D.R. HORTON, INC., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE SUSAN JOHNSON, District Judge, Respondents, and ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nonprofit Corporation, Real Party in Interest.

No. 66085

D.R. HORTON, INC., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE SUSAN JOHNSON, District Judge, Respondents, and ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nonprofit Corporation, Real Party in Interest.

No. 66101

October 29, 2015 358 P.3d 925

Original petitions for a writ of prohibition or mandamus challenging district court orders granting an ex parte stay and denying an NRCP 41(e) motion to dismiss.

The supreme court, Hardesty, C.J., held that: (1) the district court acted within its discretion in granting stay pending completion of prelitigation process, (2) stay tolled period for dismissing case that had not been brought to trial within five years, and (3) the district court was not required to evaluate diligence of parties before determining whether stay tolled prescriptive period for dismissing case.

Petitions denied.

Wood, Smith, Henning & Berman, LLP, and *Joel D. Odou* and *Victoria L. Hightower*, Las Vegas, for Petitioner.

Angius & Terry, LLP, and *Paul P. Terry, Jr., Scott P. Kelsey*, and *David M. Bray*, Las Vegas, for Real Party in Interest.

1. Mandamus.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.
2. Mandamus.
   Writ relief is generally not available when an adequate and speedy legal remedy exists.
3. Mandamus.
   The supreme court's consideration of writ petitions was warranted in action raising issue of whether stay was allowed pending completion of prelitigation process for constructional defects and whether such a stay would toll five-year period for bringing case to trial; questions of law pre-

sented were important, and answer to those questions would promote judicial economy and administration. NRS 40.600 *et seq.*; NRCP 41(e).

4. Action.
   The district court acted within its discretion in granting stay of constructional defect suit between builder and homeowners' association pending completion of prelitigation process; some of association's claims would face contractual limitations defense if stay were not granted. NRS 40.647(2)(b).
5. Courts.
   When a motion to dismiss an action that has not been brought to trial within five years is improperly denied, the district court lacks any further jurisdiction, rendering its subsequent orders going to the merits of the action void. NRCP 41(e).
6. Pretrial Procedure.
   When a case has not been brought to trial after five years, dismissal is mandatory, affording the district court no discretion. NRCP 41(e).
7. Pretrial Procedure.
   Any period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of the rule requiring dismissal of an action that has not been brought to trial within five years. NRCP 41(e).
8. Pretrial Procedure.
   Stay that was issued pending completion of prelitigation process for constructional defects served to toll period for dismissing case that has not been brought to trial within five years. NRS 40.600 *et seq*.; NRCP 41(e).
9. Pretrial Procedure.
   A district court is not required to evaluate the diligence of the parties before determining if a court-ordered stay tolls the prescriptive period for dismissing a case if it has not been brought to trial within five years. NRCP 41(e).
10. Pretrial Procedure.
    A stay imposed to complete the prelitigation process for constructional defects tolls the period for dismissing a case that has not been brought to trial within five years. NRS 40.600 *et seq.*; NRCP 41(e).

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, C.J.:

In these original petitions for extraordinary writ relief, we consider whether the district court erred when it initially granted an ex parte stay permitting a homeowners' association to complete the NRS Chapter 40 process and further erred when it denied a motion to dismiss the underlying complaint pursuant to the five-year rule in NRCP 41(e) when the NRS Chapter 40 process was still not complete. We conclude that the district court's order granting a stay was not in error, and the five-year period was tolled under the *Boren*

[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of these petitions.

exception to NRCP 41(e). Accordingly, we deny both of these petitions for a writ of prohibition or mandamus.

FACTS AND PROCEDURAL HISTORY

These petitions arise from the same underlying complaint. In Docket No. 66085, petitioner D.R. Horton, Inc., argues that the district court abused its discretion in granting real party in interest High Noon at Arlington Ranch Homeowners Association's[2] ex parte motion to stay the proceedings until the NRS Chapter 40 prelitigation process for constructional defect cases was complete. In Docket No. 66101, petitioner D.R. Horton argues that the district court erred in refusing to dismiss the case for failure to bring the case to trial within five years pursuant to NRCP 41(e) because it improperly excluded from the five-year period certain dates during which the proceedings were stayed.

Facts related to both petitions

Real party in interest High Noon is a homeowners' association created pursuant to NRS Chapter 116 that operates and manages the High Noon at Arlington Ranch community. This community consists of 342 individual units contained within 114 buildings. According to High Noon, the sales documents for these units contain language that precludes express and implied warranty actions after two years.

On June 7, 2007, High Noon filed a complaint against D.R. Horton "in its own name on behalf of itself and all of the High Noon . . . unit owners," alleging breach of implied warranties of workmanlike quality and habitability, breach of contract, breach of express warranties, and breach of fiduciary duty. High Noon obtained written assignment of the claims of 194 of its individual unit owners.

Even though High Noon did not specifically allege that its claims fall under NRS Chapter 40's constructional defect provisions, High Noon immediately moved, ex parte, for a stay and enlargement of time for service of the complaint pending completion of prelitigation proceedings pursuant to NRS 40.647(2)(b), which allows for stays of district court actions filed before the prelitigation process is completed when the claims would later be time-barred by statute. In support of this motion, High Noon argued that it was unclear whether its warranty claims were subject to NRS Chapter 40, but if not, they faced a possible two-year contractual limitations period, indicating that "[t]he complaint was filed to preserve [High Noon]'s claim for

[2]The petitions incorrectly identify the homeowners' association as Arlington Ranch Homeowners Association. We note that the correct name is High Noon at Arlington Ranch Homeowners Association.

breach of express and implied warranties." Additionally, High Noon stated that, to begin the prelitigation process, it would "immediately serve [d]efendants with [n]otice of construction defects pursuant to NRS 40.645, providing detailed information regarding the construction defect damages claimed." The district court granted High Noon's motion and stated that the complaint "is hereby stayed until the completion of the NRS 40.600 *et seq.* pre-litigation process."[3] In a later order, the district court determined that this stay commenced on August 13, 2007, and that the case then "remained dormant until April 14, 2008, when [D.R. Horton] filed various motions."[4] The district court further concluded that another stay had been granted on July 30, 2009, as a result of D.R. Horton's motion for stay. The court determined that this stay ended on November 5, 2009, when the district court approved the special master's case management order.[5]

Based on information from the parties' briefs and appendices, it appears that as of today, over eight years later, the NRS Chapter 40 process is still not complete.

Docket No. 66085

In this writ petition, D.R. Horton challenges the 2007 district court order granting High Noon's ex parte motion for a stay and enlargement of time for service so that High Noon could conduct NRS Chapter 40 prelitigation activities, including giving notice and opportunities to inspect and repair, prior to serving process on D.R. Horton. D.R. Horton claims that the stay is void, as High Noon's breach of implied and express warranty causes of action allege constructional defects and are therefore subject to NRS Chapter 40, which requires dismissal for failure to comply with prelitigation procedures unless certain conditions are met. NRS 40.645;

[3]Two other stays were also granted in the case below, including a stay by this court in *D.R. Horton, Inc. v. Eighth Judicial District Court*, Docket No. 58533, but those stays are not at issue in these writ petitions.

[4]Our review of the record shows that D.R. Horton only filed one motion with the court on or around April 14, 2008, and that was a motion to compel. D.R. Horton's motion sought to compel High Noon "to comply with NRS 40.6462 and provide access to each unit at the [s]ubject [p]roperty where construction defects are alleged to exist for inspection by D.R. Horton." D.R. Horton also sought "to toll the statutory deadline to submit its repair response pending completion of inspections of all units where defects are alleged to exist."

[5]Contradictory to the district court's status of the stay, there is nothing in the record to demonstrate that the court ever lifted the August 13, 2007, stay. And there is no indication in the special master's case management order that the July 30, 2009, stay was to end on November 5, 2009, upon the district court's approval of that order. These stays appear to be continuous from August 13, 2007, until now.

NRS 40.647. D.R. Horton also argues that the void 2007 stay cannot toll the NRCP 41(e) five-year rule, and it requests that this court direct the district court to vacate the order denying the motion to dismiss and to dismiss the complaint.

Docket No. 66101

In this petition, D.R. Horton makes an additional argument that the district court erred in denying a motion to dismiss based on High Noon's failure to bring the action to trial within five years pursuant to NRCP 41(e). On January 21, 2014, third-party defendant Firestop, Inc., moved to dismiss the underlying case for failure to prosecute, and D.R. Horton joined in the motion. Firestop contended that the only stay that tolled the five-year rule was the stay entered by this court in Docket No. 58533 and that the five-year period thus expired on September 14, 2013. D.R. Horton contends that the district court erred when it relied on the *Boren* tolling exception to NRCP 41(e), which permits tolling where "the parties are prevented from bringing an action to trial by reason of a stay order." *Boren v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 405 (1982). D.R. Horton argues that this court should clarify the holdings from *Boren* and its progeny and require a court to examine the parties' diligence in bringing an action to trial when determining if the tolling exception is appropriate. Alternatively, D.R. Horton asks this court to specifically preclude tolling for all stays imposed to complete the NRS Chapter 40 process.

DISCUSSION

Writ relief is appropriate

[Headnotes 1, 2]

"'A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'" *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)); *see also* NRS 34.160. Generally, "[w]rit relief is not available . . . when an adequate and speedy legal remedy exists." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene 'under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d

906, 908 (2008) (quoting *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)).[6]

[Headnote 3]

These petitions merit our consideration as they raise important issues concerning Nevada's constructional defect law. Specifically, the petitions present important questions of law—whether NRS 40.647(2)(b) allows for this type of stay and, if so, whether the stay tolls the running of the five-year period under NRCP 41(e). Although the case was filed in 2007, litigation is in the very early stages and the answer to these questions now would thus promote judicial economy and administration. *See Thran v. First Judicial Dist. Court*, 79 Nev. 176, 178, 380 P.2d 297, 298-99 (1963) (entertaining petition for writ relief from a district court order denying a motion to dismiss under NRCP 41(e)); *see also Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 1345 n.1, 950 P.2d 280, 281, 281 n.1 (1997). Accordingly, we choose to entertain these writ petitions.

The August 2007 stay

[Headnote 4]

High Noon's complaint alleged four claims for relief: (1) breach of implied warranties of workmanlike quality and habitability, (2) breach of contract, (3) breach of express warranties, and (4) breach of fiduciary duty. In the complaint, High Noon never alleges that the claims for relief fall under NRS Chapter 40.[7]

High Noon based its August 2007 ex parte stay motion on NRS 40.647(2)(b). The statute specifically states that if a plaintiff who files a constructional defect suit before completing the prelitigation process would be prevented from filing another suit based on the expiration of the statute of limitations or repose, then the court must stay the case rather than dismiss it in order to allow for compliance with the NRS Chapter 40 requirements. NRS 40.647(2)(b).

