(Bankr. D. Mass. 2012) ("While MERS admittedly holds more than a mere possessory interest in the [m]ortgage, it lacks the authority to act without direction from the note holder or servicer in light of its nominee status."); *cf. Edelstein*, 128 Nev. at 518, 286 P.3d at 258 (concluding that MERS has an agency relationship with a lender and its successors and assigns). Thus, MERS could not exercise discretion in assigning its interest to Deutsche Bank and recording that assignment.

Accordingly, we answer the bankruptcy court's first question by concluding that Deutsche Bank's interest was secured at the time of the filing of bankruptcy. Reunification of the note and the deed of trust is not necessary to foreclose because the beneficiary is an agent for the principal note holder. We modify and answer the bankruptcy court's second question by concluding that in Nevada, the recordation of an assignment from a beneficiary of a deed of trust is a ministerial act, because the agent is fulfilling a contractual obligation and has no discretion to disobey.

Parraguirre, Douglas, Cherry, Saitta, Gibbons, and Pickering, JJ., concur.

THE STATE OF NEVADA, Appellant, *v.*
MARIANN HARRIS, Respondent.

No. 64913

July 30, 2015 355 P.3d 791

Appeal from a district court order granting a prejudgment motion for a new trial. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

Defendant was found guilty in the district court of first-degree murder, child abuse and neglect with the use of a deadly weapon, and two counts of child abuse and neglect, and the district court granted defendant's motion for a new trial. State appealed. The supreme court, Saitta, J., held that: (1) statutory provision governing appeals from criminal actions clearly authorized an appeal from an order granting a motion for a new trial and did not limit the right to an appeal based on when the motion was filed or when the order resolving it was issued, overruling *State v. Lewis*, 124 Nev. 132, 178 P.3d 146 (2008); but (2) the statute does not extend to authorize a defendant to appeal from a prejudgment order denying a motion for a new trial.

Appeal is allowed to proceed.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Appellant.

Philip J. Kohn, Public Defender, and *Scott L. Coffee*, Deputy Public Defender, Clark County, for Respondent.

1. Criminal Law.
   Statutory provision governing appeals from criminal actions clearly authorized appeals from an order granting a motion for a new trial and did not limit the right to an appeal based on when the motion was filed or when the order resolving it was issued, overruling *State v. Lewis*, 124 Nev. 132, 178 P.3d 146 (2008). NRS 177.015(1)(b).
2. Statutes.
   When the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it.
3. Statutes.
   Provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of the statute and should not be read to produce unreasonable or absurd results.
4. Criminal Law.
   Statutory provision governing appeals from criminal actions does not authorize a defendant to appeal from a prejudgment order denying a motion for a new trial; a prejudgment order denying a motion for a new trial is an intermediate order that can be appealed from the judgment of conviction. NRS 177.015(1)(b), 177.045.

Before the Court En Banc.

OPINION

By the Court, Saitta, J.:

In this opinion, we consider whether this court has jurisdiction to review the State's appeal from an order granting a prejudgment motion for a new trial in a criminal matter. Because the plain language of NRS 177.015(1)(b) authorizes such an appeal, and because the unique policy concerns identified in our decision in *State v. Lewis*, 124 Nev. 132, 136, 178 P.3d 146, 148 (2008), do not apply, we hold that this court has jurisdiction to consider an appeal by the State from an order granting a prejudgment motion for a new trial.

FACTUAL AND PROCEDURAL HISTORY

On October 2, 2013, a jury returned verdicts finding respondent Mariann Harris guilty of first-degree murder, child abuse and neglect with the use of a deadly weapon, and two counts of child abuse and neglect. Prior to sentencing, Harris filed a timely motion for a new trial, which the district court granted. Pursuant to NRS 177.015(1)(b),

the State appealed from the order granting the motion for a new trial. Because this court has held that NRS 177.015(1)(b) only permits appeals from district court orders "resolving *post-conviction* motions for a new trial," *Lewis*, 124 Nev. at 136, 178 P.3d at 148, we ordered the State to show cause why the appeal should not be dismissed for lack of jurisdiction.

DISCUSSION

The State argues that the *Lewis* holding is based on a rationale that has no application to its right to appeal in a criminal case. The State, therefore, requests this court to revisit *Lewis* as it relates to appeals from orders granting prejudgment motions for a new trial.

The plain language of NRS 177.015 allows for the State to appeal any order granting a new trial

[Headnotes 1-3]

Whether NRS 177.015(1)(b) authorizes the present appeal is an issue of statutory interpretation. "[W]hen the language of a statute is plain, its intention must be deduced from such language, and the court has no right to go beyond it." *State v. Colosimo*, 122 Nev. 950, 960, 142 P.3d 352, 359 (2006) (internal quotations omitted). "[P]rovisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of [the] statute[ ] and should not be read to produce unreasonable or absurd results." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

NRS 177.015(1)(b) provides, in relevant part, that any aggrieved party, whether it is the State or the defendant, may appeal "from an order of the district court . . . granting or refusing a new trial." Thus, the plain language of NRS 177.015(1)(b) clearly authorizes an appeal from an order granting a motion for a new trial and does not limit the right to an appeal based on when the motion was filed or when the order resolving it was entered.

State v. Lewis holds that NRS 177.015(1)(b) only authorizes appeals from post-conviction motions for a new trial

This court has had a prior opportunity to consider the State's right to appeal pursuant to NRS 177.015(1)(b) from a prejudgment order granting relief. In *Lewis*, this court held that the State did not have a statutory right to appeal from an order granting a presentence motion to withdraw a guilty plea. 124 Nev. at 136, 178 P.3d at 148. In reaching this decision, the court observed that NRAP 3A, which governs civil appeals, used language similar to the provision in NRS 177.015(1)(b) regarding an appeal from an order granting or refusing a new trial and that the language in NRAP 3A had been

interpreted to only allow for an appeal from an order denying a post-judgment motion for a new trial. 124 Nev. at 135, 178 P.3d at 148. Noting these similarities and that this court had treated a motion to withdraw a guilty plea as tantamount to a motion for a new trial, the *Lewis* court stated that it saw no reason to construe the same language in NRS 177.015(1)(b) in an inconsistent manner. 124 Nev. at 134-36, 178 P.3d at 147-48.

The court further determined that "compelling policy justifications" supported a holding disfavoring appeals from intermediate orders and for requiring a final judgment "before this court is vested with jurisdiction." *Id.* at 136, 178 P.3d at 148. Those policy justifications include ensuring that there is a complete record for appellate review and "promoting judicial economy by avoiding . . . piecemeal" review of intermediate orders. *Id*. at 136, 178 P.3d at 148 (internal quotations omitted). Based on these policy justifications, this court held that, "pursuant to NRS 177.015(1)(b), [it] has authority to review determinations of the district court resolving *post-conviction* motions for a new trial, as well as post-conviction motions that are the 'functional equivalent' of a motion for a new trial" and determined that an order granting a prejudgment motion to withdraw a guilty plea is not appealable "because it is an intermediate order of the district court." *Id*. at 136, 137, 178 P.3d at 148, 149.

Lastly, the *Lewis* court addressed the State's argument that by refusing to hear an appeal from a district court order granting a presentence motion to withdraw, the State would be deprived of its right to appellate review of an erroneous decision by the district court because the State cannot appeal from an acquittal. 124 Nev. at 136-37, 178 P.3d at 149. The court noted that the district court has "vast discretion" in the grant or denial of a presentence motion to withdraw a guilty plea and found that the State "generally suffers no substantial prejudice" when a motion to withdraw a guilty plea is granted because "[t]he State may proceed to trial on the original charges or enter into a new plea bargain with the defendant." *Id*. at 137, 178 P.3d at 149. Therefore, the court did not find the State's argument to be compelling. *Id*.

Thus, the rationale behind *Lewis* is that despite its plain language, NRS 177.015(1)(b) does not include intermediate orders, which it describes as any order entered before a judgment of conviction, because that would be inconsistent with the final judgment rule and the policy reasons supporting that rule. However, this rationale is less persuasive when applied to the unique policy considerations regarding presentencing orders granting a new trial in criminal cases and when considering the different effects of granting a motion to withdraw a guilty plea versus granting a motion for a new trial.

The unique policy rationale regarding presentence orders granting a new trial in a criminal case shows that NRS 177.015(1)(b) should be interpreted differently than NRAP 3A(b)(2)

In *Lewis*, the State argued, as it does here, that precluding the appeal would leave the State without a remedy when a motion is granted before judgment. 124 Nev. at 136-37, 178 P.3d at 149. In rejecting this argument, the *Lewis* court used a policy rationale that is specific to a motion to withdraw a guilty plea and inapplicable to a motion for a new trial. *Id.* at 137, 178 P.3d at 149. The *Lewis* court's primary focus was on the "vast discretion" that the district court has in deciding a motion to withdraw a guilty plea and the idea that the State suffers "no substantial prejudice" when a prejudgment motion to withdraw a guilty plea is granted because it "may proceed to trial on the original charges or enter into a new plea bargain." *Id.* But in focusing on considerations that are specific to a prejudgment motion to withdraw a guilty plea, the court lost sight of the appeal provision's context—a motion for a new trial. In that context, the district court has discretion in deciding the motion, but that discretion is not as "vast" as with a prejudgment motion to withdraw a guilty plea, which may be granted for any reason that is fair and just. *See State v. Second Judicial Dist. Court*, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) ("The granting of the motion to withdraw one's plea before sentencing is proper where for any substantial reason the granting of the privilege seems 'fair and just.'"); *see also* NRS 176.165. While this court suggested it would be a "rare circumstance[ ]" when the State could assert that a district court "has exceeded the broad boundaries of judicial discretion in allowing a defendant to withdraw a plea before sentencing," *Lewis*, 124 Nev. at 137, 178 P.3d at 149, it is significantly more likely that the State can demonstrate that a district court exceeded its discretion in granting a motion for a new trial, particularly given the potential injustice if the defendant obtains an acquittal following an improvidently granted new trial. And the prejudice to the State is far more substantial when a motion for a new trial is granted—the significant time and resources expended to conduct the first trial are wasted.

These interests outweigh the policy justifications that this court relied upon in *Lewis* to preclude the State from appealing a prejudgment order granting a new trial. The efficiency of the final judgment rule loses some weight when put against the costs, both financial and societal, of an improvidently granted new trial. In this respect, there is no valid reason to distinguish between an order granting a new trial that is entered before final judgment (not appealable after *Lewis*) and one entered after final judgment (appealable).

We therefore hold that because *Lewis* eliminates an appeal that the Legislature plainly afforded the State and because the rationale in *Lewis* is inapplicable to orders granting prejudgment motions for a new trial, *Lewis* is overruled to the extent that it would not permit an appeal by the State from an order granting a prejudgment motion for a new trial.

Lewis is not overturned in situations of an appeal of an interlocutory order denying a motion for a new trial

[Headnote 4]

We do not, however, extend our holding to authorize a defendant to appeal from a prejudgment order *denying* a motion for a new trial. A prejudgment order denying a motion for a new trial is an intermediate order that can be reviewed on appeal from the judgment of conviction. *See* NRS 177.045. Thus, concluding that NRS 177.015(1)(b) does not authorize an appeal from a prejudgment order denying a motion for a new trial will not eliminate a defendant's right to challenge the order; rather, it merely mandates how and when a defendant may challenge the order. In contrast, allowing a defendant to appeal from intermediate orders would cause confusion in the district court about its jurisdiction to proceed with sentencing and entry of the judgment, which could cause extensive, unnecessary delay in both. Thus, the policy considerations expressed in *Lewis* remain valid in that context, and we hold that *Lewis* should remain undisturbed as it applies to orders *denying* a prejudgment motion for a new trial.

CONCLUSION

Because the plain language of NRS 177.015(1)(b) clearly authorizes an appeal from a prejudgment order granting a motion for a new trial and the *Lewis* rationale does not apply to a State's appeal in the criminal context from an order granting a motion for a new trial, we overrule *Lewis* to the extent that it prohibits the State from pursuing its statutory right to appeal a prejudgment order granting a motion for a new trial. Therefore, we hold that this court has jurisdiction to hear the State's appeal of the district court's order granting Harris's motion for a new trial.

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

DOUBLE DIAMOND RANCH MASTER ASSOCIATION, A NEVADA NONPROFIT CORPORATION, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE, RESPONDENTS, AND THE CITY OF RENO, NEVADA, REAL PARTY IN INTEREST.

No. 65666

July 30, 2015 354 P.3d 641

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss in a contract action.

