a large plastic bag, containing two smaller bags with an eight-ball imprinted on them, each holding a "green, leafy substance." At the administration's direction, a campus police officer conducted a field test of the substance in one of the smaller bags, which came back positive for marijuana. The officer advised L.W. of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and, after questioning him, placed the boy under arrest.

The State charged L.W. with possession of a controlled substance with intent to sell. At a contested hearing on the charges against him, L.W. objected to the admission of evidence resulting from the search in question—specifically, testimony by the searching teacher and the campus police officer describing the fruits of the search, including statements that L.W. allegedly made explaining how he came to be holding the cash and baggies—but the Hearing Master declined to suppress on the grounds that L.W. had consented to the search via the Behavior Contract. Ultimately, the Hearing Master found that the "green leafy substance" was marijuana, that L.W. carried it with the intent to sell, and judged him guilty of the State's charge. The district court affirmed the Hearing Master's findings of fact, conclusions of law, and recommendations, and formally adjudicated L.W. a delinquent. L.W. appeals.

II.

[Headnotes 1-3]

In many ways, public schools act "in loco parentis," and school administrations are therefore granted certain authority, which "permit[s] a degree of supervision and control that could not be exercised over free adults." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). But this authority is not carte blanche, and "[i]t can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate." *Robinson v. Bd. of Regents of*

E. Ky. Univ., 475 F.2d 707, 709 (6th Cir. 1973) (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969)) (third alteration in original). Thus, a warrant- and suspicion-less search of a student, of the sort that the Legacy administration conducted upon L.W., is presumptively unreasonable, absent that student's consent (or other applicable exception, of which the State's briefing concedes there are none). *See New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (holding that a school's search of a student is reasonable if, at its inception, there are "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school"); *State v. Ruscetta*, 123 Nev. 299, 302, 163 P.3d 451, 453-54 (2007) (holding warrantless searches presumptively unreasonable absent valid consent). To qualify, constitutionally speaking, such consent must be both intelligently and voluntarily given. *Ruscetta*, 123 Nev. at 302, 163 P.3d at 454.

Courts of other jurisdictions have held that the State cannot condition access to public education on a prospective student's renunciation of his right to be free from otherwise unconstitutional searches and seizures—even in the context of higher education—because, in light of the draconian result of a student's failure to give consent, such clauses amount to contracts of "adhesion" and therefore lack the requisite earmarks of intelligence and voluntariness. *Smyth v. Lubbers*, 398 F. Supp. 777, 788 (W.D. Mich. 1975); *see Robinson*, 475 F.2d at 709 ("[T]he state, in operating a public system of higher education, cannot condition attendance at one of its schools on the student's renunciation of his constitutional rights."); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 156 (5th Cir. 1961) (holding that a tax-supported college "cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process"); *Morale v. Grigel*, 422 F. Supp. 988, 999 (D.N.H. 1976) (stating that a school could not condition a student's attendance upon a waiver of constitutional rights); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968) (recognizing that a college may not condition admission on a waiver of constitutional rights); *Devers v. S. Univ.*, 712 So. 2d 199, 206 (La. Ct. App. 1998) (noting the unconstitutionality of conditioning college dormitory occupancy on waiver of constitutional rights); *cf. Tinker*, 393 U.S. at 506 (noting that students retain First Amendment rights while attending school). But this reasoning does not pertain where a student seeks to pursue special activities beyond education because "[b]y choosing to 'go out for the team,'" or to engage in other voluntary, nonathletic activities, such students also "voluntarily subject themselves to a degree of regulation . . . higher than that imposed on students generally." *Vernonia*, 515 U.S. at 657. And so there is a line of cases wherein the United States Supreme Court has upheld random and suspicion-less searches of certain minor students as a condition of their participation in said extracurric-

ulars. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831 n.3, 834 (2002) (upholding drug testing of students who wished to participate in extracurricular activities); *Vernonia*, 515 U.S. at 664-65 (upholding random urinalysis requirement for participation in interscholastic athletics in schools).

[Headnote 4]

The State argues that L.W.'s concession in his Behavior Contract—"I realize that I am subject to random searches by school administration"—amounted to his free and intelligent consent to otherwise unconstitutional searches. According to the State, though "[L.W.] may have faced a difficult choice about whether to enroll in school, he had other options and was not forced into signing a behavior contract." And the existence of these "other options," the State argues, takes the circumstances of L.W.'s consent outside the rubric of *Robinson* and its progeny, and into the narrower class of cases exemplified by *Vernonia* and *Earls*.