In its stay motion, High Noon alleged that, pursuant to NRS 116.4116(1), D.R. Horton "attempted to limit the implied [and express] warranties in their sales documents to [a] two[-]year period."

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[6]In the alternative, D.R. Horton 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; *see also Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). A writ of prohibition is improper in this case because the district court had jurisdiction to hear and determine the outcome of the motion to stay and the motion to dismiss. *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (stating that we will not issue a writ of prohibition "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration").

[7]The parties' briefs do not dispute whether the stay applied to all claims for relief.

High Noon alleged that D.R. Horton began selling units on August 31, 2004, and High Noon filed its complaint on June 7, 2007, more than two years later. For that reason, some of High Noon's claims would face a contractual limitations defense if a stay was not granted under NRS 40.647(2)(b). Further, NRS 40.635(3) provides that NRS Chapter 40 does not "bar or limit any defense otherwise available, except as otherwise provided in those sections." Since NRS Chapter 40 does not prevent any defense otherwise available, D.R. Horton could argue a shorter limitations period based on its sales contracts. If the NRS Chapter 116 limitation period for warranties was contractually modified to two years, as permitted by NRS 116.4116(1), this shorter period should allow the district court to enter a stay under NRS 40.647(2)(b), just as it would for a statutory limitation period, so that High Noon could undertake the prelitigation process without jeopardizing its claims.[8] Thus, based on High Noon's argument that it may or may not have NRS Chapter 40 claims, it would have been appropriate for the district court to extend the time to allow completion of the prelitigation process.[9]

The August 2007 stay tolled the five-year rule

D.R. Horton claims that the district court erred in finding that the August 2007 stay precluded the parties from litigating as the parties were actually engaged in the NRS Chapter 40 process. We disagree.

[Headnote 5]

Where a motion to dismiss under NRCP 41(e) is improperly denied, the district court lacks any further jurisdiction, rendering its subsequent orders going to the merits of the action void. *Cox v. Eighth Judicial Dist. Court*, 124 Nev. 918, 924-25, 193 P.3d 530, 534 (2008). Therefore, if we determine that dismissal was required under NRCP 41(e), any subsequent orders entered by the district court would necessarily be void.

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[8]We recognize that NRS 40.695 generally tolls statutes of limitation or repose for constructional defect claims during the prelitigation process. However, High Noon sought a stay because it was unclear whether that statute would apply to preserve its claims, given that they were brought under NRS Chapter 116 and the existence of a contractual limitations period.

[9]NRS 40.645 requires that a claimant provide prelitigation notice before a claimant can amend a complaint to add a cause of action for a constructional defect. And, under NRS 40.603(2),

> "Amend a complaint to add a cause of action for a constructional defect" means any act by which a claimant seeks to:
>
> . . . .
>
> 2. Amend the pleadings in such a manner that the practical effect is the addition of a constructional defect that is not otherwise included in the pleadings.
>
> The term does not include amending a complaint to plead a different cause for a constructional defect which is included in the same action.

[Headnote 6]

NRCP 41(e) states, in pertinent part, that:

> Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of any party, or on the court's own motion, after due notice to the parties, unless such action is brought to trial within 5 years after the plaintiff has filed the action, except where the parties have stipulated in writing that the time may be extended. . . . A dismissal under this subdivision (e) is a bar to another action upon the same claim for relief against the same defendants unless the court otherwise provides.

In addressing NRCP 41(e), we have concluded that it "is clear and unambiguous and requires no construction other than its own language." *Thran v. First Judicial Dist. Court*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963). Additionally, where a case has not been brought to trial after five years, dismissal is mandatory, affording the district court no discretion. *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002). Notably, though, this court has recognized exceptions to the mandatory nature of NRCP 41(e).

The Boren exception

[Headnote 7]

Under current Nevada law, "[a]ny period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of [NRCP] 41(e)." *Boren*, 98 Nev. at 6, 638 P.2d at 405. The holding in *Boren* was based on the fact that the district court prohibited the parties from going to trial and then dismissed their action for failure to bring it to trial, circumstances that were unarguably "unfair and unjust." *Id.* at 5-6, 638 P.2d at 404. In *Boren*, our short opinion provided no facts from the case, but we indicated that the district court had stayed the proceedings for more than four years. *Id.* at 5, 638 P.2d at 404. Boren had argued that the plaintiffs "had some kind of duty of diligence in seeking vacation of the stay order [and to bring the case to trial]." *Id.* at 6, 638 P.2d at 404. However, we disagreed and determined that the plaintiffs' lack of diligence was "immaterial," as "we would be hard-pressed to formulate a rule describing the degree of diligence required under such circumstances." *Id.* at 6, 638 P.2d at 404-05.

D.R. Horton argues that, unlike in *Boren*, the parties here were not *prevented* from bringing the action to trial because of the stay order. It claims that High Noon intentionally prolonged the stay by not immediately filing its NRS Chapter 40 notice and denying D.R. Horton access to properties containing alleged constructional defects.

[Headnote 8]

While High Noon may have prolonged the process, prompting D.R. Horton to file several motions to compel,[10] the matter was "stayed until the completion of the NRS 40.600 *et seq.* prelitigation process." Because the stay prevented the case from proceeding,[11] *Boren*'s rule applies, and the court-ordered August 2007 stay tolls the prescriptive period under NRCP 41(e) while the district court-ordered stay is in effect.

Boren and its progeny do not require a district court to evaluate the diligence of the parties before determining if a court-ordered stay tolls the prescriptive period under NRCP 41(e)

[Headnote 9]

D.R. Horton also argues that a court must evaluate the circumstances and the parties' diligence in bringing a matter to trial before determining that a stay tolls the prescriptive period. We disagree. While some of our holdings post-*Boren* cite diligence requirements and consider the resulting unfairness to the plaintiff, unlike the circumstances here, those cases did not involve a court-ordered stay. For example, D.R. Horton cites *Baker v. Noback*, 112 Nev. 1106, 1110-11, 922 P.2d 1201, 1203-04 (1996), for the proposition that an evaluation is required to look at the unique facts of the case and resulting unfairness to the plaintiff. However, *Baker* did not involve a court-ordered stay, and this court examined the circumstances of the case, which involved a statutory requirement to first proceed through a medical malpractice screening panel. 112 Nev. at 1110, 922 P.2d at 1203. D.R. Horton also cites to *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 43 P.3d 1036 (2002), arguing that we determined that a mandatory arbitration period was not an exception to NRCP 41(e), and the plaintiff's lack of diligence ultimately contributed to proper dismissal under the five-year rule. However, *Morgan* also did not involve a court-ordered stay. 118 Nev. at 317-18, 43 P.3d at 1037-38. Finally, for further support, D.R. Horton cites to *Edwards v. Ghandour*, 123 Nev. 105, 112-13, 159 P.3d 1086, 1091 (2007) (holding that the district court's stay, based on misinformation and later rescinded, did not toll NRCP 41(e) when plaintiff knew the

[10]The district court also stated that it shared part of the blame for the length of the August 2007 stay for not imposing any end or sunset provision.

[11]We have maintained that litigation should conclude within a reasonable amount of time. *See, e.g.*, *Massey v. Sunrise Hosp.*, 102 Nev. 367, 369, 724 P.2d 208, 209 (1986). "Rule 41(e) accomplishes this end by requiring counsel's diligence in pursuing claims." *Id.* While D.R. Horton alleges that High Noon did not pursue the matter swiftly, it appears from the record that D.R. Horton shares in the blame for the delay of this case as it did not seek any remedy until now. For example, the record does not include any motions that D.R. Horton might have filed seeking to vacate the August 2007 stay or challenging the validity of the stay before bringing the instant writ petition.

stay was invalid and he "did not take appropriate action to move his case forward and set aside the stay"), *rejected on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1053-54, 194 P.3d 709, 712-13 (2008). However, this too is distinguishable, as here, the district court issued a *valid* stay.

D.R. Horton also argues that courts consider the diligence of parties in determining other motions related to NRCP 41(e), citing to *Carstarphen v. Milsner*, 128 Nev. 55, 60, 270 P.3d 1251, 1254 (2012), for support. There, we held that when a district court evaluates a motion for a preferential trial date to circumvent the five-year rule, it "must consider the time remaining in the five-year period when the motion is filed and the diligence of the moving party and his or her counsel in prosecuting the case." *Id*. at 1252. This case is also distinguishable, as a court-ordered stay prevents parties from prosecuting the case, while a motion for a preferential trial date in a case presumptively has no such impediment.

As a result of the court-ordered stay in this case, the district court was not required to evaluate the parties' diligence. However, given the lapse of time in this matter, neither the parties nor the district court have been diligent in monitoring the status of the NRS Chapter 40 prelitigation process, which was the subject of the stay order.

We do not adopt a new exemption to the Boren rule excepting constructional defect stays from tolling

[Headnote 10]

Finally, D.R. Horton argues, in the alternative, that this court should hold that a stay imposed to complete the NRS Chapter 40 process should not toll the NRCP 41(e) five-year period because the statutes provide ample time for a claimant to complete the process without risking a statute of limitations issue.[12] D.R. Horton also argues that the purpose of NRS Chapter 40 is to ensure a quick and fair resolution to construction defect disputes, and that premature complaints and tolling all counter the purpose behind the statutes. We conclude that these arguments also lack merit.

Certainly, NRS Chapter 40's mechanisms provide opportunities to repair and otherwise resolve constructional defects before a claimant can pursue litigation. *See D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). But D.R. Horton's argument fails to consider the purpose behind NRS 40.647(2)(b). In that statute, the Legislature recognizes the importance of completing the prelitigation process before a claimant can pursue a case even where a suit has been filed to avoid the expi-

[12]D.R. Horton also argues that High Noon knew that the stays did not toll the five-year rule and that the district court warned of this on multiple occasions. However, in the hearing on the motion to dismiss, the district court stated that it erred in that analysis.

ration of a limitation period.[13] Surely the prelitigation purposes of NRS Chapter 40 of repair, mediation, and settlement are furthered by court-ordered stays under NRS 40.647(2)(b) while parties complete the constructional defect prelitigation process. Excluding an NRS 40.647(2)(b) stay from the full period allowed by NRCP 41(e) would be unfair, and we see no reason to exclude NRS Chapter 40 litigants from the *Boren* exception.

CONCLUSION

We choose to exercise our discretion and entertain the writ petitions in these cases. We deny the writ petition in Docket No. 66085, concluding that the August 2007 stay is valid. Similarly, we deny the writ petition in Docket No. 66101, as the court-ordered stay tolled the five-year prescriptive period under NRCP 41(e), pursuant to *Boren*. Accordingly, we deny both writ petitions.

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

VINCENT VALENTI, Appellant, *v*. THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES, Respondent.