City brought action against homeowners' association seeking specific performance of maintenance agreement that association claimed to have terminated under statute allowing associations to terminate unconscionable contracts upon 90 days' notice. The district court denied association's motion to dismiss. Association petitioned for a writ of mandamus or prohibition. The supreme court, HARDESTY, C.J., held that the 90 days' notice requirement does not act as a statute of limitations for a notice recipient to commence litigation.

Petition denied.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Don Springmeyer, John M. Samberg*, and *Christopher W. Mixson*, Reno, for Petitioner.

Karl S. Hall, City Attorney, and *Susan Ball Rothe*, Deputy City Attorney, Reno, for Real Party in Interest.

1. PROHIBITION.
   Homeowners' association was not entitled to writ of prohibition directing district court to vacate its order denying association's motion to dismiss and to order dismissal of contracting party's action for specific performance of contract; district court had jurisdiction to conduct and determine the outcome of the motion hearing. NRS 34.320.
2. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. MANDAMUS.
   The supreme court generally declines to consider a writ of mandamus petition that challenges an interlocutory district court order denying a motion to dismiss because an appeal from a final judgment is an adequate legal remedy; however, even when an adequate and speedy remedy exists, the supreme court may exercise its discretion when an important issue of law needs clarification and sound judicial economy warrants intervention. NRS 34.160.

4. Mandamus.
   The supreme court would consider, on petition for writ of mandamus, whether 90-day notice period in statute allowing homeowners' association to terminate unconscionable contract operated as a statute of limitations on contracting party's action for specific performance of contract; issue was an important issue of law in need of clarification, and resolving issue at mandamus stage would promote judicial economy. NRS 34.160, 116.3105(2).
5. Statutes.
   When a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, the supreme court will consider reason and public policy to determine legislative intent.
6. Statutes.
   The supreme court assumes that when enacting a statute, the Legislature is aware of related statutes.
7. Statutes.
   When interpreting an ambiguous statute to determine the Legislature's intent, the supreme court will look to the legislative history of the statute in light of the overall statutory scheme.
8. Statutes.
   The Legislature is presumed to have intended a logical result when enacting a statute, rather than an absurd or unreasonable one.
9. Common Interest Communities.
   The 90 days' notice requirement in statute allowing a homeowners' association to terminate unconscionable contracts does not act as a statute of limitations for a notice recipient to commence litigation; rather, upon notice from an association, the notice recipient would then have the customary period of limitations for contracts in which to commence an action. NRS 11.190, 116.3105(2).

Before the Court En Banc.

OPINION

By the Court, Hardesty, C.J.:

NRS 116.3105(2) permits a homeowners' association that provides at least 90 days' notice to terminate "any contract . . . that is not in good faith or was unconscionable to the units' owners at the time entered into." In this writ petition, we address whether the 90 days' notice operates as a statute of limitations or a notice for the recipient to commence litigation. We conclude that NRS 116.3105(2) does not act as a statute of limitations, and a recipient of an association's notice of termination of a contract is not required to take legal action within the 90-day time frame. Accordingly, we deny this petition.

FACTS

In 1996, Kreg Rowe, the developer of petitioner Double Diamond Ranch Master Association (the Association) entered into a Maintenance and Operation Agreement (Maintenance Agreement) with the

City of Reno. Because the property was in a flood zone, the Federal Emergency Management Agency required the developer to obtain a Letter of Map Revision and enter into the Maintenance Agreement prior to developing the South Meadows and Double Diamond Ranch homes in Reno, Nevada. The Maintenance Agreement requires, among other obligations, that the Association maintain certain flood control channels, provide rock rip-rap protection in the Double Diamond/South Meadows area, and file an annual report.

In February 2012, the Association gave notice to the City that it was terminating the contract pursuant to NRS 116.3105(2). This statute permits homeowners' associations to terminate at any time a contract that was entered into by a declarant[1] if the contract was (1) unconscionable to the units' owners at the time entered into, and (2) the association provides 90 days' notice to the recipient. NRS 116.3105(2). In its notice, the Association claimed that it should not have been a party to the Maintenance Agreement because Mr. Rowe signed the agreement on the Association's behalf one day before the Association legally came into being. Further, the Association claimed that Mr. Rowe entered into the Maintenance Agreement for his own benefit, in order to "develop the adjacent property as he desired." Finally, the Association claimed that the City never sought to enforce the Maintenance Agreement and only learned about its existence recently. Later that month, the City rejected the Association's notice of termination.

In October 2013, the City brought an action against the Association seeking specific performance of the Maintenance Agreement. The Association moved to dismiss the complaint for failure to state a claim for relief and failure to join indispensable parties. More specifically, the Association argued that the contract was invalid as the Association had statutorily terminated the Maintenance Agreement 20 months before. The Association also contended that it did not own the property at issue, and other indispensable parties were necessary, such as the land owner and Mr. Rowe, the developer.

At the hearing on the motion, the Association argued that the statute required the recipient of the notice of contract termination to file suit within 90 days. More specifically, the Association argued that the burden shifted to the recipient to bring a cause of action within that time if it questioned an association's claim of unconscionabil-

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[1]A declarant is the real estate developer of a property who has control of a homeowners' association until a certain percentage of homes are sold and the homeowners can elect the association's first board of directors. *See* NRS 116.035(1) (defining a "declarant" as "any person or group of persons acting in concert who . . . [a]s part of a common promotional plan, offers to dispose of the interest of the person or group of persons in a unit not previously disposed of"); NRS 116.31032 (detailing the period of declarant's control of an association); NRS 116.31034 (describing the election process for the executive board of an association).

ity or lack of good faith. The district court ultimately denied the Association's motion to dismiss. The court determined that there were several genuine issues of material fact; for example, whether the Association, including the property owners, benefited from the Maintenance Agreement and whether the parties' agreement was unconscionable. Further, the court stated that the statute provided no guidance as to when a recipient must pursue legal action, and instead, the City's letter rejecting the Association's notice of termination provided enough notice to the Association "that a justiciable controversy may exist as a result." Thereafter, the Association petitioned this court for a writ of mandamus or prohibition directing the district court to vacate its order denying the Association's motion to dismiss and to order dismissal instead.

DISCUSSION

[Headnotes 1-3]

The Association petitions this court for a writ of mandamus compelling the district court to vacate the court's order denying its motion to dismiss.[2] "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160; *see also Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Generally, this court "decline[s] to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss" because an appeal from a final judgment is an adequate legal remedy. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. However, even when an adequate and speedy remedy exists, this court may exercise its discretion when an important issue of law needs clarification and sound judicial economy warrants intervention. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

[Headnote 4]

While the Association has an adequate legal remedy, whether the 90-day notice period within NRS 116.3105(2) operates as a statute of limitations is an important issue of law in need of clarification, and resolving this issue at this stage of the proceedings would pro-

[2]Alternatively, the Association seeks a writ of prohibition. A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991). Because the district court had jurisdiction to conduct and determine the outcome of the motion hearing, we deny the Association's alternative request for a writ of prohibition and consider this petition under the mandamus standard.

mote judicial economy. Accordingly, we exercise our discretion to consider the Association's petition.

The 90-day notice period in NRS 116.3105(2) is not a statute of limitations

The Association argues that the statute requires the recipient of a notice of contract termination under NRS 116.3105(2) to take legal action within 90 days, otherwise the 90-day language is superfluous. The Association further argues that the 90-day notice shifts the burden to the recipient to commence an action. We disagree.

Pursuant to NRS 116.3105, a homeowners' association may terminate contracts or leases entered into by declarants after giving 90 days' notice. NRS 116.3105(1) permits associations to terminate contracts within two years of an executive board's election by its units' owners. In addition, NRS 116.3105(2) permits associations to terminate contracts at any time if the declarant did not enter into the contract in good faith or the contract was unconscionable to the units' owners at the time of contract formation. The Association argues that the statute requires the recipient of the notice to file legal action within the 90-day period. Interpreting whether NRS 116.3105(2)'s 90-day notice period operates as a statute of limitations is an issue of first impression and a question of law that we review de novo.[3] *See Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559 ("Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition.").

[Headnotes 5, 6]

This court has concluded that when a statute is facially clear, it will give effect to the statute's plain meaning. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). Where a statute is ambiguous, because it is susceptible to more than one reasonable interpretation, this court will consider reason and public policy to determine legislative intent. *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 124-25, 127 P.3d 528, 531 (2006). In addition, this court assumes that when enacting a statute, the Legislature is aware of related statutes. *Id.* at 125, 127 P.3d at 531.

NRS 116.3105(2) states in full as follows:

> The association may terminate without penalty, at any time after the executive board elected by the units' owners pursuant to NRS 116.31034 takes office upon not less than 90 days'

[3]Moreover, while several other states have adopted the Uniform Common Interest Ownership Act that Nevada adopted in 1991, no other state court has interpreted whether the statute requires a notice recipient to pursue legal action within the 90-day notice period.

> notice to the other party, any contract or lease that is not in good faith or was unconscionable to the units' owners at the time entered into.

The statute does not expressly indicate what rights and obligations a recipient has when it receives an association's notice of termination of a contract. On the one hand, the 90 days' notice could indicate the time frame a party has to pursue legal action; on the other hand, the 90 days' notice could merely indicate the period the association must continue to perform under the contract before termination. Accordingly, we conclude that NRS 116.3105(2) is ambiguous, and we therefore look to the intent of the Legislature and to related statutes.

[Headnotes 7, 8]

When interpreting an ambiguous statute to determine the Legislature's intent, this court will look to the legislative history of the statute in light of the overall statutory scheme. *See We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). In addition, "'[t]he [L]egislature is presumed to have intended a logical result, rather than an absurd or unreasonable one.'" *Clark Cnty. Sch. Dist. v. Clark Cnty. Classroom Teachers Ass'n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999) (quoting *Angoff v. M & M Mgmt. Corp*., 897 S.W.2d 649, 654 (Mo. Ct. App. 1995)).

When the Legislature codified NRS Chapter 116, it modeled the chapter on the Uniform Common Interest Ownership Act (UCIOA). *See, e.g.*, Hearing on A.B. 221 Before the Assembly Judiciary Comm., 66th Leg. (Nev., March 20, 1991); Hearing on A.B. 221 Before the Senate Judiciary Comm., 66th Leg. (Nev., May 23, 1991). Nevada did not amend any of the UCIOA language in the section of the bill that became NRS 116.3105(2), and thus, the statute mirrors section 3-105 of the UCIOA. *See* Hearing on A.B. 221 Before the Assembly Judiciary Comm., 66th Leg., Exhibit C (Nev., April 17, 1991) (indicating no changes to the section of the bill that became NRS 116.3105(2)). *Compare* NRS 116.3105(2), *with* Unif. Common Interest Ownership Act § 3-105(b) (2008), 7 U.L.A. 349 (2009). Testimony from one of the committee hearings on Assembly Bill 221 indicated that "association management and consumer protection were the two most common threads throughout the bill." Hearing on A.B. 221 Before the Assembly Judiciary Comm., 66th Leg. (Nev., February 20, 1991) (testimony of Stephen Hartman). Further, the UCIOA offered purchaser protections, including the "power of an association to terminate 'sweetheart' contracts entered into by the developer." *Id*., Exhibit C (prepared testimony by Michael Buckley).

Similarly, commentary to the UCIOA reflects that the purpose behind this law was to address the "common problem in the development of . . . planned community . . . projects: the temptation on the part of the developer, while in control of the association" to engage

in self-dealing contracts. Unif. Common Interest Ownership Act § 3-105 cmt. 1, 7 U.L.A. 349. Thus, this law allows an association to terminate any contract that is not bona fide or is unconscionable: "certain contracts . . . [are] so critical to the operation of the common interest community and to the unit owners' full enjoyment of their rights of ownership that they . . . should be voidable by the unit owners." *Id.* at § 3-105 cmt. 2, 7 U.L.A. 349.

The Restatement (Third) of Property also permits a similar termination of a contract entered into by a developer that is not bona fide or is unconscionable to the members, and also recognizes the conflicting interests of the declarant and the association.[4] Restatement (Third) of Prop.: Servitudes § 6.19 (2000). "The developer's primary interest is in completing and selling the project, while that of the purchasers is in maintaining their property values and establishing the quality of life they expected when buying the property." *Id.* at § 6.19 cmt. a. Recognizing that an association's "members have little opportunity to protect themselves" while the association is under the control of the developer, this rule permits associations to treat certain contracts as voidable. *Id.* at § 6.19 cmt. d. However, neither the UCIOA nor the Restatement speaks to whether a recipient can challenge the termination notice and when a recipient of a termination notice must file an action against the association.

Thus, interpreting the statute as a statute of limitations as the Association suggests would require us to read additional language into the statute, which we decline to do.[5] *See McKay v. Bd. of Cnty. Comm'rs*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) (explaining that when a statute is silent, "it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the [L]egislature would or should have done").