Both *Vernonia* and *Earls* ultimately rest on the "special needs" exception to the Fourth Amendment's warrant requirement, *Earls*, 536 U.S. at 829, 836-37; *Vernonia*, 515 U.S. at 653, an exception that the State, in its briefing, confessed has no applicability here—"[A]dministrators were not relying on a special need exception to search [L.W.] in the instant case; they were relying on [his] consent." But even setting aside the State's waiver of the special needs exception, and *Vernonia* and *Earls*' poor fit to its remaining argument, *see Edwards v. Emperor's Garden Rest*., 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (finding waiver of an argument where a party "neglected [its] responsibility to cogently argue" the issue), in terms of the availability of the "other options" the State claims were available to L.W., the record simply does not support their existence—the State did not proffer any such evidence before the juvenile Hearing Master or juvenile court, nor did the State make any argument on such grounds below; the juvenile Hearing Master likewise made no mention of the availability of alternative schooling to L.W. in its discussion of the supposed voluntariness of the consent to search. Indeed, the only mention in the appellate record of the availability of such "other options" to which the State can point is a statement by the juvenile court that, because of L.W.'s age, "[h]e could have [gone] over to Adult Ed alternative school as an alternative at St. Louis."

This statement by the juvenile court appears to have been based upon its own understanding of Nevada's educational system and not upon any evidence presented by the State, as the full exchange demonstrates:

> THE COURT: He's seventeen. He could have [gone] over to Adult Ed alternative school as an alternative . . . .
>
> [L.W.'s counsel]: Yeah I'm not—I'm not sure about that. So—

> THE COURT: I am. Now, if he was sixteen your argument would be . . . stronger. But seventeen there are other options than going back to regular school.

And, the juvenile court judge's anecdotal assurance does not qualify as supporting evidence of the supposed educational options available to L.W. because it was neither "[g]enerally known within the territorial jurisdiction of the trial court," as L.W.'s counsel's uncertainty demonstrates, nor can we say it is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," because the district court made no mention of the sources he relied upon for such information. *See* NRS 47.130; *see also* NRS 47.150.

There being no meaningful evidence that L.W. had alternative public education available to him, the circumstances of his appeal differ from those of the students in either *Vernonia* and *Earls*—he asked for nothing more than *mere access* to a public education. Thus, and despite the State's arguments to the contrary, nothing sets L.W. apart from the public school student body as a whole; put differently, if the State may condition L.W.'s access to public education upon his waiver of his constitutional right to be free from unreasonable search and seizure, it could seemingly do the same for *any* prospective public school student. This is an outcome that *Vernonia* and *Earls*, even assuming their pertinence in the context of consent searches, plainly do not sanction. *See Earls*, 536 U.S. at 830 (noting that the Court's opinions "did not simply authorize all school drug testing, but rather conducted a fact-specific balancing"); *Vernonia*, 515 U.S. at 665 (cautioning "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts"). The facts of L.W.'s appeal thus fall squarely under the *Robinson* line of cases, wherein a state conditioned attendance at one of its schools on the student's renunciation of his or her constitutional rights.

Even admitting so, the State urges this court to ignore *Robinson*, et al., and instead follow an Oregon appellate court case, *State ex rel. Juvenile Dep't v. Stephens*, 27 P.3d 170 (Or. Ct. App. 2001), which holds inappositely. The circumstances of *Stephens* are undeniably similar to those at hand—a youth with behavioral problems signed a "Family/School Agreement," which included a clause whereby the youth agreed to "[s]ubmit to random searches of possessions, lockers, [and] person," as a condition of his enrollment in a "last chance" school. *Id.* at 172 (emphasis omitted). The Oregon Court of Appeals determined that the youth's acquiescence to that clause amounted to his constitutionally valid consent because he could have opted not to complete his education and was therefore not "obligated to attend [the school]." *See id.* at 174 (citing ORS 339.030, which provides exemptions from compulsory school attendance, as evidence

of the lack of the youth's obligation). Thus, according to the Oregon appellate court, the youth's circumstances in choosing to complete his public education were analogous to those "where, in exchange for a desired benefit, a citizen must agree to a search of his or her person or belongings." *Id.* (citing to *State v. Brownlie*, 941 P.2d 1069 (Or. Ct. App. 1997), wherein the same court held that a defendant's consent to x-ray screening of her purse could be inferred from her conduct in placing it on a conveyor belt at a courthouse, and *State v. Kelsey*, 679 P.2d 335 (Or. Ct. App. 1984), where it held that defendant impliedly consented to a pre-boarding search at terminal gate by attempting to board an airplane).