No. 63987

November 5, 2015 362 P.3d 83

Appeal from a district court order denying a petition for judicial review of a Department of Motor Vehicles' decision to revoke a driver's license. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Motorist petitioned for review of an administrative law judge's decision to revoke motorist's driver's license upon finding that he was driving while intoxicated. The district court denied the petition for review. Motorist appealed. The supreme court, Douglas, J., held that: (1) statute governing expert qualification prerequisite for attesting to an individual's blood-alcohol concentration in support of a driver's license revocation was ambiguous; and (2) statutory expert qualification requirement for attesting to an individual's blood-alcohol concentration in support of a driver's license revocation applied to all proposed expert witnesses, including chemists.

Reversed and remanded.

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[13]NRS Chapter 40's only reference to a "stay" is in NRS 40.647(2)(b), and this subsection has remained unchanged with the recent constructional defect amendments enacted by the Legislature and subsequently approved by the Governor. *See* A.B. 125, 78th Leg. (Nev. 2015) (effective Feb. 24, 2015).

Law Offices of John G. Watkins and *John Glenn Watkins*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, *William J. Geddes*, Senior Deputy Attorney General, and *Nathan L. Hastings*, Deputy Attorney General, Carson City, for Respondent.

1. Administrative Law and Procedure.
   On appeal from orders deciding petitions for judicial review, the supreme court reviews the administrative decision in the same manner as the district court.
2. Administrative Law and Procedure.
   On appeal from an order deciding a petition for judicial review of an administrative decision, the supreme court reviews the administrative decision for an abuse of discretion, giving deference to the administrative agency's factual findings that are supported by substantial evidence.
3. Administrative Law and Procedure.
   On appeal from an order deciding a petition for judicial review of an administrative decision, the supreme court reviews questions of statutory interpretation de novo.
4. Statutes.
   In interpreting a statute, the supreme court looks to the plain language of the statute, and, if that language is clear, the supreme court does not go beyond it.
5. Statutes.
   When a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and the supreme court must resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy.
6. Automobiles.
   Statute governing expert qualification prerequisite for attesting to an individual's blood-alcohol concentration in support of a driver's license revocation was ambiguous, and thus, interpretation of the statute warranted reference to statute's legislative history; in one possible reading, affidavits of both chemists and other persons were admissible as evidence in an administrative proceeding only if the affiant had been qualified previously as an expert in alcohol concentration in a state court of record, but in an alternative reading, "any other person" was subject to the expert qualification requirement, but a "chemist" was not. NRS 50.320(1).
7. Statutes.
   When engaging in statutory construction, no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.
8. Automobiles.
   Statutory expert qualification requirement for attesting to an individual's blood-alcohol concentration in support of a driver's license revocation applied to all proposed expert witnesses, including chemists, and, thus, chemist was required to be qualified as an expert in a Nevada court of record prior to admission of her affidavit attesting to motorist's blood-alcohol concentration; at time the term "chemist" was added to statute, Legislature espoused no intent to treat chemists differently than other expert witnesses,

and same concern for reliability and trustworthiness of an expert affidavit arose when a person statutorily defined as a chemist was the affiant. NRS 50.320(1).

Before PARRAGUIRRE, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether a chemist, as defined under NRS 50.320, must be qualified as an expert in a Nevada court of record prior to admission of his or her affidavit attesting to an individual's blood-alcohol concentration in a driver's license revocation hearing. In doing so, we expand our decision in *Cramer v. State, DMV*, 126 Nev. 388, 240 P.3d 8 (2010), where we specifically declined to address this issue. We conclude that the expert qualification requirement in NRS 50.320(1) applies to all proposed expert witnesses, including chemists.

BACKGROUND

On the morning of July 1, 2012, Nevada Highway Patrol Trooper Scott Reinmuth witnessed motorist Vincent Valenti make two lane changes without signaling. As a result, Trooper Reinmuth initiated a traffic stop. Upon making contact with Valenti, Trooper Reinmuth observed signs of intoxication and asked Valenti to complete several field sobriety tests. Valenti's test performances revealed impairment, so Trooper Reinmuth administered a preliminary breath test. The breath test indicated Valenti's blood-alcohol concentration was 0.154. Trooper Reinmuth then arrested Valenti for driving while under the influence of alcohol. Trooper Reinmuth also instructed Valenti that he would be required to submit to either a blood test or another breath test when they arrived at Clark County Detention Center. Upon arrival, Valenti submitted to a blood test.[1] Forensic scientist Christine Maloney conducted a blood analysis, which revealed a blood-alcohol concentration of 0.159.

Thereafter, the Department of Motor Vehicles notified Valenti in writing that his driver's license was being revoked. Valenti requested an administrative hearing to contest the revocation. At the hearing, the administrative law judge admitted Maloney's affidavit into evidence over Valenti's objection. In the affidavit, Maloney attested that she was a chemist, as defined by NRS 50.320(5), and that Val-

[1]Valenti contests the constitutionality of the warrantless blood testing. We need not address this issue because we reverse the district court's decision based on the improperly admitted expert affidavit.

enti's blood-alcohol concentration was 0.159 at the time of testing. Maloney's affidavit did not, however, state whether she had been previously qualified as an expert in a Nevada court of record.

After the hearing, the administrative law judge concluded Valenti's blood-alcohol concentration was 0.08 or more at the time of the traffic stop.[2] The administrative law judge explained, pursuant to *Cramer*, 126 Nev. 388, 240 P.3d 8, that there are two classes of persons under NRS 50.320, "chemists" and "any other person," and a chemist is not required to qualify as an expert before his or her affidavit attesting to blood-alcohol concentration is admitted into evidence. Consequently, Maloney's affidavit, declaring that she was a chemist, was admissible. Based on Maloney's affidavit and testimony given by Trooper Reinmuth, the administrative law judge ruled that the DMV established the necessary elements of proof and revoked Valenti's driver's license.

Valenti then petitioned the district court for judicial review, arguing that the administrative law judge's decision was not supported by substantial evidence because Maloney's affidavit, which failed to state whether she had been court-qualified as an expert, was inadmissible. The district court denied Valenti's petition, concluding that Maloney's affidavit indicated she was a chemist and was therefore admissible. Valenti appeals the district court's decision.

DISCUSSION

[Headnotes 1-3]

"On appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district court." *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014); *see Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (affording "no deference to the district court's ruling in judicial review matters"). We review the administrative decision for an abuse of discretion, giving deference to the administrative agency's factual findings that are supported by substantial evidence. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). We review questions of statutory interpretation de novo. *Id.*

If the results of a preliminary breath test or evidentiary blood test show that a motorist had "a concentration of alcohol of 0.08 or more in his or her blood or breath at the time of the test, the license, permit or privilege of the person to drive must be revoked."

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[2]It is unlawful for any person who has a concentration of alcohol of 0.08 or more in his or her blood to drive or be in actual physical control of a vehicle. NRS 484C.110(1).

NRS 484C.210(1) (2013).[3] Motorists may then contest the revocation at a requested DMV administrative hearing. NRS 484C.230(1). The scope of the administrative hearing is limited to determining whether the motorist had a concentration of alcohol of 0.08 or more in his or her blood or breath at the time of the test. NRS 484C.230(2). In reaching that determination, the affidavit of "a chemist and any other person who has qualified in a court of record in this State to testify as an expert witness regarding the presence . . . of alcohol" must be admitted. NRS 50.320(1) and (2).

On appeal, Valenti contends that NRS 50.320(1)'s expert qualification prerequisite applies to both "chemists" and "any other person." Hence, Valenti argues that Maloney's affidavit, which declared that she was a chemist but failed to address whether she had been court-qualified to testify as an alcohol-concentration expert, was inadmissible. In opposition, the State contends that NRS 50.320(1)'s expert qualification prerequisite does not apply to persons who are defined as chemists pursuant to NRS 50.320(5).[4] Thus, according to the State, a chemist's affidavit is admissible in an administrative proceeding, so long as his or her place of employment and job duties are of the kind defined by NRS 50.320(5). We disagree.

The language of NRS 50.320(1) is ambiguous

[Headnotes 4, 5]

"In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it." *Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015). "But when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (internal quotation omitted).

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[3]Chapter 484C of NRS was amended by the 2015 Legislature. Upon review of the amendments, we conclude that they do not affect our analysis.

[4]NRS 50.320(5) provides:

> As used in this section, "chemist" means any person employed in a medical laboratory, pathology laboratory, toxicology laboratory or forensic laboratory whose duties include, without limitation:
>
> (a) The analysis of the breath, blood or urine of a person to determine the presence or quantification of alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance; or
>
> (b) Determining the identity or quantity of any controlled substance.

In pertinent part, NRS 50.320 provides:

> 1. The affidavit or declaration of a chemist and any other person who has qualified in a court of record in this State to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol . . . which is submitted to prove:
>
> . . .
>
> (b) The concentration of alcohol . . .
>
> is admissible in the manner provided in this section.
>
> 2. An affidavit or declaration which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit or declaration.

[Headnote 6]

Both Valenti and the State maintain that the language of NRS 50.320(1) is plain and that this court need not go beyond it to discern legislative intent. We, however, are unable to decipher legislative intent according to the plain language. Instead, we conclude that the language of NRS 50.320(1) can reasonably be read to offer different meanings.

In one possible reading, the affidavits of both chemists and other persons are admissible as evidence in an administrative proceeding only if the affiant has been qualified previously as an expert in alcohol concentration in a Nevada court of record. In this reading, the Legislature's use of the conjunction "and" between "chemist" and "any other person" makes the modifier "who has qualified" apply to both "chemist" and "any other person." *Cf. Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("[T]he expression of one thing is the exclusion of another . . . ."). And the deliberate use of the conjunction "and" between the clauses means that the clauses are to be taken together. *See Black's Law Dictionary* 86 (6th ed. 1991) (defining "and" as "[a] conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first"). Taken together and applied to the subsequent modifier—"who has qualified in a court of record in this State"—both chemists and other persons must qualify.

In an alternative reading, "any other person" is subject to the expert qualification requirement, but a "chemist" is not. According to the last antecedent rule of statutory construction, the modifier "who has qualified" likely relates back only to the antecedent immediately preceding—"any other person." *See Thompsen v. Hancock*, 49 Nev. 336, 341, 245 P. 941, 942 (1926) ("It is a rule of construction that relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last

antecedent."). In such a reading, the chemist is not beholden to the modifier and is thus exempt from the requirement contained therein, a reading that contradicts the first. Because NRS 50.320(1) may be read to render meanings at odds with one another, its language is ambiguous.