Moreover, this court has identified three purposes for which statutes of limitations are intended to operate:

> First, there is an evidentiary purpose. The desire is to reduce the likelihood of error or fraud that may occur when evaluating factual matters occurring many years before. Memories fade, witnesses disappear, and evidence may be lost. Second, there is a desire to assure a potential defendant that he will not be liable under the law for an indefinite period of time. Third, there is a

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[4]In the Restatement (Third) of Property: Servitudes § 6.19(3)(d) (2000):

> After the developer has relinquished control of the association to the members, the association has the power to terminate without penalty . . . any contract or lease that is not bona fide, or was unconscionable to the members other than the developer at the time it was entered into, under the circumstances then prevailing.

[5]We disagree with the Association's argument that the 90-day language in the statute would be superfluous if it were not acting as a statute of limitations. The 90-day period appears to provide time for a notice recipient to make preparations for termination of the contract.

> desire to discourage prospective claimants from "sleeping on their rights."

State Indus. Ins. Sys. v. Jesch, 101 Nev. 690, 694, 709 P.2d 172, 175 (1985).

Considering these purposes here, the evidentiary purpose is moot since the statute permits an association to terminate contracts "at any time." NRS 116.3105(2). Because an association can terminate a contract at any time, time passage, fading memories, disappearing witnesses, and lost evidence are seemingly less important than preserving an association's right to terminate.

The second and third purposes would be incongruent with the customary statute of limitations for contracts (either four or six years depending on if the contract is in writing). *See* NRS 11.190(1)(b) and (2)(c).[6] While a potential defendant should not have to worry about liability after a certain period of time, as described above, we determine that the customary statute of limitations for contracts found in NRS 11.190 should apply, as reducing the four-year or six-year limit to 90 days, while allowing an association to terminate a contract at any time, appears unequal. Similarly, the "desire to discourage prospective claimants from sleeping on their rights" and permitting a 90-day limitations period but allowing the association to terminate *at any time* essentially permits an association to "sleep on [its] rights" while one-sidedly denying a notice recipient the typical period of limitation. *Jesch*, 101 Nev. at 694, 709 P.2d at 175 (internal quotations omitted).

[Headnote 9]

Thus, we conclude that neither the statute's plain language nor legislative history shows that the Legislature intended for the 90 days' notice requirement in NRS 116.3105(2) to act as a statute of limitations for a notice recipient to commence litigation. Rather, upon notice from an association, the notice recipient would then have the customary period of limitations for contracts under NRS 11.190 in which to commence an action.[7]

Because we conclude that the 90-day notice period in NRS 116.3105(2) does not operate as a statute of limitations or shift the burden to a notice recipient to file an action, we conclude that the

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[6]Under NRS 11.190(1)(b) and (2)(c), "actions . . . may only be commenced . . . [w]ithin 6 years . . . [on a]n action upon a contract, obligation or liability founded upon an instrument in writing" or "[w]ithin 4 years . . . [on a]n action upon a contract, obligation or liability not founded upon an instrument in writing."

[7]In the same way that NRS 116.3105(2)'s 90-day requirement does not operate as a statute of limitations for a notice recipient, nothing in the plain language of the statute imposes a duty on the notice provider to file an action within the 90-day period in response to a denial of the contract termination notice.

district court did not err in denying the Association's motion to dismiss, and we deny this petition.

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

PICKERING, J., with whom CHERRY, J., agrees, concurring:

I agree with the majority's decision to deny the petition for a writ of mandamus or prohibition but would do so on the basis that this challenge to the district court's order denying the petitioner's motion to dismiss does not qualify for extraordinary writ relief. At best, the petition asserts legal error by the district court in not crediting the petitioner's argument that, under NRS 116.3105, the City of Reno had 90 days to sue, once the Double Diamond Ranch Master Association (HOA) gave notice it was terminating the parties' contract as "not bona fide" or "unconscionable." This termination provision, or one like it, has been part of the Uniform Common Interest Ownership Act (UCIOA) since 1982. *Compare* UCIOA § 3-105(b) (2008), 7 U.L.A., part 1B 349 (2009), *with* UCIOA § 3-105 (1982), 7 U.L.A., part 2 107 (2009). Yet, as the majority acknowledges, no court, including our Nevada district courts, has read this termination provision as petitioner does. It is more natural to read the provision as the district court did: after a notice of termination under NRS 116.3105, an HOA-terminable contract remains in force for at least 90 days. Such a contract is prospectively voidable but not void, in other words.

Mandamus does not lie to correct a district court's legal error in denying a motion to dismiss for failure to state a claim upon which relief can be granted. *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983); *see Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. Nat'l Caucus of Labor Comms.*, 525 F.2d 323, 326 (2d Cir. 1975) ("It is not the function of mandamus to allow *ad hoc* appellate review of interlocutory orders when only error is alleged."). Such an error, if one occurs, is correctable by the district court as the case proceeds and by this court on direct appeal from the eventual final judgment. *See Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5-6, 106 P.3d 134, 136-37 (2005) (emphasizing that the final judgment rule, which withholds appellate review until final judgment is reached in the district court, plays "a crucial part of an efficient justice system": "[f]or the trial court, it inhibits interference from the appellate court during the course of preliminary and trial proceedings, and for the appellate court, it prevents an increased caseload and permits the court to review the matter with the benefit of a complete record"). Also, mandamus "requires not only a clear error but one that unless immediately corrected will wreak irreparable harm." *In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir. 2006);

see NRS 34.170 (allowing for mandamus in cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law"). "[B]ecause an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

This petition, as filed, met none of the conventional criteria for extraordinary writ relief. It asserts legal error in the denial of a motion to dismiss. But the error not only was not "clear," as mandamus relief requires; it was, as the majority concludes, nonexistent. Nor did the petitioner establish that an eventual appeal would not afford an adequate legal remedy. The only harm alleged was the expense associated with the HOA having to defend itself in district court. But this harm inheres in any order denying a motion to dismiss and, by itself, is not enough to justify writ relief. "Postponing appeal to the end of a litigation, rather than interrupting it *in medias res* with a mandamus proceeding that would require this court to conduct interlocutory appellate review, is as likely to reduce as to increase the total expense of the litigation." *In re Linee Aeree Italiane*, 469 F.3d at 640.

I recognize that, in *International Game Technology*, we deemed advisory or supervisory mandamus permissible when needed to resolve "an important issue of law [that] needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." 124 Nev. at 197-98, 179 P.3d at 559. Such use of extraordinary writ review provides a needed "escape hatch" from the finality rule, which ordinarily defers appellate review until final judgment is reached in the district court, and the strict limitations conventionally imposed on extraordinary writ relief. *Cf. Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 282 (2d Cir. 1967). "Even so, proper occasions for employing advisory mandamus are hen's-teeth rare: it is reserved for blockbuster issues, not merely interesting ones." *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989). These limitations need to be observed, or the narrow exception to the rules governing extraordinary writ relief set forth in *International Game Technology* will overrun the final judgment rule.

I respectfully disagree with my colleagues in the majority that petitioner's argument with respect to the UCIOA termination provision codified as NRS 116.3105 presents the kind of "important issue of law need[ing] clarification" that would qualify a case for advisory mandamus. To me, the fact that the provision has existed for more than 30 years without any court or commentator reading it as the petitioner presses us to do should have led us to summarily deny the petition so the case could proceed in district court. Instead,

once this court ordered an answer and full briefing, the parties voluntarily suspended all proceedings in the district court, halting its forward progress. I submit that we should have denied the petition as procedurally insufficient, without reaching the merits. I therefore concur, but only in the result.

TABUTA JOHNSON, AKA TABUDAH EUGENE HUMES, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 63737

July 30, 2015 354 P.3d 667

Appeal from a sentence and conviction following a jury trial of one count of conspiracy to commit robbery, two counts of robbery, and one count of battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Kathy Hardcastle, Judge, and Carolyn Ellsworth, Judge.[1]

The court of appeals, TAO, J., held that: (1) show-up identification procedure, under which defendant and accomplice were presented to victims handcuffed, with spotlight shining on each one while standing in front of marked police vehicle, was not unnecessarily suggestive; (2) strong countervailing policy considerations existed to justify show-up identification procedure; (3) victims' identifications were reliable, notwithstanding any suggestiveness in show-up identification procedure; and (4) habitual offender adjudication was not abuse of discretion.

Affirmed.

Lambrose Brown and *William H. Brown*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
When considering an unpreserved error for plain error review, the appellate court examines (1) whether there was error, (2) whether the error was plain or clear, and (3) whether the error affected the defendant's substantial rights. NRS 178.602.

2. CRIMINAL LAW.
An error is plain if it is so unmistakable that it reveals itself by a casual inspection of the record; at a minimum, the error must be clear under

[1]Johnson was tried before The Honorable District Judge Kathy Hardcastle and sentenced by The Honorable District Judge Carolyn Ellsworth.

current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. NRS 178.602.

3. Criminal Law.
   When a witness testifies that he knows a particular suspect committed a crime because he personally saw the crime as it occurred, and then at a different time and place recognized the suspect to be the same person he previously saw, he is said to have performed an identification of the suspect.
4. Criminal Law.
   Witnesses can be asked to identify a suspect either outside of the courtroom prior to the trial during the initial police investigation of the crime or later during the trial itself, or both.
5. Criminal Law.
   Both in-court and out-of-court identifications can be challenged by the defendant.
6. Constitutional Law.
   The Due Process Clauses of the United States and Nevada Constitutions forbids a criminal prosecution to be based on any witness's identification that was procured under circumstances that were unnecessarily suggestive and likely to have resulted in a mistake that cannot be repaired. Const. art. 1, § 8(5); U.S. Const. amend. 14.
7. Constitutional Law.
   The Due Process Clauses of the United States and Nevada Constitutions prohibit suggestive and mistaken identifications, whether they occurred outside of the courtroom before trial or during a criminal trial itself, when a witness identifies the defendant from the witness stand as the perpetrator of the offense. Const. art. 1, § 8(5); U.S. Const. amend. 14.
8. Criminal Law.
   An in-court identification of the defendant during trial can be challenged in two ways, either because the in-court identification is itself improper, or because it was contaminated by an improper out-of-court identification that occurred before trial.
9. Criminal Law.
   Though frowned upon, one-person show-up identifications are nonetheless permissible when the totality of the circumstances surrounding the identification demonstrate that they are reliable.
10. Constitutional Law.
    In considering a challenge to a pretrial one-person show-up identification, the question is whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that due process was denied to the defendant; if it was not, the witness's identification is admissible during a criminal trial, and the jury may examine its credibility and reliability. Const. art. 1, § 8(5); U.S. Const. amend. 14.
11. Constitutional Law; Criminal Law.
    Even though the Due Process Clauses of the United States and Nevada Constitutions may theoretically bar an overly suggestive identification whether it occurred before trial or during trial, the appellate courts review the validity of identifications under different legal standards depending upon when and how they occurred. Const. art. 1, § 8(5); U.S. Const. amend. 14.
12. Criminal Law.
    When a one-person show-up identification occurs outside of court and precedes the filing of any formal charges, the appellate court's inquiry in a challenge to the identification involves two questions: (1) whether the

show-up procedure was unnecessarily suggestive, and (2) whether the identification was nonetheless reliable in spite of any unnecessary suggestiveness in the identification procedure.

13. Criminal Law.

The appellate court's answers to the questions as to whether a one-person show-up identification was unnecessarily suggestive and whether it was nonetheless reliable are based on a review of the totality of the circumstances, which includes an examination of any countervailing policy considerations that might justify an otherwise problematic identification, such as the presence or absence of any exigent circumstances, the need to quickly clear any incorrectly detained suspects so that police can continue searching for the true culprit, the freshness of the witness's recollection, and the possibility that memories might start to fade if other procedures were to be employed.

14. Criminal Law.

A one-person show-up identification is more likely to be deemed unnecessarily suggestive, and therefore invalid, when countervailing policy considerations are absent.

15. Criminal Law.

Show-up identification procedure, pursuant to which defendant and accomplice were presented to victims handcuffed, with spotlight shining on each one while standing in front of marked police vehicle, was not unnecessarily suggestive; victims were sitting in separate squad cars so that each one's identification could not influence the other, and both victims were cautioned that it was just as important for show-up identification to exonerate an innocent person as it was to implicate a guilty person.

16. Criminal Law.

Determining whether a particular show-up identification was unnecessarily suggestive turns not on general principles, but rather upon the particular circumstances surrounding the identification.