But, even assuming that a minor's access to public education is simply an amenity that can be likened to adults' access to courthouses and airplanes, it is not clear that the State may always condition its grant of some "desired benefit" upon an individual's waiver of a constitutional right. *See Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 894 (1961) ("One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." (internal quotations omitted)); *Dixon*, 294 F.2d at 156 (acknowledging that the fact that a right is not constitutionally protected does not necessarily excuse a failure of due process in the State's infringement thereupon). And, in fact, a minor's access to publicly funded education is not as easily analogized to those privileges as the Oregon appellate court suggests—while the Supreme Court has stopped short of naming the right to attend public school as one fundamental to citizenship, it has indicated that it views public education to be the foundation of meaningful democratic participation. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955). And this is because, according to the Court, public education is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment," so much so, in fact, that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* Thus, "the gift of a final chance in the public school system," to borrow the State's phrase, is in fact less luxury than necessity, and the improbability of a minor's future positive prospects absent any access to state sponsored education, indeed, the reality that he or she may never become a "good citizen" without it, *see id.*, draws into question whether a waiver of the constitutional right to be free from unreasonable search and seizure upon which such access is conditioned can ever be given "freely," as our precedent requires. *See Ruscetta*, 123 Nev. at 302, 163 P.3d at 453-54.

We are moreover mindful that a school administration's responsibility for "educating the young for citizenship is reason for scrupu-

lous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). This seems especially true in the "last chance" context, where the young minds being given a "last chance" at a public high school education may also be those on the brink of entering into lifestyles antithetical to ordered society, for whom school administrators and campus police may be the most salient point of contact with the State. It is critical that such youth learn, through their interaction with these authority figures, that the State is fair, just, and trustworthy. *See* Ross L. Matsueda & Kevin Drakulich, *Perceptions of Criminal Injustice, Symbolic Racism, and Racial Politics*, 623 Annals Am. Acad. Pol. & Soc. Sci. 163, 164 (2009) ("If citizens view the system of justice [as untrustworthy], the social and political system is likely to be volatile and unstable."). A school administration's coercion of a child's "consent" to unconstitutional searches by holding the threat of closed educational doors over his or her head does not facilitate the desired perception of justice.

III.

In light of these hefty considerations, we conclude that the State has failed to demonstrate that L.W.'s consent to search was voluntary—there was no record evidence that public education options beyond Legacy were available to him, and the State could not constitutionally condition L.W.'s access to a public education on his waiver of his right to be free from unreasonable search and seizure. The district court therefore should have suppressed the fruits of the administration's search of L.W., including, specifically, the testimony of the searching teacher and campus police officer. *See Torres v. State*, 131 Nev. 11, 17, 341 P.3d 652, 657 (2015) (noting that "[c]ourts must also exclude evidence obtained after the constitutional violation as 'indirect fruits of an illegal search or arrest'" (quoting *New York v. Harris*, 495 U.S. 14, 19 (1990))). Accordingly, we reverse and remand to the district court for proceedings consistent with this opinion.

Parraguirre and Saitta, JJ., concur.

NEVADA DEPARTMENT OF CORRECTIONS; AND NEVADA RISK MANAGEMENT, APPELLANTS, *v.* YORK CLAIMS SERVICES, INC.; AND WASHWORKS RAINBOW, LLC, RESPONDENTS.

No. 64473

May 7, 2015 348 P.3d 1010

Appeal from a district court order granting judicial review in a workers' compensation matter. First Judicial District Court, Carson City; James E. Wilson, Judge.

Workers' compensation carrier sought judicial review of appeals officer's decision that it was liable for workers' compensation coverage for claimant, who was serving out the remainder of a prison sentence at a facility similar to a halfway house and working at a carwash as required by the Department's work release program when he was injured in a fall, and was subsequently injured in a second fall after a seizure at rehabilitation facility. The district court reversed. Nevada Department of Corrections and State of Nevada Risk Management appealed. The supreme court, GIBBONS, J., held that statute that entitled a claimant to coverage referred to prison industry programs that took place inside or outside prison walls.