The Legislature has expressed no intent to release chemists from the established expert qualification requirement

Given the ambiguity of NRS 50.320(1), we look to legislative history to discern the Legislature's intent. *See Zohar*, 130 Nev. at 737, 334 P.3d at 405. The State suggests that by amending NRS 50.320 to add a definition of "chemist," *see* subsection 5, the 2009 Legislature intended that chemists be unbound from the expert qualification requirement. The expert qualification requirement at issue was codified at NRS 50.315 (1993) prior to its relocation to NRS 50.320. Under NRS 50.315 (1993), a "person" was required to qualify as an expert before his or her affidavit was admissible. Not until 1995 was a "chemist" additionally named as an individual whose expert affidavit must be admitted.[5] 1995 Nev. Stat., ch. 708, §§ 1-2, at 2712-13. At that juncture, the Legislature espoused no intent to treat chemists differently,[6] nor was any intent to treat chemists differently espoused when the 2009 Legislature added a definition to the term chemist.[7] *See generally, e.g.*, Hearing on A.B. 250 Before the Assembly Judiciary Comm., 75th Leg. (Nev., March 16, 2009). The most informative statement as to the Legislature's intent in defining chemist came from a lead proponent of Assembly Bill 250, Deputy District Attorney L.J. O'Neale. O'Neale testified: "This is just a clarification that, for th[o]se people that everybody calls chemists, the law will call them chemists as well."[8]

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[5]As we conclude here, the requirement that a chemist first be court-qualified has endured since NRS 50.320's inception in 1995.

[6]The focus of the hearings on Senate Bill 157, which added the term chemist, concerned Confrontation Clause issues in the affected criminal proceedings. The Legislature gave no discussion as to why the term chemist was added. *See generally, e.g.*, Hearing on S.B. 157 Before the Senate Judiciary Comm., 68th Leg. (Nev., February 13, 1995).

[7]Through Assembly Bill 250, the 2009 Legislature also amended NRS 50.320 to change the court wherein an expert could meet the qualification prerequisite from "the district court of any county" to "a court of record in this State." 2009 Nev. Stat., ch. 16, § 1, at 32.

[8]In context, O'Neale stated:

> The section of the bill that defines the term "chemist" is becoming significant because, as persons go to greater and greater extremes in the defense of cases, we have seen a couple of instances where defense counsel say, well, your chemist is not really a chemist because his or her job title is not chemist. In fact, none of the people who do this work have a job title of chemist. Metro forensic lab people are forensic scientists.

Id. Missing from O'Neal's statement, and indeed, more revealing, from the relevant legislative history altogether, is intent to do anything other than to define chemist. Therefore, we conclude, absent any expression of intent by the 2009 Legislature to, by defining the preexisting term chemist, revoke the established requirement that chemists be court-qualified, such an attenuated conclusion is without justification. *See Presson v. Presson*, 38 Nev. 203, 208, 147 P. 1081, 1082 (1915) ("Repeals by implication are not favored."); *Burns v. Reed*, 500 U.S. 478, 497 (1991) (rejecting proposition that Congress intended to revoke the common-law tradition of legislative immunity by covert inclusion in the general language of 1871 statute aimed at enforcing the Fourteenth Amendment).

Moreover, to ask that this court draw such a conclusion would lead to unreasonable results. *See Presson*, 38 Nev. at 210, 147 P. at 1083 ("[T]he [L]egislature cannot be presumed to have done an absurd thing . . . ."); *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011) ("[T]his court will not read statutory language in a manner that produces absurd or unreasonable results." (internal quotation omitted)). The State asks that this court presume the Legislature to have intended to surreptitiously change the law. However, the State has not set forth any reason why the Legislature would take such a roundabout approach to revoking the requirement that chemists qualify, as by covertly revealing the revocation as an intention that must be deduced from the act of defining the word chemist. That is, this court would have to accept that the Legislature took the former approach, as an alternative to quite simply and directly stating that chemists are to be exempt from the expert qualification requirement. Given that the Legislature is tasked with providing a clear recitation of the laws that govern this state, presuming such an indirect approach to lawmaking would be to presume the Legislature to have done something absurd. We decline to so presume.

[Headnote 7]

But, the State argues, if we read the statute as Valenti suggests, maintaining the expert qualification requirements for chemists and

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> They used to be called criminalists, and this was changed a couple of years ago. The people who do the analysis for Quest Laboratories, which does the Highway Patrol cases, are termed forensic technicians. So their job titles do not say chemist. Chemist is perhaps on the lowest level as a term of art because people say, "Do you have your chemist available? Is your chemist ready to go?" So these people are always referred to as chemists even though their job titles are not chemist. *This is just a clarification that, for these people that everybody calls chemists, the law will call them chemists as well.*

Hearing on A.B. 250 Before the Assembly Judiciary Comm., 75th Leg. (Nev., March 16, 2009) (emphasis added).

other experts alike, the new language defining chemist will be rendered nugatory or mere surplusage. Generally, "[n]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage if such consequences can properly be avoided." *Paramount Ins., Inc. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (internal quotation omitted). In this case, to the extent the language defining chemist is rendered nugatory or mere surplusage due to our construal, we conclude such consequences are not properly avoidable.

The reasoning and public policy set forth in Cramer v. State further direct that the court qualification requirement should be maintained for all experts, including chemists

In *Cramer v. State, DMV*, we similarly maintained the expert qualification requirement for experts, but we declined to extend our holdings to chemists. 126 Nev. 388, 393 n.3, 240 P.3d 8, 11 n.3 (2010). We specified: "In this opinion, we do not address whether a chemist who submits an affidavit pursuant to NRS 50.320 must be qualified as an expert, as that issue was not raised in this appeal." *Id.* Now properly before us, we have taken this opportunity to decide the issue. In so doing, we find further support for our conclusions in the reasoning and public policy grounds outlined in *Cramer*, as they dictate our construal of the statute. *See J.E. Dunn*, 127 Nev. at 82, 249 P.3d at 508 (concluding public policy favored one interpretation of a statute over another).

In arriving at our *Cramer* holdings, we noted that in accordance with NRS 233B.123(4), "a defendant in an administrative proceeding is entitled to confront and cross-examine the witnesses against him." *Cramer*, 126 Nev. at 394, 240 P.3d at 12 (citing *State, Dep't of Motor Vehicles & Pub. Safety v. Evans*, 114 Nev. 41, 45, 952 P.2d 958, 961 (1998)). To preserve that statutory right, in light of the affidavit exception created by NRS 50.320, we ruled that the affidavit's affiant must be once subject to the adversarial process of court qualification. *See id.* (reading NRS 233B.123(4) and NRS 50.320 together). We reasoned that "[a]llowing an affidavit from a proposed expert, which lacks the reliability and trustworthiness of an affidavit from one who has been qualified to testify as an expert, would violate NRS 50.320's plain meaning and lead to absurd results, including the revocation of driver's licenses based on a lay-person's affidavit." *Id.*

[Headnote 8]

Here, the same concerns for reliability and trustworthiness of an expert affidavit arise when a person who is statutorily defined as a chemist is the affiant. The Legislature's act of defining "chemist" is not a guarantee to the trustworthiness or reliability of a chemist's affidavit. The adversarial test of cross-examination, to which

experts submit at the time of court qualification, is better suited to defend these standards. *See id.* at 394-95, 240 P.3d at 12-13. In sum, *Cramer*'s holdings were founded on preserving reliability and trustworthiness in administrative procedure. Keeping consistent with its principles, we expand its holdings and include chemists under the umbrella of experts subject to NRS 50.320(1)'s expert qualification requirement.

In accord with reason and public policy, Maloney's affidavit, which indicated that she was a chemist but failed to state whether she had been qualified in a Nevada court of record, was inadmissible at Valenti's revocation hearing. *See id.* at 390, 240 P.3d at 9 (concluding that an expert's affidavit is inadmissible when the author has not been qualified *or* the affidavit fails to state the court wherein he or she was qualified (emphasis added)). In the affidavit's absence, it cannot be said that the evidence relied upon by the administrative law judge was sufficiently substantial to revoke Valenti's driver's license.

Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

PARRAGUIRRE and CHERRY, JJ., concur.

WPH ARCHITECTURE, INC., A NEVADA CORPORATION, APPELLANT, *v.* VEGAS VP, LP, A NEVADA LIMITED PARTNERSHIP, RESPONDENT.

No. 54389

November 5, 2015 360 P.3d 1145

Appeal from a district court order denying a motion to confirm in part, modify, or correct an arbitration award. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Real estate developer brought professional negligence action against architecture firm, and, after developer did not accept firm's offers of judgment, the case proceeded to arbitration. The panel ruled in favor of firm, but held that each party would bear its own fees and costs. The district court denied firm's motion to confirm in part, modify, or correct arbitration award to order developer to pay firm's attorney fees and costs. Firm appealed. The supreme court, SAITTA, J., held that: (1) arbitration was substantively governed by state law; (2) as a matter of first impression, statutes and rules regarding attorney fees and costs are substantive; and (3) as a matter of first impression, statutes and rules regarding attorney fees and costs do not require an arbitrator to award fees or costs.

Affirmed.

Weil & Drage, APC, and *Jean A. Weil* and *Trevor O. Resurreccion*, Henderson, for Appellant.

Greenberg Traurig and *Tami D. Cowden* and *Mark E. Ferrario*, Las Vegas, for Respondent.

1. Alternative Dispute Resolution.
   A district court's confirmation of an arbitration award is reviewed de novo.
2. Alternative Dispute Resolution.
   An arbitration award may be vacated based on statutory grounds and certain limited common-law grounds.
3. Alternative Dispute Resolution.
   At common law, an arbitration award may be vacated if it is arbitrary, capricious, or unsupported by the agreement, or when an arbitrator has manifestly disregarded the law.
4. Alternative Dispute Resolution.
   Arbitration between real estate developer and architecture firm was substantively governed by state law and procedurally governed by American Arbitration Association (AAA) rules; arbitration section of architecture contract between parties stated arbitration would be in accordance with the AAA rules, miscellaneous provisions section stated that contract itself was governed by state law, and parties extensively blacked out other portions of boilerplate contract, but did not repudiate the AAA rules clause.
5. Appeal and Error.
   Contract interpretation is reviewed de novo.
6. Costs.
   Statutes and rules of civil procedure regarding award of attorney fees and costs after a party makes an offer of judgment, or in an action alleging more than $2,500 in damages, are substantive laws. NRS 17.115 (2014); NRS 18.020; NRCP 68.
7. Costs.
   Attorney fees and costs may be awarded when a party fails to improve upon a rejected statutory offer of judgment in an action before the district court. NRS 17.115 (2014); NRCP 68.
8. Alternative Dispute Resolution.
   Statutes and rules of civil procedure regarding award of attorney fees and costs after a party makes an offer of judgment, or in an action alleging more than $2,500 in damages, do not require an arbitrator to award attorney fees or costs; an arbitrator has the discretion to award fees. NRS 17.115 (2014); NRS 18.020, 38.238(1); NRCP 68.
9. Alternative Dispute Resolution.
   In determining whether an arbitrator has manifestly disregarded the law, the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, SAITTA, J.:

In Nevada, it is well settled that a party who makes an unimproved upon offer of judgment in a district court action may recover attorney fees and costs incurred after the offer of judgment was made. This opinion addresses whether this is also true when the statutory offer of judgment takes place in an arbitration proceeding.