17. Criminal Law.

To extent that show-up identification procedure by which defendant and accomplice were presented to victims handcuffed, with spotlights shining on each one while standing in front of marked police vehicle, was unnecessarily suggestive, strong countervailing policy considerations existed to justify police officers' decision to attempt show-up identification rather than another form of identification; show-up identification was conducted within 30 minutes of crime while victims' memories were still fresh, crime was violent and occurred in open, true criminals could have committed additional offenses or otherwise escaped if police had mistakenly detained wrong people and employed more time-consuming method of identification before clearing suspects and resuming their search, and defendant had suggested to victim that he had firearm, which underscored need for police to identify suspect quickly.

18. Criminal Law.

Show-up identification procedure by which defendant and accomplice were presented to victims handcuffed, with spotlights shining on each one while standing in front of marked police vehicle, were reliable notwithstanding any suggestiveness in procedure; female victim testified that she had clear opportunity to view both men as they approached her prior to robbery and that she paid special attention because she sensed danger, male victim had opportunity to view them as he was assaulted for period of approximately 30 seconds, show-up identification was conducted within 30 minutes of crimes, both victims accurately described assailants gender, appearance, and clothing, and told officers what direction assailants fled to,

police almost immediately found defendant and accomplice based on victims' statements, female victim immediately recognized defendant as one of the assailants with 100-percent certainty, and male victim immediately recognized defendant with 90-percent certainty.

19. Criminal Law.
When assessing admissibility of a show-up identification, reliability rather than suggestiveness is the main concern.

20. Criminal Law.
Reliability of a show-up identification is measured by: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the degree of attention paid by the witness, (3) the accuracy of the witness's prior description, (4) the level of the witness's certainty demonstrated at the confrontation, and (5) the length of time between the crime and confrontation.

21. Sentencing and Punishment.
Habitual offender adjudication was not abuse of discretion based on defendant's claim that it was based on the district court's erroneous belief that it was required to adjudicate him as habitual criminal based on defendant's perceived escalating violence; record did not demonstrate that the district court was unaware of its discretion, the district court did not characterize its concern about "escalation of [defendant's] willingness to go from non-violent crimes to violent crimes" as sole basis for adjudication nor indicate any belief that habitual criminal adjudication was mandatory or automatic, and the district court was not required to utter specific phrases or make findings to justify its decision. NRS 207.010.

22. Sentencing and Punishment.
A district court may exercise discretion to dismiss a habitual offender count when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice. NRS 207.010.

23. Sentencing and Punishment.
The purpose of the habitual criminality statute is to allow the criminal justice system to deal determinedly with career criminals who seriously threaten public safety. NRS 207.010.

24. Sentencing and Punishment.
Adjudication under the habitual criminal statutes entails the broadest kind of judicial discretion, and the habitual criminal statutes do not include any express limitations on the judge's discretion.

25. Criminal Law.
In reviewing a district court's decision to sentence a defendant as a habitual criminal, the appellate court considers the record as a whole and evaluates whether the sentencing court, in fact, exercised its discretion.

26. Sentencing and Punishment.
No requirement exists that the sentencing court must utter specific phrases or make particularized findings that it is just and proper to adjudicate a defendant as a habitual criminal. NRS 207.010.

27. Sentencing and Punishment.
The habitual criminal statute makes no special allowance for non-violent crimes or for the remoteness of convictions, but rather regards these as considerations within the discretion of the district court. NRS 207.010.

28. Sentencing and Punishment.
The sentencing court acts properly in adjudicating a defendant as a habitual criminal as long as it does not operate under a misconception of the law regarding the discretionary nature of the adjudication. NRS 207.010.

Before GIBBONS, C.J., TAO and SILVER, JJ.

OPINION

By the Court, TAO, J.:

Appellant Tabuta Johnson was convicted of various criminal offenses following a trial during which the jury was permitted to hear testimony regarding an out-of-court "show-up" identification and the victims identified him in court as the perpetrator of the offenses. In the show-up, Johnson was handcuffed, placed in front of a police car, and illuminated with a spotlight to be viewed by witnesses who then identified him as the perpetrator of the crimes. Johnson did not object below but now asks this court to hold that the show-up was improperly conducted in violation of his constitutional due process rights. He also argues for the first time on appeal that he was improperly sentenced as a habitual criminal.

The Nevada Supreme Court has been presented with few opportunities to review the validity of such show-up identifications; the court last visited this area of the law in *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964-65 (1989), in which it held that a show-up somewhat factually similar to the one in this case was unnecessarily suggestive and therefore improper. Under the particular facts of this case, we conclude that the trial court did not plainly err by admitting the identification testimony into evidence because the identification procedure used was not unnecessarily suggestive and the identification was reliable.

We also conclude that the sentencing court did not plainly err in adjudicating Johnson as a habitual criminal because the record does not demonstrate that the court operated under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication. Accordingly, we affirm the judgment of conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

One evening, Christina Raebel and Albert Valdez were walking to a bar in downtown Las Vegas when they noticed two men, later identified as Johnson and his brother, Varian Humes, following them. Raebel viewed the two men directly as they approached for about "a second and a half" while Valdez saw them through his peripheral vision for "[o]ne second." Suspicious, Raebel moved her purse from her hip to the front of her body with both hands.

Without warning, Humes punched Valdez in the head, causing him to fall to the ground. At the same time, Johnson grabbed Raebel from behind, covering her mouth with one hand and gesturing with

the other to indicate he was carrying a firearm. Johnson removed Raebel's purse from her shoulder and pushed her to the ground. Raebel screamed as she fell and Johnson responded by punching her in the face. While both Raebel and Valdez lay helpless on the sidewalk, Humes demanded that Valdez "give [him] everything" and in response Valdez emptied his pockets, throwing his wallet and cell phone on the sidewalk. Valdez's wallet was unique and easily identifiable because it was constructed entirely out of duct tape. Johnson and Humes then tried to escape by running southbound. Raebel was bruised and Valdez was bleeding from a gash in his forehead. The entire incident lasted "about thirty seconds."

Within minutes, police officers from the Las Vegas Metropolitan Police Department (LVMPD) arrived at the scene. Raebel and Valdez told the police they were attacked by two black males about six feet tall, with one slightly taller than the other, and described their clothing and the direction in which they fled. Based upon those descriptions, the police issued a radio broadcast to search for two black males about six feet tall wearing dark pants and hoodies who ran southbound from the scene, with the "taller male . . . wearing a black hooded sweatshirt and the shorter of the males . . . wearing a brown sweatshirt." The broadcast also alerted officers to look for a stolen purse, wallet, and other property.

A few moments later, patrolling officers saw Johnson and his brother emerge from an alley two or three blocks south of the crime scene and jaywalk diagonally across an intersection. The other end of the alley was a dead end blocked by a chain-link fence and shrubbery. According to the officers, Johnson was wearing "a dark black sweatshirt with a hood on it and dark jeans," while his brother was wearing "a black sweatshirt but it was faded so it actually looked brown in the light and he was also wearing jeans."[2] Deciding that the duo "match[ed] the description to a tee" and suspicious as to what the two had been doing in a dead-end alley, the officers detained the men for questioning. When they looked in the alley, the officers saw Raebel's purse, car keys, some makeup containers, and Valdez's unique duct-tape wallet scattered on the ground. The officers handcuffed the two men and issued *Miranda* warnings to them. Officers later found Valdez's cell phone in Humes's pocket.

Approximately 20 to 30 minutes after the crime, officers informed Raebel and Valdez that they "found people that matched the description" and asked if they wanted to identify them. After agreeing, Raebel and Valdez were separately transported to where Johnson and his brother were held. On the way there, the police asked Raebel and Valdez to state if they recognized the people that

[2]At trial, Raebel testified that Johnson wore a "brownish zip up hoodie" with "a pattern on it" and the "hood up." Valdez testified that he recalled Johnson wearing "a grey jacket with red lining like a grid almost."

would be shown to them, and instructed that "[a] person is just as innocent as they are guilty" and that it was "just as important to free an innocent man" as it was to identify a guilty one. While Raebel and Valdez took turns sitting inside a police car approximately 30 to 60 feet away, officers brought out Johnson and his brother one at a time in handcuffs and shined spotlights on them as they stood in front of another marked patrol car. Raebel and Valdez were separated from each other during this process to prevent them from influencing each other. Raebel immediately recognized both Johnson and his brother and informed the police that she was 100-percent certain they were the two perpetrators. Valdez felt approximately 90-percent certain about Johnson's identity but did not recognize Johnson's brother at all.

Johnson and Humes were charged with one count of conspiracy to commit robbery, two counts of robbery, and one count of battery with intent to commit a crime. Humes would later enter a plea of guilty to various charges, but Johnson chose to proceed to trial.

During the trial, the jury was apprised of the out-of-court "show-up" identification during which Johnson was affirmatively identified as one of the perpetrators by both Raebel and Valdez. Additionally, both Raebel and Valdez testified at trial and identified Johnson in court as one of the perpetrators. The jury convicted Johnson on all counts.

Following trial, the State sought to have Johnson adjudicated as a habitual criminal and submitted certified copies of six judgments of conviction reflecting prior felonies.[3] At sentencing, the district court voiced concern about the violence of the crime, the randomness of the victims, and the "escalation of [Johnson's] willingness to go from non-violent crimes to violent crimes." The court adjudicated Johnson a habitual criminal and sentenced him to four sentences of a maximum of 25 years with minimum parole eligibility of 10 years, with two of those sentences to run consecutively.

ANALYSIS

On appeal, Johnson contends that the show-up identification was conducted in an unnecessarily suggestive and therefore unconstitutional manner, and the trial court should not have admitted either testimony describing the show-up identification or the victims' in-court identification of him during the trial. Johnson also argues that the sentencing court plainly erred in adjudicating him as a habitual criminal.

[Headnotes 1, 2]

At trial, Johnson did not object to either the show-up identification or the trial testimony relating to it, nor did he object to his sen-

[3]Johnson's criminal history mainly consisted of fraud and controlled substances violations.

tence when it was rendered. Consequently, the scope of our review is narrowly limited to determining whether plain error occurred. *See* NRS 178.602. In particular, we examine (1) whether there was error, (2) whether the error was plain or clear, and (3) whether the error affected the defendant's substantial rights. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "An error is plain if [it] is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks and citations omitted).

Under the particular facts of this case, we conclude that neither the trial court nor the sentencing court committed plain error warranting reversal.

The validity of show-up identification procedures

[Headnotes 3-5]

When a witness testifies that he knows a particular suspect committed a crime because he personally saw the crime as it occurred and then at a different time and place recognized the suspect to be the same person he previously saw, he is said to have performed an "identification" of the suspect. Witnesses can be asked to identify a suspect either outside of the courtroom prior to the trial during the initial police investigation of the crime, or later during the trial itself (or both). Both in-court and out-of-court identifications can be challenged by the defendant.

Out-of-court pretrial identifications are typically conducted through a number of common methods, including asking the witness if the perpetrator is one of several people lined up together in the same room (commonly called a "physical line-up"); showing the witness an array of facial photographs and asking if the perpetrator is among them (commonly called a "photographic line-up"); or, as in this case, by presenting a single suspect (or a very small group of potential suspects) to the victim soon after a crime is committed and inquiring if that person is the perpetrator (commonly known as a one-on-one "show-up" identification, a "confrontation," or a "field identification").

[Headnotes 6-8]

Whichever method is used, the Due Process Clause of the United States and Nevada Constitutions[4] forbids a criminal prosecution to

[4]Nevada's Due Process Clause is textually identical to the federal clause in relevant respects, *see* Nev. Const. art. 1, § 8(5), and the Nevada Supreme Court reads the state clause as coextensive with the federal clause. *See generally Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009). "Nevada has historically followed the United States Supreme Court on most, if not all, of its

be based upon any witness's identification that was procured under circumstances that were unnecessarily suggestive and likely to have resulted in a mistake that cannot be repaired. *See Gehrke v. State*, 96 Nev. 581, 583-84, 613 P.2d 1028, 1029 (1980); *Baker v. State*, 88 Nev. 369, 372, 498 P.2d 1310, 1312 (1972). The Constitution prohibits these suggestive and mistaken identifications whether they occurred outside of the courtroom before trial or during a criminal trial itself when a witness identifies the defendant from the witness stand. *See Manson v. Brathwaite*, 432 U.S. 98, 104-07 (1977). Indeed, in some instances, when a witness participated in a pretrial identification procedure that was extremely unreliable, courts have concluded that the witness's memory may have been so contaminated that a later in-court identification of the same suspect may also be precluded. *See generally United States v. Bagley*, 772 F.2d 482, 492 (9th Cir. 1985) ("Suggestive pretrial identification procedures may be so impermissibly suggestive as to taint subsequent in-court identifications and thereby deny a defendant due process of law."). Thus, an in-court identification of the defendant during trial can be challenged in two ways, either because the in-court identification is itself improper, or because it was contaminated by an improper out-of-court identification that occurred before trial.