Reversed.

[Rehearing denied July 31, 2015]

[En banc reconsideration denied September 3, 2015]

Adam Paul Laxalt, Attorney General, and *Clark G. Leslie*, Senior Deputy Attorney General, Carson City, for Appellant Nevada Department of Corrections.

Beckett, Yott, McCarty & Spann and *James A. McCarty*, Reno, for Appellant Nevada Risk Management.

Gordon Silver and *Anjali D. Webster, John P. Desmond*, and *Molly Malone Rezac*, Reno, for Respondents.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   On appeal from orders deciding petitions for judicial review, the supreme court reviews the administrative decision in the same manner as the district court; thus, factual findings will only be overturned if they are not supported by substantial evidence, which is evidence that a reasonable mind could accept as adequately supporting the agency's conclusions. NRS 233B.135(3)(e), (f).
2. APPEAL AND ERROR.
   The supreme court reviews questions of law de novo.
3. ADMINISTRATIVE LAW AND PROCEDURE.
   Although statutory construction is generally a question of law reviewed de novo, the supreme court defers to an agency's interpretation of

its governing statutes or regulations if the interpretation is within the language of the statute.

4. Workers' Compensation.
   Statute that entitled a workers' compensation claimant to coverage under the modified program of industrial insurance established by regulations if that person was an offender confined at the state prison while engaged in work in a prison industry or work program referred to prison industry programs, whether the work took place inside the prison walls, e.g., producing license plates, or outside the prison walls, e.g., outdoor day-labor projects; statute was amended to add the word "or" in the phrase "prison industry or work program." NRS 616B.028(1).
5. Statutes.
   When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.
6. Statutes.
   In conducting a plain language reading of a statute, a court should avoid an interpretation that renders language meaningless or superfluous.
7. Statutes.
   If a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply.
8. Statutes.
   The plainness or ambiguity of statutory language is determined, not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.
9. Statutes.
   When a statute is ambiguous, a court should construe it consistently with what reason and public policy would indicate the legislature intended.
10. Statutes.
    When a statute is ambiguous, a court may look to its legislative history to ascertain the legislature's intent.

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Gibbons, J.:

Appellants Nevada Department of Corrections (NDOC) and State of Nevada Risk Management are contesting the district court's finding that they, and not respondent York Claims Services, Inc., are responsible for Jonathan Piper's workers' compensation coverage stemming from two incidents in which Piper was injured. At the administrative level, the appeals officer found York liable for Piper's workers' compensation coverage for both injuries. Upon judicial review, the district court set aside the appeals officer's decision, finding that NDOC was responsible for Piper's workers' compensation coverage pursuant to NRS 616B.028(1). We conclude that the district court erred in setting aside the decision of the appeals officer because NRS 616B.028(1) does not apply to offenders like Piper, who are participating in the work release program.

FACTS AND PROCEDURAL HISTORY

In 2010, Jonathan Piper, who was convicted and imprisoned for burglary two years earlier, was transferred to Casa Grande Transitional Housing in Las Vegas, Nevada, to serve out the remainder of his sentence. Casa Grande is similar to a halfway house and is operated by NDOC for offenders participating in NDOC's work release program. Among other various rules and restrictions, an offender at Casa Grande must either have a job or be in the process of searching for a job in the private sector.

Washworks Rainbow, LLC, a full-service car wash in Las Vegas, hired Piper to wipe down vehicles after they were washed. Washworks paid premiums on behalf of Piper to York so that Piper was covered under its workers' compensation insurance coverage, just as Washworks did for all of its employees. After discovering that Piper had a background in gardening, Washworks' owner, Richard Olden, asked Piper to trim some trees on Washworks' property. While trimming the trees, Piper fell off his ladder and struck his head on the ground. Piper, rendered unconscious by the fall, suffered a traumatic brain injury and was taken to the hospital. An emergency craniotomy was performed in order to accommodate brain swelling, essentially saving Piper's life. Over the next four months, Piper underwent various brain surgeries and was transferred between hospitals and rehabilitation centers.

Following Piper's injury, Olden submitted the standard insurance forms he used anytime an employee was injured. York, the workers' compensation insurance provider for Washworks, notified Piper that it denied his claim from his ladder fall. York asserted that Piper was in the legal custody of NDOC while working at Washworks. Thus, York asserted that pursuant to NRS 209.492 and NRS 616B.028, NDOC was financially responsible for Piper's workers' compensation coverage under its own insurance program.