We hold that because the award of fees and costs by an arbitrator is discretionary, appellant WPH Architecture, Inc., has not demonstrated that the arbitrator manifestly disregarded Nevada law by refusing to award it fees and costs.

FACTUAL AND PROCEDURAL HISTORY

Respondent Vegas VP, LP, hired WPH to perform architectural services for a condominium project that Vegas VP was building in Las Vegas. Vegas VP brought an action against WPH for professional negligence relating to the services that WPH performed for Vegas VP. The contract provided that any disagreement between Vegas VP and WPH would be resolved by mediation and, if that were unsuccessful, binding arbitration before the American Arbitration Association (AAA).

After an unsuccessful attempt at mediation, Vegas VP filed a demand for arbitration. Prior to arbitration, WPH submitted what it claimed to be two statutory offers of judgment under NRCP 68 and NRS 17.115 to Vegas VP.[1] Vegas VP did not accept either offer.

The case proceeded to arbitration, and an AAA panel of arbitrators ruled in favor of WPH. The arbitration order also stated that each party would bear its own fees and costs. WPH then filed a post-award motion for costs, fees, and interest, claiming that as the prevailing party it was entitled to fees and costs under Nevada law. The arbitration panel denied WPH's motion, stating that no caselaw existed which held that offers of judgment are available in arbitration proceedings in Nevada. Therefore, "[w]ithout express authority to grant fees and costs incidental to a declined offer of judgment, [the arbitration] Panel [was] disinclined to rule in favor of WPH."

WPH subsequently filed a motion in the district court to confirm in part, modify, or correct the arbitration award to order Vegas VP to pay WPH's attorney fees, costs, and interest. The district court denied WPH's motion. This appeal follows.

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[1]NRS 17.115 was repealed by the 2015 Nevada Legislature. 2015 Nev. Stat., ch. 442, § 41, at 2569; A.B. 69, 78th Leg. (Nev. 2015). Because NRS 17.115 was still in effect at the time of the arbitration, its subsequent repeal does not affect our disposition in this case.

DISCUSSION

WPH argues that because the arbitration panel manifestly disregarded Nevada law regarding the awarding of attorney fees and costs, the district court erred in denying WPH's motion to confirm in part, modify, or correct the arbitration award. Specifically, WPH argues that the arbitration panel disregarded NRCP 68 and NRS 17.115, which provide for a party who makes an offer of judgment that its adversary does not improve upon to recover the reasonable attorney fees and costs it incurs, *see* NRCP 68(f)(2); NRS 17.115(4)(c)-(d), and NRS 18.020, which requires costs to be awarded to the prevailing party in an action alleging more than $2,500 in damages, *see* NRS 18.020(3).

[Headnotes 1-3]

"We review a district court's confirmation of an arbitration award de novo." *Sylver v. Regents Bank, N.A.*, 129 Nev. 282, 286, 300 P.3d 718, 721 (2013). An arbitration award "may be vacated based on statutory grounds and certain limited common-law grounds." *Bohlmann v. Printz*, 120 Nev. 543, 546, 96 P.3d 1155, 1157 (2004), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006). At common law, "an arbitration award may be vacated if it is 'arbitrary, capricious, or unsupported by the agreement' or when an arbitrator has 'manifestly disregard[ed] the law.'" *Id.* (alteration in original) (quoting *Wichinsky v. Mosa*, 109 Nev. 84, 89-90, 847 P.2d 727, 731 (1993)).

The arbitration was substantively governed by Nevada law

[Headnotes 4, 5]

WPH argues that the contract between it and Vegas VP contained a choice-of-law agreement stating that any arbitration arising from the contract would be substantively governed by Nevada law. Vegas VP argues that the contract contained a choice-of-law agreement stating that the arbitration would be substantively governed by AAA rules. Contract interpretation is reviewed de novo. *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013).

The contract between Vegas VP and WPH contains two choice-of-law clauses. The first clause (AAA rules clause), found under the contract's "Arbitration" section, states that the arbitration, "unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the [AAA]." The second clause (Nevada laws clause), found in the contract's "Miscellaneous Provisions" section, states that the contract itself would be "governed by the law of the principal place of business of the Architect, unless otherwise provided." The principle place of business of WPH is Nevada.

The United States Supreme Court has ruled on this issue in a case with facts very similar to the current case. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, two parties disputed how a choice-of-law provision applied to their arbitration. 514 U.S. 52, 53 (1995). The contract governing the parties' dispute had both a clause stating that "'any controversy' arising out of the transactions between the parties 'shall be settled by arbitration' in accordance with the rules of the National Association of Securities Dealers (NASD)" *and* a clause stating that "the entire agreement 'shall be governed by the laws of the State of New York.'" *Id*. at 58-59. The Court reasoned that reading the agreement as choosing New York law to apply for *both* the procedural and substantive law governing the arbitration would violate a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Id*. at 63. Thus, the Court found that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read the laws of the State of New York to encompass substantive principles" and the NASD rules to govern the procedural aspect of the arbitration. *Id*. at 63-64 (internal quotations omitted).

Similar to *Mastrobuono*, a finding here that the Nevada law clause supersedes the AAA rules clause would require this court to violate a well-established tenet of contract interpretation by rendering the AAA rules clause meaningless. *See Bielar*, 129 Nev. at 465, 306 P.3d at 364 (holding that this court interprets a contract so as to give effect to each of its words and to not render any terms meaningless). We also find that such a finding would not express the parties' intentions when they entered into the Agreement. *See Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 310, 301 P.3d 364, 367 (2013) ("Contract interpretation strives to discern and give effect to the parties' intended meaning."). The parties' extensively blacked out portions of the contract, which was originally a boilerplate architecture agreement entitled "Abbreviated Standard Form of Agreement Between Owner and Architect." By blacking out portions of the contract, the parties indicated that they did not intend for those portions to be part of the contract. Yet the AAA rules clause was not similarly repudiated, indicating that the parties intended for that clause to be included in the contract. Therefore, we hold that the arbitration was substantively governed by Nevada law and procedurally governed by the AAA rules.

NRCP 68, NRS 17.115, and NRS 18.020 are substantive laws

[Headnote 6]

Vegas VP argues that this court previously held attorney fees to be procedural in *Tipton v. Heeren*, 109 Nev. 920, 859 P.2d 465 (1993). In *Tipton*, the court stated in a footnote that it agreed with the parties' assessment that under a choice-of-law provision in a promisso-

ry note, Wyoming law would govern substantive issues and Nevada law would govern procedural issues. *Id.* at 922 n.3, 859 P.2d at 466 n.3. The court then, without making an express finding or performing any analysis on the issue of whether attorney fees is a procedural issue, applied Nevada law to the issue of attorney fees. *Id*. at 924, 859 P.2d at 467. Because the court in *Tipton* did not analyze the issue of whether attorney fees statutes are substantive law, we hold that *Tipton* is not controlling in this case. Thus, the issue of whether attorney fees laws are procedural or substantive is one of first impression.

Federal courts have found state laws awarding attorney fees to be substantive. For example, the Ninth Circuit Court of Appeals has stated that "[s]tate laws awarding attorney[ ] fees are generally considered to be substantive laws." *Northon v. Rule*, 637 F.3d 937, 938 (9th Cir. 2011). Indeed, federal district courts in Nevada have found NRCP 68, NRS 17.115, and NRS 18.020 to all be substantive laws. *See Walsh v. Kelly*, 203 F.R.D. 597, 598-99 (D. Nev. 2001) (holding that NRCP 68 and NRS 17.115 are substantive laws); *see also In re USA Commercial Mortg. Co.*, 802 F. Supp. 2d 1147, 1178 (D. Nev. 2011) (holding NRS 18.020 to be a substantive law).

We see no reason to disagree with the federal courts on this issue. Therefore, we hold that NRCP 68, NRS 17.115, and NRS 18.020 are substantive laws that apply to the arbitration proceedings in the current case.

The award of attorney fees and costs is discretionary by an arbitrator

[Headnote 7]

It is well settled that NRCP 68 and NRS 17.115 provide that attorney fees and costs may be awarded when a party fails to improve upon a rejected statutory offer of judgment in an action before the district court. *See RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 40-41, 110 P.3d 24, 28 (2005). We have similarly ruled that NRS 18.020 requires the award of costs to the prevailing party in several types of district court actions. *See Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1050, 881 P.2d 638, 643 (1994); *see also Campbell v. Campbell*, 101 Nev. 380, 383, 705 P.2d 154, 156 (1985). However, we have never ruled as to whether the statutes or the rule create a similar requirement when a dispute is decided in private arbitration proceedings.

[Headnote 8]

NRCP 68 and NRS 17.115 contain no references to arbitration, awards, or arbitrators. Similarly, NRS 18.020 also contains no reference to arbitration proceedings. Therefore, NRCP 68, NRS 17.115, and NRS 18.020(3) by their plain language do not expressly require

the award of fees and costs in an arbitration proceeding.[2] Furthermore, no Nevada caselaw exists holding that those statutes apply to arbitration proceedings. Therefore, we conclude that these statutes do not require an arbitrator to award attorney fees or costs.

NRS 38.238(1) states that "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitral proceeding." WPH argues that because NRS 38.238(1) expressly allows an arbitrator to award any attorney fees and costs that would be authorized by law in a civil action involving the same claim, the AAA panel was therefore required to award attorney fees and costs mandated by NRCP 68, NRS 17.115, and NRS 18.020. However, in making its argument, WPH ignores the operative word in NRS 38.238(1): that "[a]n arbitrator *may* award" fees and costs. (Emphasis added.) Thus, the statute merely gives an arbitrator the discretion to award fees; it is not a requirement to do so. *See* NRS 0.025(1)(a) (" 'May' confers a right, privilege or power."); *see also Tarango v. State Indus. Ins. Sys*., 117 Nev. 444, 451 n.20, 25 P.3d 175, 180 n.20 (2001) ("In statutes, 'may' is permissive and 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." (internal quotations omitted)).

WPH has not shown that the AAA panel manifestly disregarded Nevada law

[Headnote 9]

In determining whether an arbitrator has manifestly disregarded the law, "the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law." *Clark Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist*., 122 Nev. 337, 342, 131 P.3d 5, 8 (2006) (internal quotations omitted).