In the instant case, Raebel and Valdez identified Johnson as the perpetrator in a pretrial show-up. During the trial, Raebel and Valdez described the pretrial show-up and also identified Johnson again in court as the perpetrator. Johnson challenges both the in-court and out-of-court identifications, but only contends that the in-court identification was improper because it was tainted by the prior show-up identification. Therefore, our focus is upon the validity of the out-of-court show-up.

Historically, "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, [was] widely condemned" and viewed by courts with deep suspicion. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). The Nevada Supreme Court has held that show-ups are "inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).

[Headnotes 9, 10]

Though frowned upon, such show-up identifications are nonetheless permissible when the "totality of the circumstances" surrounding the identification demonstrate that they are reliable. *Stovall*, 388 U.S. at 302 ("[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circum-

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interpretations and applications of the law governing searches and seizures." *State v. Lloyd*, 129 Nev. 739, 745, 312 P.3d 467, 471 (2013) (internal quotation marks omitted).

stances surrounding it."); *see also Jones*, 95 Nev. at 617, 600 P.2d at 250; *Banks v. State*, 94 Nev. 90, 94-96, 575 P.2d 592, 595-96 (1978). The question is whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that due process was denied to the defendant. *Stovall*, 388 U.S. at 302; *Jones*, 95 Nev. at 617, 600 P.2d at 250. If it was not, the witness's identification is admissible during a criminal trial and the jury may examine its credibility and reliability. *Gehrke*, 96 Nev. at 584, 613 P.2d at 1030.

[Headnotes 11, 12]

Even though the Due Process Clause may theoretically bar an overly suggestive identification whether it occurred before trial or during trial, courts review the validity of identifications under different legal standards depending upon when and how they occurred. Because the show-up identification of Johnson in this case occurred outside of court and preceded the filing of any formal charges, our inquiry involves two questions: (1) whether the show-up procedure was unnecessarily suggestive, and (2) whether the identification was nonetheless reliable in spite of any unnecessary suggestiveness in the identification procedure. *Banks*, 94 Nev. at 94, 575 P.2d at 595 (citing *Manson*, 432 U.S. at 98).

[Headnotes 13, 14]

We base our answer to both questions upon a review of the totality of the circumstances. *Id.* Those circumstances include examination of any countervailing policy considerations that might justify an otherwise problematic identification, including such factors as the presence or absence of any exigent circumstances, the need to quickly clear any incorrectly detained suspects so that police can continue searching for the true culprit, the freshness of the witness's recollection, and the possibility that memories might start to fade if other procedures were to be employed. *See Bias*, 105 Nev. at 872, 784 P.2d at 965 (holding that show-up was unnecessarily suggestive when no countervailing policy considerations or any exigency existed); *Jones*, 95 Nev. at 617, 600 P.2d at 250 (holding that policy considerations justified on-scene show-up when, under the circumstances, the witness's memory was fresher immediately after the crime and an immediate identification might have exonerated an innocent suspect and freed authorities to continue the investigation). A show-up is more likely to be deemed unnecessarily suggestive, and therefore invalid, when countervailing policy considerations are absent. *Jones*, 95 Nev. at 617, 600 P.2d at 250.

The show-up in this case was not unnecessarily suggestive

[Headnote 15]

Johnson alleges that the show-up procedures utilized in this case were unnecessarily suggestive, and that no countervailing policy

considerations exist to justify the procedures the police chose to employ. Specifically, Johnson contends that because he was wearing handcuffs and spotlighted in front of a marked police car during the show-up, the circumstances strongly implied to Raebel and Valdez that the police had already arrested the perpetrators of the crime based on other evidence, and Raebel and Valdez were therefore implicitly pressured to corroborate the police work already done. Johnson did not object below and raises these arguments for the first time on appeal.

In seeking reversal of his conviction, Johnson relies principally upon *Bias*, 105 Nev. at 871-72, 784 P.2d at 964-65, in which the Nevada Supreme Court held that a show-up was unnecessarily suggestive where the defendant was handcuffed, placed in front of a police car, and illuminated with a spotlight to be viewed by witnesses who then identified him as the perpetrator of the crimes. The show-up was conducted four hours after the crime, under conditions in which no exigency existed. *Id*. at 872, 784 P.2d at 965. The Nevada Supreme Court concluded "that this show-up procedure was unnecessarily suggestive because there were no countervailing policy considerations to justify it." *Id*. The court nonetheless affirmed the conviction because the identification was deemed "sufficiently reliable." *Id*.

In *Gehrke*, approximately 45 minutes after the incident, eyewitnesses were escorted by an officer to the defendant's home where they were told the police had a suspect in mind. 96 Nev. at 584, 613 P.2d at 1030. The police placed the defendant in front of the headlights of a police car. *Id*. The two eyewitnesses "were seated together in the back seat of the police car, where their initial reaction, whether correct or not, could be reinforced." *Id*. at 586, 613 P.2d at 1031 (Mowbray, C.J., concurring). The Nevada Supreme Court concluded that due to the lack of exigent circumstances, the identification procedure was unnecessary. *Id*. at 584, 613 P.2d at 1030.

[Headnote 16]

Determining whether a particular show-up was unnecessarily suggestive turns not on general principles, but rather upon the particular circumstances surrounding the identification. In this case, even though Johnson was handcuffed and spotlighted, several other circumstances demonstrate that the show-up was not unduly suggestive when considered as a whole, and therefore the show-up in this case was unlike those in *Bias* and *Gehrke*. In this case, Raebel and Valdez were specifically cautioned that it was just as important for the show-up to exonerate innocent people as it was to implicate guilty ones. Additionally, during the show-up, Raebel and Valdez were separated and not allowed to talk to each other while they each independently viewed Johnson and his brother. Neither of these circumstances occurred in *Bias* or *Gehrke*. In *Gehrke*, the two eyewit-

nesses were seated together in the back seat of the car, "where their initial reaction, whether correct or not, could be reinforced." 96 Nev. at 586, 613 P.2d at 1031 (Mowbray, C.J., concurring). Moreover, the witnesses in *Bias* and *Gehrke* were never directed that an important purpose of the show-up was to free the innocent and not merely to blindly confirm the suspicions of the police whether true or not. Quite to the contrary, in *Gehrke*, the witness was merely told that the police "had a suspect in mind," and no other instructions were given. 96 Nev. at 584, 613 P.2d at 1030. In *Bias*, the witness was simply asked "if the black guy was the one." 105 Nev. at 870, 784 P.2d at 964. In contrast, the circumstances of the instant case reflect that the police took substantial steps to ensure that Raebel and Valdez were not unduly pressured into a false or mistaken identification.[5]

[Headnote 17]

Even if the show-up contained elements of suggestiveness, strong countervailing policy considerations existed in this case that justified the officers' decision to attempt a show-up rather than another form of identification. The show-up was conducted within half an hour of the crime, while the victims' memories were still fresh. The crime was violent and occurred in the open on the streets of Las Vegas; had the police mistakenly detained the wrong people and employed a more time-consuming method of identification before clearing the suspects and resuming their search, the true criminals could have committed additional violent offenses against other unsuspecting victims in the meantime or escaped apprehension entirely. Furthermore, Johnson suggested he had a firearm during the robbery. While no firearm was ultimately recovered, his claim to have had one on him underscored the need to find him quickly before he could endanger other victims. Thus, the decision to employ a show-up rather than another more onerous method of identification was warranted under the exigencies that existed in this case.

Therefore, we conclude that the confrontation in this case was not unnecessarily suggestive, and any suggestiveness that might have existed was counterbalanced by important policy considerations justifying the show-up.

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[5]Various federal cases have held that show-up identification procedures similar to the one employed in this case were not improper. *See United States v. Drake*, 543 F.3d 1080, 1088-89 (9th Cir. 2008) (holding that show-up was not unnecessarily suggestive, although the robbery occurred in less than one minute, the police officers informed the victim "that they had captured the suspect," and the defendant was handcuffed and surrounded by officers); *United States v. Bagley*, 772 F.2d 482, 492-93 (9th Cir. 1985) (holding that show-up was not unnecessarily suggestive, although the witness viewed the defendant seated in a police car, handcuffed, and surrounded by officers); *United States v. Kessler*, 692 F.2d 584, 586 (9th Cir. 1982) (explaining that "[t]he use of handcuffs or other indicia of custody" does not automatically invalidate a show-up).

The identification was reliable

[Headnotes 18-20]

Even if the procedures employed here could be said to have been suggestive, suggestiveness by itself does not necessarily preclude the use of identification testimony at trial if the identification was otherwise reliable. *Bias*, 105 Nev. at 872, 784 P.2d at 965. In fact, when assessing admissibility, reliability rather than suggestiveness is the main concern. *Jones*, 95 Nev. at 617, 600 P.2d at 250. Reliability is measured by: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the degree of attention paid by the witness, (3) the accuracy of the witness's prior description, (4) the level of the witness's certainty demonstrated at the confrontation, and (5) the length of time between the crime and confrontation. *Canada v. State*, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988) (quoting *Manson*, 432 U.S. at 114).

Here, Raebel testified that she had a clear opportunity to view the two suspects for about a second-and-a-half as they approached her prior to the crime, and paid special attention because she sensed danger. She then remained in close physical proximity to her assailants for another 30 seconds as the assault took place. Valdez testified that, prior to the crime, he only viewed the suspects for a second through his peripheral vision, but had more opportunity to see them as they assaulted him over the next 30 seconds. Raebel and Valdez were in close proximity to their attackers and were asked to conduct the show-up within about 30 minutes after the crime while the incident was still fresh in their minds. At the show-up, Raebel immediately recognized both suspects with 100-percent certainty. Valdez immediately recognized Johnson with 90-percent certainty.

Moreover, prior to the show-up, Raebel and Valdez accurately described the race, gender, and height of the suspects they later positively identified, and provided descriptions of the color of their clothing accurate enough that, within minutes, the police found suspects who fit the description "to a tee."[6] Raebel and Valdez in-

[6]Johnson notes that the victims' clothing descriptions appeared to change and became more detailed only after they participated in the show-up. At the scene, the victims told police that the perpetrators wore dark pants and hoodies, one black and the other brown. At trial, Raebel recalled that Johnson wore a "brownish zip up hoodie" with "a pattern on it" and the "hood up." Valdez testified that he recalled Johnson wearing "a grey jacket with red lining like a grid almost." While it is certainly true that notable discrepancies existed, on balance these discrepancies are insufficient to render the identification unreliable when weighed against all of the other facts present in this case. *See Kessler*, 692 F.2d at 586 (explaining that subsequent descriptions that became more "detailed and accurate cannot be used to show impermissible suggestiveness" because "one of the central and legitimate purposes of a show-up is to sharpen the recollections of eyewitnesses and to enable them to focus attention on details they may have otherwise overlooked"). *See also United States v. Brown*, 636 F.

formed officers that the two perpetrators fled south on foot, and police found Johnson and Humes minutes later on foot two or three blocks immediately south of the crime scene disposing of the victims' property. Additionally, Valdez's cell phone was discovered in Humes's pocket.

Under these circumstances, we conclude that the identification of Johnson, both in court and during the pretrial show-up, was reliable and not mistaken. *See Bias*, 105 Nev. at 872, 784 P.2d at 965 (holding that show-up not inadmissible when the victim was certain that the defendant was the assailant and recognized the defendant's features and clothing, as well as the weapon found at the scene of the show-up); *see also United States v. Gregory*, 891 F.2d 732, 734-35 (9th Cir. 1989) (holding that identification was reliable when the witnesses viewed the robber for approximately 30 seconds and described the assailant to police officers soon after the robbery); *United States v. Barrett*, 703 F.2d 1076, 1085 (9th Cir. 1983) (explaining that the witness's "degree of attention was undoubtedly high" because she was the victim of the robbery). Consequently, we conclude that the district court did not commit plain error when it permitted the jury to hear testimony regarding the victims' identification of Johnson both before and during trial.

The district court did not plainly err in adjudicating Johnson a habitual criminal

[Headnote 21]

Johnson argues that the sentencing court improperly adjudicated him as a habitual criminal based only on his perceived escalating violence. Although Johnson did not object when the sentence was rendered, he contends this constituted plain error because the sentencing court impermissibly based its sentence upon only a single consideration rather than the multiplicity of factors on which a proper sentence should be based. Thus, Johnson avers that the district court believed that it was required to apply the habitual sentencing statutes.