NDOC and co-appellant Risk Management appealed York's denial of coverage to the State of Nevada Department of Administration Hearings Division. The assigned hearing officer found that York's denial of Piper's claim was improper. The hearing officer concluded that York was responsible for coverage because Piper was injured in the course and scope of his employment at Washworks.

Eight days later, while walking around his recovery facility, Piper suffered a major seizure and fell, striking his head. Once again Piper required emergency brain surgery. York notified Piper that it would not cover any medical charges following the date of his second head injury. York asserted that Piper's second head injury was not work-related nor was it a result of his first head injury because the seizure was a nonindustrial intervening event.

Following York's second coverage denial, Piper, NDOC, Risk Management, and York stipulated to forego the initial hearing on

York's second denial of coverage and consolidate both issues—York's challenge of the hearing officer's decision and Piper's challenge of York's second denial—before an appeals officer. The hearing officer granted the stipulation.

Following two days of hearings and written closing statements, the appeals officer was tasked with determining two issues. First, whether the hearing officer's decision finding York responsible for Piper's workers' compensation coverage from his first injury was correct. Second, whether Piper's seizure was an intervening act precluding York from responsibility for workers' compensation coverage for Piper's second injury.

The appeals officer found York liable for workers' compensation coverage for both of Piper's injuries. As to the first issue, the appeals officer found York liable because it found that Piper was an employee of Washworks. Further, the appeals officer found that York's reliance on NRS 616B.028 was without merit. As to the second issue, the appeals officer again agreed with NDOC, finding that the first injury was the substantial contributing cause of Piper's second injury.

York then petitioned for judicial review of the appeals officer's decision. On review, the district court focused entirely on York's NRS 616B.028 argument. The district court posited that the critical question is "what did the legislature intend when it used the term 'work program' in NRS 616B.028(1)." After a plain-language reading, the district court found that "work program" in NRS 616B.028(1) included the work release program. Thus, the district court concluded that York was not responsible for workers' compensation coverage because NDOC was responsible under NRS 616B.028(1). Accordingly, the district court set aside the appeals officer's decision. NDOC appealed the district court's order.

DISCUSSION

NDOC argues that the district court misinterpreted NRS 616B.028 because it was not meant to apply to a participant, like Piper, in the work release program. We agree.

Standard of review

[Headnote 1]

"On appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district court." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014); *see also Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) ("[T]his court affords no deference to the district court's ruling in judicial review matters.").

"We review the factual determinations of administrative agencies for clear error 'in view of the reliable, probative and substantial evidence on the whole record' or for an 'abuse of discre-

tion.'" *Nassiri*, 130 Nev. at 248, 327 P.3d at 489 (quoting NRS 233B.135(3)(e), (f)). "Thus, factual findings will only be overturned if they are not supported by substantial evidence, which, we have explained, is evidence that a reasonable mind could accept as adequately supporting the agency's conclusions." *Id*.

[Headnotes 2, 3]

We review questions of law de novo. *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011); *see* NRS 233B.135(3)(a)-(d). "Although statutory construction is generally a question of law reviewed de novo, this court defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (internal quotations omitted).

The district court misinterpreted NRS 616B.028

[Headnote 4]

NRS 616B.028(1) entitles a person to "coverage under the modified program of industrial insurance established by regulations adopted by the Division" if that person is an "offender confined at the state prison, while engaged in work in a prison industry or work program."[1]

NDOC argues that the district court erred when it found that "work program" in NRS 616B.028(1) encompasses the work release program that Piper participated in. In response, York argues that the district court correctly determined that the plain and ordinary meaning of NRS 616B.028 shows that the work release program falls within the ambit of "work program." Each side relies upon a number of statutory construction arguments in support of its position.