Here, the arbitration panel considered whether Nevada's offer of judgment and costs statutes required the award of fees and costs in an arbitration proceeding before finding that no judicial or statutory authority mandated such an award. The arbitration panel also considered whether it had the authority under AAA rules to grant post-award fees and costs incidental to a declined offer of judgment, and it concluded that AAA rules did not grant that authority.

As discussed above, NRCP 68, NRS 17.115, and NRS 18.020(3) do not by their plain language require the award of fees and costs in an arbitration proceeding. Furthermore, no Nevada caselaw exists

[2]In contrast, California's offer of judgment statute explicitly states that it applies to both trial and arbitration proceedings. *See* Cal. Civ. Proc. Code § 998 (West 2009).

holding that those statutes apply to arbitration proceedings. Lastly, NRS 38.238(1) provides an arbitrator with the discretion to award attorney fees and costs in an arbitration proceeding but does not require the arbitrator to do so. Therefore, no clear statute or authority exists that would require the award of attorney fees and costs in an arbitration proceeding. As such, WPH has not demonstrated that the arbitration panel knew of any statute or authority that required the panel to award attorney fees and costs to WPH. We therefore hold that WPH has failed to demonstrate that the arbitrator manifestly disregarded Nevada law.

CONCLUSION

Because the award of fees and costs by an arbitrator is discretionary, WPH has not demonstrated that the AAA panel manifestly disregarded Nevada law when it refused to award them to WPH. Thus, we affirm the district court's denial of WPH's motion to confirm in part, modify, or correct the arbitration award.

GIBBONS, J., concurs.

PICKERING, J., concurring:

I concur but only in the result. The arbitrators considered and rejected the limited arguments the appellant made to them to support its post-award request for attorney fees and costs. Those arguments did not include the choice-of-law and *Erie*-based substance v. procedure distinctions on which the majority focuses. Since no authority was cited to the arbitrators to suggest, much less establish, that NRS 17.115 and NRCP 68 apply in the arbitration setting, the arbitrators did not act in manifest disregard of law in declining to award fees and costs based on those provisions of Nevada law. *See Graber v. Comstock Bank*, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995) ("[W]hen searching for a manifest disregard for the law, a court should attempt to locate arbitrators who appreciate the significance of clearly governing legal principles but decide to ignore or pay no attention to those principles."). The record before the arbitrators likewise does not establish appellant's entitlement to costs pursuant to "NRS 18.010, *et seq.*," to which appellant generically referred the arbitrators. While I would affirm, therefore, I would do so on the grounds that the arbitrators did not manifestly disregard the law that was presented to them, without reaching the more complex and uncertain questions the majority undertakes to resolve.

IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF ADEN HAILU, AN ADULT.

FANUEL GEBREYES, APPELLANT, *v.* PRIME HEALTHCARE SERVICES, LLC, DBA ST. MARY'S REGIONAL MEDICAL CENTER, RESPONDENT.

No. 68531

November 16, 2015 361 P.3d 524

Appeal from a district court order denying a petition for temporary restraining order and permanent injunction. Second Judicial District Court, Family Court Division, Washoe County; Frances Doherty, Judge.

Guardian filed emergency motion for temporary restraining order to enjoin hospital from removing patient from life support. After several hearings, the district court ruled in hospital's favor, but granted injunction pending guardian's appeal. The supreme court, PICKERING, J., held that as a matter of first impression, the district court failed to properly consider whether American Association of Neurology guidelines adequately measure all functions of entire brain, including the brain stem, under Uniform Determination of Death Act.

Reversed and remanded.

O'Mara Law Firm, P.C., and *David C. O'Mara*, Reno, for Appellant.

Snell & Wilmer, L.L.P., and *William E. Peterson* and *Janine C. Prupas*, Reno, for Respondent.

1. APPEAL AND ERROR.
   Although the supreme court gives deference to the district court's factual findings, the supreme court reviews the district court's conclusions of law, including statutory interpretation issues, de novo.
2. DEATH.
   Although it is for the law to define the standard of death, courts have deferred to the medical community to determine the applicable criteria for deciding whether brain death is present. NRS 451.007.
3. DEATH; HEALTH.
   The district court failed to properly consider, in denying guardian's petition for temporary restraining order to enjoin hospital from removing patient from life support, whether American Association of Neurology guidelines, relied upon by hospital physicians to declare patient brain dead, adequately measured all functions of the entire brain, including the brain stem, under Uniform Determination of Death Act, and were considered accepted medical standards by states that had adopted the Act, warranting reversal and remand. NRS 451.007.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

"For legal and medical purposes, a person is dead if the person has sustained an irreversible cessation of . . . [a]ll functions of the person's entire brain, including his or her brain stem." NRS 451.007(1). The determination of death "must be made in accordance with accepted medical standards." NRS 451.007(2). Here, we are asked to decide whether the American Association of Neurology guidelines are considered "accepted medical standards" that satisfy the definition of brain death in NRS 451.007. We conclude that the district court failed to properly consider whether the American Association of Neurology guidelines adequately measure all functions of the entire brain, including the brain stem, under NRS 451.007 and are considered accepted medical standards by states that have adopted the Uniform Determination of Death Act. Accordingly, we reverse the district court's order denying a petition for temporary restraining order and remand.

FACTS

Medical history

On April 1, 2015, 20-year-old university student Aden Hailu went to St. Mary's Regional Medical Center (St. Mary's) after experiencing abdominal pain. Medical staff could not determine the cause of her pain and decided to perform an exploratory laparotomy and remove her appendix.[1] During the laparotomy, Hailu's blood pressure was low and she suffered "severe, catastrophic anoxic, or lack of brain oxygen damage," and she never woke up. After her surgery, Hailu was transferred to the St. Mary's Intensive Care Unit (ICU), under the care of Dr. Anthony Floreani. Within the first two weeks of April, three different electroencephalogram (EEG) tests were conducted,[2] all of which showed brain functioning.

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[1]An exploratory laparotomy is a surgery in which "[t]he surgeon makes a cut into the abdomen and examines the abdominal organs." *See Abdominal Exploration*, Nat'l Inst. of Health: U.S. Nat'l Library of Med., https://www.nlm.nih.gov/medlineplus/ency/article/002928.htm (last updated Nov. 13, 2015).

[2]An EEG test

> detects abnormalities in the brain waves or electrical activity of the brain. During the procedure, electrodes consisting of small metal discs with thin wires are pasted on the scalp. The electrodes detect tiny electrical charges that result from the activity of the brain cells. The charges are amplified and appear as a graph on a computer screen or as a recording that may be printed out on paper.

Electroencephalogram (EEG), Johns Hopkins Med.: Health Library, http://www.hopkinsmedicine.org/healthlibrary/test_procedures/neurological/electroencephalogram_eeg_92,P07655/ (last visited Nov. 13, 2015).

On April 13, 2015, Dr. Aaron Heide, the Director of Neurology and Stroke at St. Mary's, first examined Hailu. Dr. Heide concluded that Hailu was not brain dead at that time but was "rapidly declining." To make that determination, Dr. Heide conducted an examination of Hailu's neurological functions; her left eye was minimally responsive, she was chewing on the ventilator tube, and she moved her arms with stimulation. The next day, April 14, 2015, Hailu did not exhibit these same indicia of neurological functioning.

On May 28, 2015, St. Mary's performed an apnea test,[3] which involved taking Hailu off ventilation support for ten minutes to see if she could breathe on her own; Hailu failed the apnea test, leading St. Mary's to conclude that "[t]his test result confirms Brain Death unequivocally." Based on Hailu's condition, Dr. Jeffrey Bacon wrote the following in his notes: "Awaiting administration and hospital lawyers for direction re care—withdrawal of Ventilator support indicated NOW in my opinion as brain death unequivocally confirmed." On June 2, 2015, St. Mary's notified Hailu's father and guardian,[4] Fanuel Gebreyes, that it intended to discontinue Hailu's ventilator and other life support. Gebreyes opposed taking Hailu off life support and sought judicial relief.

Procedural history

June 18, 2015, hearing

Gebreyes filed an emergency motion for temporary restraining order to enjoin St. Mary's from removing Hailu from life-sustaining services. On June 18, 2015, the district court held a hearing on the matter. The parties stipulated that St. Mary's would continue life-sustaining services until July 2, 2015, at 5:00 p.m. to allow Gebreyes to have an independent neurologist examine Hailu. They further stipulated that if, after the independent examination, Gebreyes wished St. Mary's to continue life support, he would need to request it through guardianship court. However, "if on July 2, 2015, it is determined that Aden Hailu is legally and clinically deceased, the hospital shall proceed as they see fit." Based on the stipulation, the district court dismissed the complaint for a temporary restraining order.

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[3]An apnea test "adds carbon dioxide to the patient's blood. A person with a functioning brain stem tries to breathe in response to the carbon dioxide. If the patient tries to breathe, you abort the test immediately and say the patient is not brain-dead." Leslie C. Griffin & Joan H. Krause, *Practicing Bioethics Law* 106 (2015) (internal quotation marks omitted).

[4]Hailu has two guardians: Fanuel Gebreyes and Metsihate Asfaw (Hailu's cousin). Asfaw was attending college in Russia and did not directly participate in this case.

July 2, 2015, hearing

For reasons unknown, Gebreyes was unable to obtain the services of a neurologist before the stipulated July 2, 2015, deadline. Consequently, on July 1, 2015, Gebreyes filed an "Emergency Petition for Order Authorizing Medical Care, Restraining Order and Permanent Injunction." In the petition, he alleged that the doctors at St. Mary's had prematurely determined that Hailu had experienced brain death and sought to prevent the hospital from removing Hailu from the ventilator. St. Mary's opposed the emergency petition on July 2, 2015, and the district court held a hearing that same day.

At the July 2, 2015, hearing, the district court heard from four witnesses. First, Gebreyes testified that he wanted Hailu to get a tracheostomy[5] and feeding tube to prepare her for transport; he hoped to take her home or relocate her to Las Vegas, where he resides. When asked why he did not obtain the services of another doctor to perform the tracheostomy, he stated that it was something he thought St. Mary's had to do because Hailu is at St. Mary's. Second, Gebreyes obtained the services of Dr. Paul Byrne—a known opponent of brain-death declarations who is unlicensed in Nevada—to testify that Hailu is still alive. Dr. Byrne complained that Hailu was never treated for thyroid problems and testified that this treatment will help her improve.

Third, Dr. Aaron Heide testified on behalf of St. Mary's. Dr. Heide applied the American Association of Neurology (AAN) guidelines to Hailu to determine if she was brain dead. He testified that the AAN guidelines are the accepted medical standard in Nevada. The AAN guidelines call for three determinations: (1) whether there is a coma and unresponsiveness; (2) whether there is brainstem activity (determined by conducting a clinical examination of reflexes, eyes, ears, etc.); and (3) whether the patient can breathe on her own (determined by conducting an apnea test). Although another doctor conducted the apnea test one month after Dr. Heide's last examination of Hailu, Dr. Heide believed that Hailu "had zero percent chance of any form of functional neurological outcome." Further, Dr. Heide also administered a Transcranial Doppler test, which is a test that measures blood flow to the brain.[6] While there was still some blood flow to Hailu's brain, the lack of blood flow was consistent with brain death.