[Headnotes 22, 23]

Under NRS 207.010, a defendant who has been convicted of at least three felonies qualifies as a habitual criminal. The Nevada Supreme Court has held that a district court has the discretion to sentence a defendant as a habitual offender merely because the defendant was convicted of at least three separate prior felonies. *LaChance v. State*, 130 Nev. 263, 278, 321 P.3d 919, 930 (2014).

Supp. 2d 1116, 1127 (D. Nev. 2009) (holding that identification was reliable, although the witness held a mistaken belief about the color of the assailant's sweatshirt and jeans); *Drake*, 543 F.3d at 1088-89 (holding that identification was reliable, although the victim "significantly underestimated" the defendant's height and the robbery occurred in less than a minute).

Nevertheless, a district court may exercise discretion to "dismiss a count under NRS 207.010 when the prior offenses are stale or trivial, or in other circumstances where an adjudication of habitual criminality would not serve the purposes of the statute or the interests of justice." *French v. State*, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982); *see Clark v. State*, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993) (explaining that "[t]he decision to adjudicate a person as a habitual criminal is not an automatic one"). The purpose of the habitual criminality statute is to allow the criminal justice system to deal determinedly with career criminals who seriously threaten public safety. *Sessions v. State*, 106 Nev. 186, 191, 789 P.2d 1242, 1245 (1990).

[Headnotes 24-28]

Adjudication under the habitual criminal statutes entails "the broadest kind of judicial discretion," *Tanksley v. State*, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (internal quotation marks omitted), and the statutes do not include any express limitations on the judge's discretion. *French*, 98 Nev. at 237, 645 P.2d at 441. In reviewing a district court's decision to sentence a defendant under these statutes, we consider the record as a whole and evaluate whether the sentencing court, in fact, exercised its discretion. *O'Neill v. State*, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007). In doing so, no requirement exists that "the sentencing court must utter specific phrases or make particularized findings that it is just and proper to adjudicate a defendant as a habitual criminal." *Hughes v. State*, 116 Nev. 327, 333, 966 P.2d 890, 893 (2000) (internal quotation marks omitted). Moreover, the habitual criminal statute "makes no special allowance for nonviolent crimes or for the remoteness of convictions" but rather regards these as "considerations within the discretion of the district court." *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). The sentencing court acts properly as long as it does not operate "under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication." *Hughes*, 116 Nev. at 333, 996 P.2d at 893-94.

Here, we conclude that the district court properly exercised its discretion to sentence Johnson as a habitual criminal. The record does not demonstrate that the district court was unaware of the discretion statutorily entrusted to it. While the sentencing court expressed concern over the "escalation of [Johnson's] willingness to go from non-violent crimes to violent crimes," the court never characterized this as the sole basis for adjudicating Johnson as a habitual criminal, nor did the court indicate any belief that habitual criminal adjudication was mandatory or automatic. The court was not required to utter specific phrases or findings to justify its decision. Taken as a whole, the record does not demonstrate that the district court operated under a misconception of the law regarding the discretionary nature of

a habitual criminal adjudication. Thus, the sentencing court did not plainly err in adjudicating Johnson as a habitual criminal.

CONCLUSION

For the reasons discussed above, we conclude that the trial court did not plainly err in admitting testimony relating to the show-up identification, nor did the sentencing court plainly err in adjudicating Johnson as a habitual criminal. Accordingly, we affirm the judgment of conviction and sentence.

GIBBONS, C.J., and SILVER, J., concur.

BARBARA ANN HOLLIER TRUST; BARBARA ANN HOLLIER LAWSON AKA BARBARA ANNE LAWSON AND BARBARA ANNE HOLLIER, INDIVIDUALLY AND AS TRUSTEE OF THE BARBARA ANN HOLLIER TRUST; AND ACADIAN REALTY, INC., A NEVADA CORPORATION, APPELLANTS, *v.* WILLIAM E. SHACK, JR.; AND NICOLLE JONES PARKER AKA NICOLLE SHACK PARKER, RESPONDENTS.

No. 63308

BARBARA ANN HOLLIER TRUST; BARBARA ANN HOLLIER LAWSON AKA BARBARA ANNE LAWSON AND BARBARA ANNE HOLLIER, INDIVIDUALLY AND AS TRUSTEE OF THE BARBARA ANN HOLLIER TRUST; AND ACADIAN REALTY, INC., A NEVADA CORPORATION, APPELLANTS, *v.* WILLIAM E. SHACK, JR.; AND NICOLLE JONES PARKER AKA NICOLLE SHACK PARKER, RESPONDENTS.

No. 64047

August 6, 2015 356 P.3d 1085

Consolidated appeals from a district court judgment on a jury verdict and post-judgment orders awarding attorney fees and costs and denying a motion for a new trial in a property action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Commercial tenants filed suit against lessor, trust that owned leased premises, and trustee asserting claims for breach of contract and breach of implied covenant of good faith and fair dealing. Defendants answered and asserted counterclaims for breach of contract, intentional misrepresentation, and abuse of contract. The district court dismissed abuse of process claim and entered judgment on the jury's verdict for tenants, and ordered that $100,000 awarded to defendants on abuse of process claim would be treated as offset

against tenants' damages. Both parties appealed. The supreme court reversed and remanded for new trial on damages only. On remand, the district court entered judgment on the jury's verdict, denied defendants' motion for judgment notwithstanding verdict (JNOV) and their request for award of pre- and post-judgment interest on $100,000 award, and awarded tenants attorney fees. Defendants appealed. The supreme court, GIBBONS, J., held that: (1) as matter of first impression, lessor's filing of motions for JNOV or alternatively for new trial tolled 20-day limitations period governing tenants' motion for attorney fees; (2) the district court's original determination that $100,000 award to defendants would be offset against tenants' damages award was not vacated by the supreme court's reversal and remand for new trial; (3) pre- and post-judgment interest did not accrue on $100,000 award; and (4) trust that owned leased premises and trustee were not parties to lease, and thus, were not liable for award of attorney fees to tenants under terms of lease.

Affirmed in part and reversed in part.

[Rehearing denied September 28, 2015]

Law Office of Andrew M. Leavitt and *Andrew M. Leavitt* and *Robert F. Purdy*, Las Vegas, for Appellants.

Gentile, Cristalli, Miller, Armeni & Savarese, PLLC, and *Dominic P. Gentile*, Las Vegas; *Gordon Silver* and *Joel Z. Schwarz*, Las Vegas, for Respondents.

1. LANDLORD AND TENANT.
   Commercial lessor's filing of motions for judgment notwithstanding verdict (JNOV), or alternatively for new trial, tolled 20-day limitations period governing tenants' motion for attorney fees, as prevailing parties on claims for breach of contract and breach of implied covenant of good faith and fair dealing, when post-judgment motions suspended finality of judgment. NRCP 50, 54(d)(2)(B), 59.
2. COURTS.
   Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes.
3. APPEAL AND ERROR.
   Statutory interpretation is a question of law that the supreme court reviews de novo.
4. STATUTES.
   When the language of a statute is plain and unambiguous, the supreme court will give that language its ordinary meaning and not go beyond it.
5. STATUTES.
   If a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply; rather, when a statute is ambiguous, the supreme court construes it consistently with what reason and public policy would indicate the Legislature intended.
6. APPEAL AND ERROR.
   Nevada has an interest in promoting judicial economy by avoiding the specter of piecemeal appellate review.

7. Appeal and Error.
   The legal operation and effect of a judgment is a question of law subject to de novo review.
8. Appeal and Error.
   The district court's determination in original trial that $100,000 awarded to commercial lessor on counterclaim against tenants for abuse of process, which represented value of option that tenants were to have paid lessor in exchange for lessor's promise not to sell property during period of lease, would be offset against damages awarded to tenants on their claims for breach of contract and breach of implied covenant of good faith and fair dealing was not vacated on appeal when the supreme court reversed and remanded for new trial on damages alone, for purposes of lessor's request on retrial for pre- and post-judgment interest on $100,000 award, where the supreme court did not address $100,000 offset in prior appeal.
9. Interest.
   Pre- and post-judgment interest did not accrue on $100,000 awarded to commercial lessor on counterclaim against tenants for abuse of process, where the district court ordered that $100,000 award be offset against damages awarded to tenants on their claims for breach of contract and breach of implied covenant of good faith and fair dealing, offset merely operated to reduce tenants' damages.
10. Landlord and Tenant.
    Trust that owned leased premises and trustee were not parties to commercial lease, and thus, were not liable for award of attorney fees to tenants who prevailed on their claims against lessor, trust, and trustee for breach of contract and breach of implied covenant of good faith and fair dealing, where lease provided that only party to lease could be held responsible for attorney fees in action to enforce lease.

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Gibbons, J.:

In this case, appellants appeal from the denial of a variety of motions and an award of costs and attorney fees to respondents. This appeal raises one issue of first impression: whether the filing of a post-judgment motion that tolls the time to appeal also tolls NRCP 54(d)(2)(B)'s 20-day deadline to move for attorney fees. We hold that it does. Further, we affirm the district court on all accounts except two. We conclude that the district court erred in finding: (1) that the $100,000 offset in appellants' favor from the first trial was extinguished by this court's previous order of reversal and remand; and (2) that all three appellants, instead of just Acadian Realty, Inc., are liable for attorney fees. Accordingly, we reverse on these two issues.

FACTS AND PROCEDURAL HISTORY

Nicolle Shack-Parker and her father, William E. Shack (the Shacks), doing business as Kids Care Club, entered into a "Lease Option Agreement and Contract of Sale" (the lease) with Acadian

Realty, Inc. Under the terms of the lease, the Shacks rented a commercial property in Las Vegas (the property) for three years. Upon execution of the lease, the Shacks owed $100,000 for a security deposit and $100,000 in option money. The nonrefundable $100,000 in option money acted as consideration for Acadian Realty not selling the property during the three-year lease and could be applied against the purchase price later if the Shacks chose to purchase the property.

Nicolle leased the property with the intent of opening and operating a child daycare facility, but the property needed extensive work prior to opening. During the reconstruction, the Shacks encountered numerous problems, which included asbestos, electrical wiring not being up to code, and the property not being connected to the Las Vegas valley water line. During this process, tensions between the parties rose and reached a breaking point when, according to the Shacks, Barbara Lawson, the owner of Acadian Realty, refused to sign documents required by the City of Las Vegas in order for construction to be completed.

The first trial

The Shacks filed a complaint against Acadian Realty, the Barbara Ann Hollier Trust (the actual owner of the property), and Barbara Lawson, both individually and as the trustee of the trust (collectively referred to as Lawson). In June 2008, the parties proceeded to trial on the Shacks' claims for breach of contract and breach of the implied covenant of good faith and fair dealing and Lawson's counterclaims for breach of contract, intentional misrepresentation, and abuse of process.

Following the conclusion of the trial, but before the jury rendered a verdict, the district court dismissed Lawson's abuse of process claim. The jury, however, already had the verdict form, which included a line for damages related to the abuse of process claim. Nevertheless, the trial judge stated that "if the jury comes back with an award on abuse of process, it will just be stricken."

The jury awarded the Shacks damages for their breach of contract claim and their breach of the implied covenant of good faith and fair dealing claim. As to the counterclaims, the jury rejected Lawson's breach of contract and intentional misrepresentation claims, but found the Shacks liable for $105,000 for abuse of process. The jury wrote in by hand that $100,000 of the $105,000 award was for the option money supposedly held in an escrow account and the remaining $5,000 was for attorney fees.

During a post-trial hearing regarding the fact that the jury wrongly awarded attorney fees and the abuse of process claim had been dismissed as a matter of law, the district court stated:

> At any rate, here's what I'm going to do. The case is a mess. I mean truly, the case is a mess. How it got that way the

> Lord only knows, but it's been a series of one-step decisions at a time . . . . I'm going to order that Mrs. Lawson gets the $100,000 which was required as the second payment for the option money. She complied with her option agreement in that she never listed the property and it was never sold during the term of the lease, so I'm saying just exactly what Mr. Shack said. The money's in an account; she can pick it up anytime she wants to. So I'm going to enforce what he told us in sworn testimony, so the $100,000 that's been sitting in some title company or some escrow account somewhere in California gets paid to Mrs. Lawson.

Additionally, the district court affirmed the damages awarded to the Shacks and clarified that the $100,000 going to Lawson would be treated as an offset. Both parties appealed the final judgment along with other orders.

The first appeal

On appeal, this court entered an order of reversal and remand. *Shack v. Barbara Ann Hollier Trust*, Docket No. 53039 (Order of Reversal and Remand, March 9, 2011). The order reached two conclusions: (1) the jury damages award amounts were not supported by the evidence, and (2) the district court cannot accept a verdict with interlineations on the verdict form. *Id.* As to the first conclusion, this court reasoned that it could not determine how the jury arrived at the damages figure because there was no indication as to what comprised the jury's award. *Id.* Later, this court denied a petition for rehearing but clarified that "this matter is remanded for a new trial solely on the issue of [the Shacks'] damages claims." *Shack v. Barbara Ann Hollier Trust*, Docket No. 53039 (Order Denying Rehearing but Clarifying Order of Reversal and Remand, May 11, 2011).