[Headnotes 5-10]

"[W]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Employers Ins. Co. of Nev. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001). In conducting a plain language reading, we avoid an "interpretation that renders language meaningless or superfluous." *In re George J.*, 128 Nev. 345, 349, 279 P.3d 187, 190 (2012) (internal quotations omitted). "If, however, a statute is

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[1]NRS 616B.028(1) reads, in pertinent part:

> Any offender confined at the state prison, while engaged in work in a prison industry or work program, whether the program is operated by an institution of the Department of Corrections, by contract with a public entity or by a private employer, is entitled to coverage under the modified program of industrial insurance established by regulations adopted by the Division if the Director of the Department of Corrections complies with the provisions of the regulations, and coverage is approved by a private carrier.

subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply." *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007). "'The plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.'" *Yates v. United States*, 135 S. Ct. 1074, 1081-82 (2015) (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). When a statute is ambiguous, we construe it "'consistently with what reason and public policy would indicate the Legislature intended.'" *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006) (quoting *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001)). Furthermore, when a statute is ambiguous we "may look to [its] legislative history to ascertain the Legislature's intent." *Potter v. Potter*, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005).

We conclude that "work program" in NRS 616B.028(1) is "subject to more than one reasonable interpretation" and is thus ambiguous. *Savage*, 123 Nev. at 89, 157 P.3d at 699. On the one hand, "work program" could be broadly construed to include the work release program, as the district court concluded. On the other hand, it could be narrowly construed to refer to a specific type of program under the auspices of the prison industries. A plain reading does not indicate one way over the other. Context is unhelpful because NRS 616B.028 is found in a different chapter than the statutes controlling prison industries and the work release program, NRS Chapters 209 and 213, respectively, and the phrase "work program" does not appear on its own in either chapter. Reading NRS 616B.028(1) broadly, as the district court did, begs the question of why the Legislature would not have simply used the phrase "work release program," considering that the alternative, prison industry, was already provided for. This interpretation renders "release" in "work release program" meaningless. Reading NRS 616B.028(1) narrowly begs the question of why "work program" exists at all in the statute, if "work program" only refers to a program under the purview of the prison industry, when prison industry is already listed. This interpretation renders "work program" superfluous. Due to the ambiguity of what exactly constitutes a "work program," we turn to NRS 616B.028's legislative history.

The original version of NRS 616B.028(1) was codified in 1989. It read, "while engaged in work in a prison industry program," as opposed to today's version, which reads "while engaged in work in a prison industry *or work* program." NRS 616B.028(1) (emphasis added). The "or work" addition was implemented by the Legislature in 1995. The legislative history reveals that "or work" was added to curtail a specific situation in which inmates who were participating in prison work camps with the Division of Forestry were suing

the Division of Forestry for failure to train and inadequate equipment.[2] Hearing on A.B. 587 Before the Senate Commerce and Labor Comm., 68th Leg. (Nev., June 27, 1995).

While NRS 616B.028's legislative history might not precisely state the extent of what "work program" is meant to encompass, it is clear that it does not contemplate the work release program under consideration here. The work release program is codified in NRS Chapter 213. Prison industries and programs concerning forestry are codified in NRS Chapter 209. There is no evidence indicating that the Legislature intended to expand NRS 616B.028(1) in 1995 to include the work release program, which was already enacted at the time, by adding "or work." Therefore, we conclude that "or work," which was added to the statute in order to resolve issues surrounding inmates working for the Division of Forestry, merely clarifies that NRS 616B.028(1) refers to prison industry programs codified in NRS Chapter 209, whether they take place inside the prison walls, e.g., producing license plates, or outside the prison walls, e.g., outdoor day-labor projects.

Consequently, we reverse the judgment of the district court and reinstate the decision of the appeals officer, which held York liable for Piper's workers' compensation coverage for both injuries.[3]

SAITTA and PICKERING, JJ., concur.

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[2]In pertinent part the legislative history reads:

> Senator O'Connell discussed the provisions in section 4.5 of A.B. 587. She pointed out the prisoners' medical care is covered in the prison system. Mr. Higgins stated when inmates are in prison work camps they are employees of the Division of Forestry. He stated they are technically employees and the medical care is paid for, but incidences have arisen where the prisoners have sued the Division of Forestry for failure to train, and having inadequate equipment. He stated the Division of Forestry is not covered by exclusive remedy. Senator O'Connell commented it is amazing that a prisoner, who is covered under the prison system, can sue the Division of Forestry for care. Mr. Higgins pointed out this is a legal loophole which attorneys have found and it needs to be filled.

Hearing on A.B. 587 Before the Senate Commerce and Labor Comm., 68th Leg. (Nev., June 27, 1995).

[3]Additionally, the fact that Washworks paid for Piper to be covered under its workers' compensation coverage provided by York supports this result. *See* NRS 616B.033.