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[5]A tracheostomy "is an opening surgically created through the neck into the trachea (windpipe) to allow direct access to the breathing tube." *What Is a Tracheostomy*, Johns Hopkins Med., http://www.hopkinsmedicine.org/tracheostomy/about/what.html (last visited Nov. 13, 2015).

[6]A Transcranial Doppler test is a noninvasive ultrasound measure of "sound waves, inaudible to the human ear, [which] are transmitted through the tissues

Last, Helen Lidholm, the CEO of St. Mary's, testified that the hospital is in favor of allowing Hailu to be transported to Las Vegas, where her father lives. Lidholm stated that St. Mary's "could make that happen" as long as Gebreyes arranges the proper medical equipment and transportation for Hailu and ensures a transfer location that can care for her. St. Mary's would allow the family to retain the services of any neurologist to come in and test Hailu as long as the physician is licensed in the State of Nevada; St. Mary's also offered to pay for the physician's examination fee. On cross-examination, Lidholm clarified that if the family has a licensed neurologist examine Hailu and determine that she is still alive, the physician can then order treatment for Hailu. Gebreyes said that he never received this offer before the hearing.

After Gebreyes said that he wanted to take advantage of the opportunity to bring in his own neurologist, the parties stipulated to extend the hearing until July 21, 2015, to give Gebreyes time to retain the services of a neurologist. The district court gave Gebreyes specific instructions on the care plan he must bring back to the court. First, the district court stated that Gebreyes needs a neurological expert because the matter involves "primarily neurological issues." Second, the care plan must determine "whether or not that physician is going to treat the patient, prescribe the protocol for the patient that the guardian is hoping for, and works with the guardian to accommodate transfer." Third, the plan must also include the method and manner of transportation, the new location, and the plan of care at the new location, along with the method of payment for such care. Finally, the care plan must be supported by medical evidence. Based on this stipulation, the district court continued the hearing to July 21, 2015.

July 21, 2015, hearing

On July 21, 2015, Gebreyes presented a plan to transport Hailu to Las Vegas based on the testimony of two physicians. First, Gebreyes called Dr. Brian Callister to testify. Dr. Callister is not a neurologist, but specializes in internal medicine and hospitalist medicine. He examined Hailu the day of his testimony and reviewed her medical records. Based on his examination of Hailu and review of her records, Dr. Callister testified: "I believe that her status is quite grim. I think that her chance of survival, her chance of awakening from her current state is a long shot. However, I do not think that the chance

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of the skull. These sound waves reflect off blood cells moving within the blood vessels, allowing the radiologist to calculate their speed. The sound waves are recorded and displayed on a computer screen." *Ultrasonography Test (Transcranial Doppler)*, Cleveland Clinic, https://my.clevelandclinic.org/health/diagnostics/hic-abdominal-renal-ultrasound/hic-ultrasonography-test-transcranial-doppler (last updated Jan. 20, 2012).

is zero." Dr. Callister stated that all three EEG tests did show brainwaves, albeit abnormal and slow. In Dr. Callister's opinion, the EEG tests are "something that should give you just enough pause to say you can't say with certainty that her chances are zero." Although Dr. Callister admitted that under the AAN guidelines Hailu's condition looks irreversible, Dr. Callister pointed to other factors that demonstrate improvement is a possibility. As examples, Dr. Callister cites Hailu's young age, her health, her skin, her ability to make urine and pass bowel movements, and the fact that the general functioning of the rest of her body is good. He explained that typically, someone kept alive by a ventilator shows other signs of deterioration, such as organ failures or necrosis of the hands and feet, that Hailu does not exhibit.

Finally, Dr. Callister questioned the reliability of the AAN guidelines stating that the AAN guidelines will always yield results consistent with brain death for a patient with a nonfunctioning cortex, even if the mid or hind parts of the brain are still functioning. Nevertheless, on cross-examination, Dr. Callister conceded that under "a strict definition" of the AAN guidelines, Hailu "would meet their category [of brain death]." On redirect, Dr. Callister concluded that "there's enough variables and enough questions based on the condition of her physical body, the EEG's and the fact that no further neurological testing has been done in several months, and the fact that no outside third party neurologist has looked at her that I would have pause."

Second, Gebreyes called Dr. Scott Manthei from St. Rose de Lima Hospital (St. Rose) in Las Vegas. Although Dr. Manthei had not reviewed Hailu's medical records, he testified that he was prepared to perform a tracheostomy on Hailu. However, St. Rose was not prepared to accept Hailu at the time because there were no available beds. Dr. Manthei did not plan on accepting Hailu into his care, except for the tracheostomy. Dr. Manthei testified that he could not perform the tracheostomy until St. Rose agreed to accept Hailu into the short-term ICU, and found a long-term care facility for Hailu after her stay at St. Rose.

Next, St. Mary's called Dr. Anthony Floreani to testify. Dr. Floreani took care of Hailu in the ICU since the night following her surgery. Dr. Floreani is a pulmonary doctor, not a neurologist. Dr. Floreani agreed with the conclusions of Dr. Heide that Hailu is brain dead. He rejected the notion that the EEGs contradict that finding by stating: "The prior EEG, the prior MRI really do not—are not considered primary determinants of brain death by the established consensus and evidence-based criteria." Dr. Floreani testified that the St. Mary's doctors did the tests "by the book exactly how you should do it."

Based on all of the evidence from the July 2 hearing and the July 21 hearing, the district court ruled in favor of St. Mary's. The

district court stated that a restraining order should not be granted because the medical evidence from Dr. Heide and Dr. Floreani suggested that the AAN guidelines were followed, and thus, "medical standards were met, the outcome and criteria were satisfied in terms of the statute, the [AAN] protocol was followed, the outcome of the various three step tests under the [AAN] protocol all direct certification of death, and I agree." Despite ruling in St. Mary's favor, the district court granted an injunction pending Gebreyes's appeal to this court. The district court's written order was filed on July 30, 2015. Gebreyes appealed on August 3, 2015, and this court issued a stay of the district court's order and directed St. Mary's not to terminate Hailu's life-support systems pending resolution of the appeal. Expedited briefing and argument followed.

DISCUSSION

[Headnote 1]

Although this court gives deference to the district court's factual findings, this court reviews the district court's conclusions of law, including statutory interpretation issues, de novo. *Torres v. Nev. Direct Ins. Co.*, 131 Nev. 531, 535, 353 P.3d 1203, 1206 (2015).

[Headnote 2]

Brain death presents a mixed legal and medical question. Although "it is for [the] law to define the standard of death," courts have deferred to the medical community to determine the applicable criteria for deciding whether brain death is present. *In re Welfare of Bowman*, 617 P.2d 731, 732 (Wash. 1980). However, the statutory requirements of Nevada's Determination of Death Act that death be determined using "accepted medical standards" and that the Act be applied and construed in a manner "uniform among the states which enact it," NRS 451.007, necessitates a legal analysis regarding what the accepted medical standards are across the country. Thus, a brief overview of the Uniform Determination of Death Act, its predecessor the Uniform Brain Death Act, and their adoption in Nevada will provide perspective to the parties' arguments.

Uniform Determination of Death Act

The Uniform Law Commission first created a uniform act regarding brain death in 1978, entitled the Uniform Brain Death Act. *State v. Guess*, 715 A.2d 643, 649 (Conn. 1998). However, due to confusion regarding the criteria of the act, the Uniform Law Commission replaced the Uniform Brain Death Act with the Uniform Determination of Death Act of 1980 (UDDA). *See id.* The UDDA provided that "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is

dead." UDDA § 1, 12A U.L.A. 781 (2008). The UDDA and similar brain death definitions have been uniformly accepted throughout the country. *See* Leslie C. Griffin & Joan H. Krause, *Practicing Bioethics Law* 106 (2015) ("Thus all fifty states define brain death as legal death even if the heart continues to beat."); Eun-Kyoung Choi et al., *Brain Death Revisited: The Case for a National Standard*, 36 J.L. Med. & Ethics 824, 825 (2008) (stating that the UDDA "provides the national legal framework for defining death").

Nevada's Determination of Death Act

In 1979, Nevada adopted the Uniform Brain Death Act (UBDA). Hearing on S.B. 5 Before the Assembly Judiciary Comm., 60th Leg. (Nev., April 10, 1979). Under the UBDA, determinations of death had to be made, "in accordance with reasonable medical standards." 1979 Nev. Stat., ch. 163, § 1, at 226. In 1985, Nevada amended NRS 451.007 and adopted the UDDA. 1985 Nev. Stat., ch. 62, § 1, at 130. Subsequent to that adoption, NRS 451.007, much like its predecessor the UBDA, provides two different methods for determining death: "For legal and medical purposes, a person is dead if the person has sustained *an irreversible cessation of*: (a) Circulatory and respiratory functions; or (b) *All functions* of the person's *entire brain, including his or her brain stem*." NRS 451.007(1) (emphases added). In contrast to the UBDA, which only required determinations of death to be made according to reasonable medical standards, the UDDA required that determinations of death "must be made in accordance with accepted medical standards," and applied and construed in a manner "uniform among the states which enact it." NRS 451.007(2)-(3). In so doing, the UDDA sought to achieve greater uniformity in making such important and profound medical determinations.

The legislative history of NRS 451.007 makes clear that the legislative purpose was to ensure there was no functioning at all of the brain before determining death. When considering the adoption of the act, physicians and medical professionals testified in support of the bill. Hearing on S.B. 5 Before the Assembly Judiciary Comm., 60th Leg. (Nev., February 27, 1979). For example, Dr. Don Olson, a physician and professor at the Nevada Medical School, testified that physicians currently use the "Harvard" criteria to determine brain death. *Id.* After the first three steps of the Harvard criteria, physicians "additionally run EEGs (electroencephalograms) 24 hours apart, to see how the brain is functioning before they would pronounce the final decision of 'Brain Death.'" *Id.* During the second hearing regarding the adoption of the UBDA, one senator stated: "if there was a heartbeat and a *brainwave*, the life support system cannot be disconnected and to do so would be murder." Hearing on S.B. 5 Before the Assembly Judiciary Comm., 60th Leg. (Nev.,

April 10, 1979) (emphasis added). And, Frank Daykin of the Legislative Counsel Bureau testified that "this bill gave a standard for determining brain death which is expressed in terms of *functioning* of the brain. . . . Once *all functioning* of the brain has ceased, medically the person is considered dead." *Id.* (emphases added). Based on this testimony, the Committee approved the bill. *Id.*

Are the AAN guidelines considered "accepted medical standards," which adequately measure all functions of a person's entire brain, including the brain stem?