The second trial

During the second jury trial, after the Shacks rested their case, Lawson moved under Rule 50 for a directed verdict, which the district court denied. The jury subsequently returned a verdict for $371,400 in damages on Shack's breach of contract and breach of the implied covenant of good faith and fair dealing claims. The jury awarded the Shacks $147,200 on their breach of contract claim: $50,000 for the security deposit, and $97,200 for other costs related to the business. The jury also awarded the Shacks $224,200 on their breach of the implied covenant of good faith and fair dealing claim: $50,000 for the security deposit, $124,200 for rent, and $50,000 for construction settlement costs. A number of post-trial motions followed.

Lawson first moved for judgment notwithstanding the verdict, or alternatively a new trial, which the district court denied. Lawson

then moved for $47,164.08 in prejudgment and post-judgment interest on the $100,000 offset it received in the first trial. The district court denied this motion, finding that the offset and the alleged interest were not recoverable because this court's reversal and remand order eliminated the $100,000 offset. Finally, Lawson moved for a new trial on its breach of contract and abuse of process counterclaims, which the district court denied.

The Shacks moved for costs requesting $19,214.93 in costs for their current law firm and $4,618.51 in costs for their former law firm. The district court awarded the Shacks' current law firm $16,217.53 in costs and their former law firm $2,683.51 in costs, for a total of $18,901.04. The Shacks also moved for $400,222 in attorney fees. Lawson opposed the motion, arguing, among other things, that the Shacks were time-barred from requesting attorney fees under NRCP 54(d)(2)(B) because the motion for attorney fees was filed more than 20 days after the notice of entry of judgment was served. The district court disagreed and found the motion timely, reasoning that Lawson's motion for judgment notwithstanding the verdict or for a new trial tolled the deadline for filing the motion. Consequently, the district court awarded the Shacks the entire $400,222 requested.

Lawson now brings this appeal, challenging the district court's (1) denial of its motion for judgment notwithstanding the verdict, (2) denial of its motion for a new trial, (3) denial of its motion for relief from judgment, (4) denial of its motion for prejudgment and post-judgment interest on the offset, (5) award of costs to the Shacks, and (6) award of attorney fees to the Shacks.[1]

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[1]Lawson also appeals from the district court's overruling of an evidentiary objection during the Shacks' direct examination of Nicolle. Although we conclude that the district court abused its discretion, as explained below, the abuse was harmless. *See* NRCP 61. Nicolle testified that, before signing the lease, she believed the lease would include a $50,000 security deposit and $50,000 in option money. But the lease clearly included a $100,000 security deposit and $100,000 in option money. The district court deemed the testimony relevant based on its belief that the implied covenant of good faith and fair dealing "encompasses the full course of conduct" between parties to a contract, not just what occurs after the execution of the contract. The implied covenant of good faith and fair dealing, however, does not apply during the negotiation or formation phase of a contract. *See* Restatement (Second) of Contracts § 205 cmt. c (1981) ("Bad faith in negotiation, although not within the scope of [the implied covenant of good faith and fair dealing], may be subject to sanctions. Particular forms of bad faith in bargaining are the subjects of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress."); *see also Threshold Techs., Inc. v. United States*, 117 Fed. Cl. 681, 708 (2014) ("[T]he covenant of good faith and fair dealing cannot attach until the *start* of plaintiff's implied-in-fact contract with the government." (emphasis added)). Bad faith in negotiations is covered by other concepts like fraud, mistake, or duress. Thus, Nicolle's testimony and statements made during negotiations are generally irrelevant as to the breach of the implied-covenant-of-good-faith-and-fair-dealing claim. *See* NRS 48.025(2) ("Evidence which is not relevant is not admissible.").

DISCUSSION

[Headnote 1]

Prior to resolving the plethora of issues presented on appeal, we turn our attention to a narrow issue of first impression raised here: whether the filing of a post-judgment motion that tolls the time to appeal also tolls NRCP 54(d)(2)(B)'s 20-day deadline to move for attorney fees. We conclude that it does.

As to timing, NRCP 54(d)(2)(B) reads: "[u]nless a statute provides otherwise, the motion [for attorney fees] must be filed no later than 20 days after notice of entry of judgment is served . . . . The time for filing the motion may not be extended by the court after it has expired."

Lawson argues that NRCP 54(d)(2)(B) mandates that a prevailing party must move for attorney fees within 20 days of the entry of judgment with no exception. Lawson asserts that the Shacks missed this filing deadline because the notice of entry of judgment was served on January 9, 2013, and the Shacks' filed their motion for attorney fees on March 4, 2013.

In response, the Shacks argue that NRCP 54(d)(2)(B)'s 20-day deadline does not begin to run until the judgment is final and appealable. They contend that, here, the judgment was tolled when Lawson filed her NRCP 50 and NRCP 59 motions, and thus, they had 20 days from the resolution of those motions to file a motion for attorney fees. Further, the Shacks contend that federal courts have adopted this approach and that it best satisfies the purpose of NRCP 54(d)—to resolve fee disputes in a timely manner and avoid piecemeal litigation.

In reply, Lawson argues that tolling cannot apply because the January 9, 2013, judgment was a final judgment. Further, Lawson asserts that the Shacks' reliance on federal law is misplaced because Nevada's rule contains the sentence, "[t]he time for filing a motion may not be extended by the court after it has expired," while the federal rule does not. Lawson also argues that tolling is impractical.

[Headnotes 2-5]

"Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes." *Vanguard Piping v. Eighth Judicial Dist. Court*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013). "Statutory interpretation is a question of law that we review de novo." *Id.* (internal quotations omitted). "[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." *Nev. Dep't of Corrs. v. York Claims Servs., Inc.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015) (internal quotations omitted). "If, however, a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply." *Id.* (internal quotations omitted). "When a statute is ambiguous, we construe it consistently with

what reason and public policy would indicate the Legislature intended." *Id.* (internal quotations omitted).

We conclude that a plain language reading of NRCP 54(d)(2)(B) does not reveal whether tolling is allowed or prohibited. Thus, we look to reason and public policy. Additionally, we consider federal law interpreting the Federal Rules of Civil Procedure, "because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002); *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 794 n.1, 312 P.3d 484, 488 n.1 (2013) ("We may consult the interpretation of a federal counterpart to a Nevada Rule of Civil Procedure as persuasive authority.").

As pointed out by the Shacks, many federal courts have implemented tolling under similar circumstances. Like NRCP 54(d)(2)(B), FRCP 54(d)(2)(B) mandates that "[u]nless a statute or a court order provides otherwise, [a] motion [for attorney fees] must . . . be filed no later than 14 days after the entry of judgment." Faced with the same question presented here, "whether the [FRCP] 54(d)(2)(B) time limit is tolled pending the outcome of post-trial motions under [FRCP] 50 or [FRCP] 59," the United States Court of Appeals for the Ninth Circuit determined that an "[FRCP] 54(d)(2)(B) motion for fees is timely if filed no later than 14 days after the resolution of [an FRCP] 50(b), [FRCP] 52(b) or [FRCP] 59 motion." *Bailey v. Cnty. of Riverside*, 414 F.3d 1023, 1025 (9th Cir. 2005). The Ninth Circuit reasoned that these post-trial motions suspend the finality of a district court's judgment, for appellate purposes, because the judgment "was not appealable during the pendency of the post-trial motions." *Id.* This same reasoning has been implemented by the United States Courts of Appeals for the Second, Sixth, and Eleventh Circuits. *Weyant v. Okst*, 198 F.3d 311, 314-15 (2d Cir. 1999) ("[C]ertain types of post-judgment motions interrupt the judgment's finality because judicial efficiency is improved by postponing appellate review of the judgment until the District Court has had an opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment, . . . [but] finality is restored upon the resolution of the last of any post-judgment motions that operated to suspend finality." (internal quotations omitted)); *Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 688 (6th Cir. 2005) ("When the district court disposes of the [FRCP] 59(e) motion, that order itself is not the 'final' judgment, nor is it itself 'an order from which an appeal lies'; instead, the disposition of the [FRCP] 59(e) motions is an order or ruling that reinstates the finality of the original entry of judgment and a ruling that makes the underlying judgment appealable." (quoting FRCP 54(a))); *Members First Fed. Credit Union v. Members First Credit Union of Fla.*, 244 F.3d 806, 807 (11th Cir.

2001) ("A timely [FRCP] 59 motion to alter or amend judgment operates to suspend the finality of the district court's judgment . . . .").

Nevada's definition of a final judgment aligns with the aforementioned federal courts' reasoning for adopting tolling. We have previously stated that, for appellate purposes, "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000); *see Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) ("More precisely, a final, appealable judgment is one that disposes of the issues presented in the case . . . ." (internal quotations omitted)). *Compare* FRCP 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies.") *with* NRCP 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."). Thus, the reasoning from *Bailey*, *Weyant*, *Miltimore Sales*, and *Members First Federal* applies equally here. Accordingly, we conclude that a post-judgment motion that tolls NRAP 4(a)'s deadline to appeal also tolls NRCP 54(d)(2)(B)'s filing deadline for a motion for attorney fees until the pending post-judgment tolling motion is decided. *See* NRAP 4(a)(4) ("If a party timely files in the district court any [Rule 50(b), Rule 52(b), or Rule 59] motions under the Nevada Rules of Civil Procedure, the time to file a notice of appeal runs for all parties from entry of an order disposing of the last such remaining motion . . . ."); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 581-85, 245 P.3d 1190, 1192-95 (2010) (discussing those motions that qualify as a motion to alter or amend under NRCP 59(e)).[2]

[Headnote 6]

Further, as argued by the Shacks, the adoption of tolling aligns with Nevada's policy interests. Nevada has an interest in "promoting judicial economy by avoiding the specter of piecemeal appellate review." *Ginsburg*, 110 Nev. at 444, 874 P.2d at 733; *see also Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 526, 134 P.3d 726, 732 (2006) (expressing concern for judicial economy and avoiding piecemeal litigation). These same considerations motivated the Second Circuit to adopt tolling. *See Weyant*, 198 F.3d at 314 (stating that there is "a 'historic federal policy against piecemeal appeals'" (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980))). The Second Circuit reasoned that "judicial efficiency is improved by postponing appellate review of the judgment until the District Court

[2]In this opinion, we consider whether a post-judgment motion that tolls the time frame in which to appeal from a final judgment, under NRAP 4(a), also tolls NRCP 54(d)(2)(B)'s time frame for filing a motion for attorney fees. Nothing in this opinion affects the time frame in which a party may begin to enforce the judgment, or seek a stay of such enforcement, under NRCP 62.

has had an opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment." *Id.* (internal quotations omitted). We recognize that both approaches that the parties argue—tolling and no tolling—are imperfect as to judicial economy. We conclude, nevertheless, that tolling furthers our policy against piecemeal litigation more so than the alternative.

While we recognize that the federal rule and the Nevada rule differ due to Nevada's inclusion of the sentence, "[t]he time for filing the motion may not be extended by the court after it has expired," NRCP 54(d)(2)(B), we conclude that this extra sentence has no effect on tolling. This extra sentence prevents a district court judge from granting a litigant a second chance at filing a motion for attorney fees if the litigant missed the filing deadline. But tolling moves the deadline for filing a motion for attorney fees to 20 days after the resolution of the last post-judgment tolling motion. For example, a district court would have no need to extend the time to file a motion for attorney fees if the motion is filed 190 days after judgment was entered, but only 18 days after an order deciding a Rule 50(b) motion was entered, because the motion would have been filed within the 20-day deadline with a couple days to spare. Once the 20-day period expires, however, the extra sentence in Nevada's statute would then prohibit any type of extension.

Finally, we disagree with Lawson that tolling is impractical. Lawson essentially contends that a judgment is not final until it includes the verdict and award of attorney fees and costs. Lawson argues that implementing this rule would allow a party to move for attorney fees after the 30-day notice of appeal deadline expires, rendering the opposing party unable to appeal an award of attorney fees. Along with the fact that tolling has apparently functioned in the four aforementioned federal circuits, which have similar appellate rules, for many years without such problems arising, an order awarding attorney fees is "[a] special order entered after final judgment," NRAP 3A(b)(8), and is substantively appealable on its own. *See Winston Prods.*, 122 Nev. at 525, 134 P.3d at 731. Thus, Lawson may appeal an award of attorney fees even after the deadline to file a notice of appeal from the final judgment has passed.

Consequently, due to the similarity between FRCP 54(d)(2)(B) and NRCP 54(d)(2)(B), the persuasive and applicable reasoning of the Second, Sixth, Ninth, and Eleventh Circuits, and our policy against piecemeal litigation, we hold that an NRCP 54(d)(2)(B) motion for attorney fees is timely if filed no later than 20 days after the resolution of a post-judgment tolling motion.[3] Therefore, we con-

[3]The scope of our holding includes post-judgment motions made under NRCP 50(b), 52(b), and 59. *See Bailey v. Cnty. of Riverside*, 414 F.3d 1023, 1025 (9th Cir. 2005); *see also* NRAP 4(a)(4); *AA Primo Builders*, 126 Nev. at 581-85, 245 P.3d at 1192-95.

clude that the district court did not err in finding the Shacks' motion for attorney fees timely. With this issue of first impression resolved, we turn to the remaining issues presented on appeal.

The district court partially erred in denying Lawson's motion for prejudgment and post-judgment interest

[Headnote 7]

The "legal operation and effect of a judgment" is a question of law, *Ormachea v. Ormachea*, 67 Nev. 273, 291, 217 P.2d 355, 364 (1950), subject to de novo review. *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 531, 216 P.3d 779, 782 (2009) ("Questions of law are subject to de novo review.").

[Headnote 8]

The district court found that the $100,000 offset "was wholly reversed and remanded by the Supreme Court of Nevada." We conclude, however, that because we never explicitly addressed the $100,000 offset in this court's March 9, 2011, and May 11, 2011, orders, the $100,000 offset remains intact. We also conclude that the Shacks' argument that Lawson somehow waived her right to the $100,000 offset fails. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued nor supported by relevant authority).

[Headnote 9]

We further conclude that the $100,000 offset did not accrue prejudgment or post-judgment interest. Under these facts, the sua sponte offset was merely a $100,000 reduction of the Shacks' original verdict. Consequently, we reverse the district court and instruct it to enter a new judgment in which the Shacks' second verdict is reduced by this $100,000 offset without interest.

The district court partially abused its discretion in its award of attorney fees to the Shacks

[Headnote 10]

We review a district court's award of attorney fees for an abuse of discretion. *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1354, 971 P.2d 383, 386 (1998). The Shacks moved for and were awarded attorney fees under the terms of the lease. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 94, 127 P.3d 1057, 1065 (2006) (stating that attorney fees may be provided for by statute, rule, or contract). The attorney fees provision of the lease reads:

> If either party brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any such action, trial or appeal thereon, shall be entitled to his reasonable

> attorneys' fees to be paid by the losing party as fixed by the court in the same or separate suit, and whether or not such action is pursued to decision or judgment.

Lawson contests the award of attorney fees on many grounds. We agree with it on one. The district court found that Barbara Lawson individually, the Barbara Ann Hollier Trust, and Acadian Realty, Inc., were all liable for the attorney fees. We conclude, however, that only Acadian Realty, Inc., is liable for attorney fees under the lease.

Contract interpretation, "[i]n the absence of ambiguity or other factual complexities, . . . presents a question of law," which is subject to de novo review. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (internal quotations omitted). "The objective in interpreting an attorney fees provision, as with all contracts, is to discern the intent of the contracting parties." *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (internal quotations omitted). "[T]raditional rules of contract interpretation [are employed] to accomplish that result." *Id.* (internal quotations omitted). "Therefore, the initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id*.

We conclude that the lease clearly states that only a party to the lease can be held responsible for attorney fees in an action to enforce the lease. It is uncontested that only Acadian Realty, Inc., was a party to the lease, and Barbara and the trust were not. Therefore, we reverse the district court's finding that all three parties were liable for attorney fees but affirm the attorney fees award against Acadian Realty, Inc.[4]

In conclusion, along with establishing the tolling properties of certain post-judgment motions upon NRCP 54(d)(2)(B), we affirm the judgment of the district court in all respects with two exceptions. First, we conclude that the $100,000 offset awarded to Lawson in the first trial remains intact. Second, we conclude that, per the terms of the lease, Barbara Lawson and the Barbara Ann Hollier Trust are not liable to the Shacks for the attorney fees award. Accordingly, we reverse the district court's judgment on these two issues.

SAITTA and PICKERING, JJ., concur.

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[4]Furthermore, we affirm the district court's denial of Lawson's NRCP 50(b) motion for judgment as a matter of law, NRCP 59 motion for a new trial, and NRCP 60(b) motion for relief from the judgments reached in the first trial. We also affirm the district court's award of costs to the Shacks.

DZIDEFO MENSAH, APPELLANT, *v.*
CORVEL CORPORATION, RESPONDENT.

No. 64053

August 6, 2015 356 P.3d 497

Pro se appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Workers' compensation claimant, who was self-employed, filed petition for judicial review of decision of appeals officer denying temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits. The district court denied petition. Claimant appealed. The supreme court held that: (1) in considering entitlement to TPD benefits, appeals officer should have considered business's income and expenses in calculating any loss to wages, not just claimant's salary; and (2) claimant was not entitled to TTD benefits.

Reversed and remanded.

[Rehearing denied October 29, 2015]

Dzidefo Mensah, Reno, in Pro Se.

Lewis Brisbois Bisgaard & Smith, LLP, and *Jeanne P. Bawa* and *John P. Lavery*, Las Vegas, for Respondent.

1. WORKERS' COMPENSATION.
   For self-employed individuals, the lack of a salary associated with typical employment does not necessarily prevent an average monthly wage calculation for the purpose of determining lost income and rendering a workers' compensation benefit decision awarding temporary partial disability benefits; instead, the injured worker's earnings, which include more than just the worker's salary and should take into consideration a self-employed individual's business profits and expenses, are part of the wage determination. NRS 608.012(1), 616C.420, 616C.423, 616C.432, 616C.441, 616C.475, 616C.500(1).
2. WORKERS' COMPENSATION.
   In determining entitlement to temporary partial disability benefits for workers' compensation claimant who was self-employed delivery driver, appeals officer should have determined best method for calculating any loss to wages resulting from claimant's industrial injury, taking into account both his business's income and expenses and not limiting determination of lost wages merely to what claimant paid himself as a salary, where claimant presented evidence demonstrating loss of business income, including that he had received compensation from delivery company under service contract and that he had paid a replacement driver to complete his delivery route during time that he was medically restricted from doing so. NRS 608.012(1), 616C.420, 616C.423, 616C.432, 616C.441, 616C.475, 616C.500(1).

3. Workers' Compensation.
Workers' compensation claimant was not entitled to temporary total disability benefits, where he was released to light-duty work with restrictions. NRS 616C.475(5).

Before Saitta, Gibbons and Pickering, JJ.

OPINION

Per Curiam:
[Headnote 1]

In this workers' compensation case, a self-employed injured worker challenges an appeals officer's order that denied him temporary total and partial disability benefits on the basis that he could not establish a loss of any income without evidence of a salary. We conclude that for self-employed individuals, the lack of a salary associated with typical employment does not necessarily prevent an average monthly wage calculation for the purpose of determining lost income and rendering a workers' compensation benefit decision. Instead, the injured worker's earnings, which include more than just the worker's salary and should take into consideration a self-employed individual's business profits and expenses, are part of the wage determination. We therefore reverse and remand.

FACTS AND PROCEDURAL HISTORY

Appellant Dzidefo Mensah was a self-employed delivery driver who contracted with FedEx Home Delivery for one of its delivery routes. Under his service contract, he was required to maintain workers' compensation insurance, which he did through respondent CorVel Corporation. While delivering packages, appellant fell and injured his shoulder. Appellant's workers' compensation claim for his shoulder injury was accepted, and he received medical treatment. He was later released to light-duty work, but with his physical restrictions, he could not complete his delivery route and instead hired a replacement driver until he canceled the service contract. Appellant requested temporary disability benefits, which were denied on the basis that he continued to receive the same compensation under the FedEx service contract as he did before the injury occurred. Appellant administratively appealed, and the appeals officer denied both temporary total disability benefits (TTD) and temporary partial disability benefits (TPD) because appellant did not produce any documentation showing that he had paid himself a salary of $1,425 per week as he claimed, and thus, any difference between his pre-injury and post-injury income could not be determined. The

district court denied appellant's petition for judicial review, and this appeal followed.

DISCUSSION

Generally, an employee who is injured by accident arising out of and in the course of employment is entitled to receive as TPD the difference between the wages earned after the injury and the benefits that the injured person would be entitled to receive if temporarily totally disabled, when the wages are less than the amount of those benefits. NRS 616C.500(1). "Wages" means the amount of money that an employee receives for the time the employee worked. *See generally* NRS 608.012(1); *see also Black's Law Dictionary* 1610 (8th ed. 2004) (defining a "wage" as "[p]ayment for labor or services," including "every form of remuneration payable for a given period to an individual for personal services"). The statutes, however, do not specifically explain how a self-employed person's wages are to be calculated.

[Headnotes 2, 3]

It is indisputable that appellant suffered an industrial injury. This made him eligible to receive temporary disability benefits, calculated based on any loss in wages caused by the injury. *See* NRS 616C.475; NRS 616C.500(1). The appeals officer concluded that appellant was not entitled to those benefits[1] because his salary could not be established from his personal and corporate income tax filings and he could not produce any paystubs or other evidence of a salary. But appellant was self-employed, and thus, it is reasonable that he did not pay himself a salary in the typical sense. *See, e.g.*, *Pratt v. Long Island Jewish Med.*, 915 N.Y.S.2d 735, 737 (App. Div. 2011) (explaining that determining the actual earnings of a self-employed claimant may require a fact-specific analysis of the claimant's business and expenses); *Caparotti v. Shreveport Pirates Football Club*, 768 So. 2d 186, 193 (La. Ct. App. 2000) ("Profits from a sole proprietorship should be treated in the same manner as wages.").

The record clearly shows that appellant received compensation from FedEx Home Delivery under his service contract, and he paid another employee to complete his delivery route during the time that he was medically restricted from doing so, demonstrating a loss to appellant's business income. And although substantial evidence supports the appeals officer's determination that appellant had not

[1]The appeals officer's determination that appellant was not entitled to TTD benefits does not appear to be challenged on appeal. Nonetheless, appellant was released to light-duty work with restrictions, and therefore the appeals officer did not err in concluding that appellant was not entitled to TTD benefits. *See* NRS 616C.475(5); *Amazon.com v. Magee*, 121 Nev. 632, 636-37, 119 P.3d 732, 735-36 (2005) (explaining that when an injured employee is released to work, even with restrictions, that employee is no longer entitled to TTD benefits).

established that he received a *salary* from his business, *see Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557 & n.4, 188 P.3d 1084, 1087 & n.4 (2008) (reviewing an appeals officer's fact-based decisions for substantial evidence, which "is evidence that a reasonable person could accept as adequately supporting a conclusion" (internal quotation omitted)), the appeals officer did not determine whether the documentation—including the Form 1099-MISC showing appellant's compensation from FedEx Home Delivery, the copies of paystubs showing wages paid to the replacement driver, and financial statements indicating appellant's business income and expenses—credibly established a loss to appellant's *earnings*, which may consist of more than just salary. *See* NAC 616C.420 (describing the average monthly wage as the "gross value of *all money* . . . received by an injured employee from his or her employment to compensate for his or her time or services" (emphasis added)); NAC 616C.423 (including more than just salary in the average monthly wage calculation); NAC 616C.432 (explaining how to calculate the average monthly wage); NAC 616C.441 (using an injured worker's earnings as the basis for a wage calculation and defining "earnings").

The appeals officer therefore erred when she concluded that she was unable to calculate appellant's average monthly wage because he could not establish his salary and had thus failed to show a loss of income. The appeals officer should have determined the best method for calculating any loss to appellant's wages resulting from his industrial injury, taking into account both his business's income and expenses, *see Pratt*, 915 N.Y.S.2d at 737-38, and not limited her determination merely to what appellant, a self-employed individual, paid himself as a salary. *See Hartford Underwriters Ins. Co. v. Hafley*, 96 S.W.3d 469, 474 (Tex. App. 2002) (holding that where the statutes only address the income of a claimant who is employed by a third-party employer, the agency has the discretion "to choose a method for calculating the equivalent of statutory 'wages' for a self-employed claimant," and affirming the agency's decision to calculate wages based on the respondent's net income).

Accordingly, we reverse the district court's order denying appellant's petition for judicial review and remand with instructions for the district court to remand this case to the appeals officer for a determination of whether the documents submitted by appellant adequately demonstrate a wage loss during the time he was on restricted duty, wherein wages include more than just salary.