[Headnote 3]

The district court focused exclusively on whether St. Mary's physicians satisfied the AAN guidelines, without discussing whether the AAN guidelines satisfy NRS 451.007. Although St. Mary's presented testimony that the AAN guidelines are the accepted medical standard in Nevada—albeit a simple "yes" to the question of whether the AAN guidelines are the accepted medical standard in Nevada—the district court and St. Mary's failed to demonstrate that the AAN guidelines are considered "accepted medical standards" that are applied uniformly throughout states that have enacted the UDDA as sufficient to meet the UDDA definition of brain death. The district court did not reach this issue at all, while St. Mary's has only cited one source to support its argument that the AAN guidelines are the nationally accepted medical standard.

St. Mary's cites the New Jersey Law Revision Commission's Report relating to the Declaration of Death Act. However, the report actually supports the opposite conclusion for which St. Mary's argues. In the report, New Jersey decided *against* adopting the AAN guidelines, stating that the AAN guidelines "are not uniformly accepted in the national (or even international) medical community." *See* N.J. Law Revision Comm'n, Final Report Relating to New Jersey Declaration of Death Act, at 14 (Jan. 18, 2013). Further, the report cited to multiple studies suggesting that "the AAN guidelines need more research" and "there is still a great variety of practice in US hospitals" even though the AAN guidelines were published in 1995. *Id.* at 10. Despite recognizing the AAN as guidelines "upon which most hospitals and physicians rely," the report concluded that the AAN guidelines were not so broadly adopted and utilized as to have become *the* accepted medical standard for determining brain death. *Id.* at 14. Based on the foregoing, and the record before us, we are not convinced that the AAN guidelines are considered the accepted medical standard that can be applied in a way to make Nevada's Determination of Death Act uniform with states that have adopted it, as the UDDA requires. NRS 451.007(3) (recognizing that the purpose of adopting the UDDA in Nevada "is to make uni-

form among the states which enact it the law regarding the determination of death").

Contrarily, extensive case law demonstrates that at the time states began to adopt the UDDA, the uniformly accepted medical standard that existed was the then so-called Harvard criteria.[7] The Harvard criteria require three steps, followed by a flat EEG as a confirmatory test: (1) unreceptivity and unresponsivity to painful stimuli; (2) no spontaneous movements or spontaneous respiration; and (3) no reflexes, as demonstrated by no ocular movement, no blinking, no swallowing, and fixed and dilated pupils. Ad Hoc Comm. of the Harvard Med. Sch., *A Definition of Irreversible Coma*, 205 JAMA 337, 337-38 (1968) [hereinafter Harvard Report]; *see also In re Welfare of Bowman*, 617 P.2d at 737. After the first three steps, the report recommends requiring flat EEGs, which serve as "great confirmatory value."[8] Harvard Report, *supra*, at 338. "All of the above tests shall be repeated at least 24 hours later with no change." *Id.*

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[7]*See* Hearing on S.B. 5 Before the Assembly Judiciary Comm., 60th Leg. (Nev., February 27, 1979) (discussing Harvard criteria); *see also United States v. Gomez*, 15 M.J. 954, 959 (A.C.M.R. 1983) ("The determination [of death] in either case must be made in accordance with accepted medical standards, such as the Harvard Brain Death tests."); *Gallups v. Cotter*, 534 So. 2d 585, 586 n.1 (Ala. 1988) ("An increasing number of states have adopted this so-called 'Harvard' definition of brain death, either by statute or court decision."); *State v. Fierro*, 603 P.2d 74, 77-78 (Ariz. 1979) ("We believe that while the common law definition of death is still sufficient to establish death, the test of the Harvard Medical School or the Commissioners on Uniform State Laws, if properly supported by expert medical testimony, is also a valid test for death in Arizona."); *Lovato v. Dist. Court in & for Tenth Judicial Dist.*, 601 P.2d 1072, 1076 (Colo. 1979) ("These [Harvard] criteria constitute the basis of accepted medical standards for determination of brain death."); *State v. Guess*, 715 A.2d 643, 648 (Conn. 1998); *Janus v. Tarasewicz*, 482 N.E.2d 418, 422 (Ill. App. Ct. 1985) (citing to the Harvard criteria as "widely accepted characteristics of brain death"); *Swafford v. State*, 421 N.E.2d 596, 599 (Ind. 1981); *Commonwealth v. Golston*, 366 N.E.2d 744, 747 (Mass. 1977) ("The Harvard Committee developed basic clinical criteria, which are generally accepted by the medical community."); *State v. Meints*, 322 N.W.2d 809, 815 (Neb. 1982); *People v. Eulo*, 472 N.E.2d 286, 298 n.15 (N.Y. 1984) ("This [Harvard] test has served as the foundation for currently applied tests for determining when the brain has ceased to function."); *State v. Clark*, 485 N.E.2d 810, 812 (Ohio Ct. App. 1984) (discussing expert witness testimony that "physicians in Ohio generally use the Harvard standards which require two flat EEG tests within a twenty-four-hour period"); *In re Welfare of Bowman*, 617 P.2d 731, 737 (Wash. 1980) ("In 1968, a Harvard Medical School committee developed criteria which now constitute the basis of accepted medical standards for the determination of brain death."); *Black's Law Dictionary* 170 (5th ed. 1979) (incorporating the Harvard criteria into the definition of brain death).

[8]The Harvard Report states the following regarding the use of the EEG tests: "The condition [of brain death] can be satisfactorily diagnosed by points 1, 2, and 3 to follow. The electroencephalogram (point 4) provides confirmatory data, and when available it should be utilized." Harvard Report, *supra*, at 337.

It appears from a layperson's review of the Harvard criteria versus the AAN guidelines that the AAN guidelines incorporated many of the clinical tests used in the Harvard criteria.[9] *See* Am. Acad. of Neurology, *Update: Determining Brain Death in Adults*, 74 Neurology 1911 (2010). However, the AAN guidelines do not require confirmatory/ancillary testing, such as EEGs. *Id.* Although the AAN guidelines state that ancillary testing should be ordered "only if clinical examination cannot be fully performed due to patient factors, or if apnea testing is inconclusive or aborted," the AAN's own study recognized that a decade after publication of the guidelines, 84 percent of brain death determinations still included EEG testing. *See* David M. Greer et al., Am. Ass'n of Neurology Enters., Inc., *Variability of Brain Death Determination Guidelines in Leading U.S. Neurologic Institutions*, 70 Neurology 1, 4 Table 2 (2007).

While the Harvard criteria may not be the newest medical criteria involving brain death, we are not convinced with the record before us that the AAN guidelines have replaced the Harvard criteria as the accepted medical standard for states like Nevada that have enacted the UDDA.[10] We recognize the Legislature's broad definition of "accepted medical standards" to promote "the development and application of more sophisticated diagnostic methods." *People v. Eulo*, 472 N.E.2d 286, 296 n.29 (N.Y. 1984) ("Any attempt to establish a specific procedure might inhibit the development and application of more sophisticated diagnostic methods."). Therefore, we hesitate to limit the criteria to determine brain death "to a fixed point in the past." *State v. Guess*, 715 A.2d 643, 650 (Conn. 1998) ("We have searched unsuccessfully for evidence that the legislature intended to render immutable the criteria by which to determine death. In the absence of any such indication, we are loath to limit the criteria to a fixed point in the past.").

Regrettably, however, the briefing and record before us do not answer two key questions. First, the briefing and testimony do not establish whether the AAN guidelines are considered accepted med-

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[9]*See also* Choi et al., *supra*, at 827 ("In summary, although several guidelines have been suggested over time, there seems to be consensus on essential components necessary for determining brain death, and these essential components have not radically evolved since the Harvard criteria of the late 1960s.").

[10]"No court has refused to accept the 'Harvard criteria.'" James Peter Padraic Dirr, *The Bell Tolls for Thee: But When? Legal Acceptance of "Brain Death" as a Criteria for Death*, 9 Am. J. Trial Advoc. 331, 340 (1985); *see also* Jerry Menikoff, *Importance of Being Dead: Non-Heart-Beating Organ Donation*, 18 Issues L. & Med. 3, 7 (2002) ("Thus, even today, if you look in almost any major textbook on internal medicine, emergency medicine, or physical diagnosis, you may perhaps find a complicated and detailed protocol that discusses how to declare someone dead using 'brain death' criteria; that protocol is likely to be based on the initial recommendations of the Harvard Committee . . . ."); *see supra* note 7.

ical standards among states that have enacted the UDDA. Besides the single citation to the New Jersey Law Revision Commission Report, which as discussed above does not four-square support St. Mary's position, St. Mary's has failed to cite in its brief or during oral argument any medical or legal document that supports the AAN guidelines as accepted medical standards under the UDDA definition. Second, whatever their medical acceptance generally, the briefing and testimony do not establish whether the AAN guidelines adequately measure the extraordinarily broad standard laid out by NRS 451.007, which requires, before brain death can be declared under the UDDA, an "irreversible cessation" of "[*a*]*ll functions* of the person's *entire* brain, including his or her brain stem."[11] NRS 451.007(1) (emphases added). Though courts defer to the medical community to determine the applicable criteria to measure brain functioning, it is the duty of the law to establish the applicable standard that said criteria must meet. *In re Welfare of Bowman*, 617 P.2d 731, 732 (Wash. 1980). The record before us does not discuss whether the AAN guidelines require an irreversible cessation of all functions of a person's entire brain, including the brain stem, as NRS 451.007(1)(b) demands. Therefore, we are not convinced that St. Mary's properly determined death as required under NRS 451.007. Thus, we hold that the district court erred in denying Gebreyes's motion for a temporary restraining order.

CONCLUSION

We recognize the important implications this case has for physicians, hospitals, families, patients, and, most importantly, Aden Hai-

[11]The experts proffered by St. Mary's did not discuss whether the AAN guidelines measure *all* functions of one's *entire* brain, including the brain stem. Although the family's expert, Dr. Brian Callister, suggested that the AAN guidelines do not adequately test for a cessation of all functions of the entire brain, but rather only test if there is a functioning cortex (excluding the mid or hind parts of the brain), the record is wholly undeveloped on this matter. A cursory review of medical research raises concerns about brain death testing comporting with NRS 451.007. *See* Choi et al., *supra*, at 826 ("[S]ome features of brain function remain intact after brain death (*e.g.*, posterior pituitary secretion of anti-diuretic hormone and thermoregulation). This raises an inconsistency with the definition of brain death in the UDDA: 'irreversible cessation of all functions of the entire brain, including the brain stem.'"); Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. Mich. J.L. Reform 301, 311-12 (2015) ("Many brain-dead patients still have at least one functioning part of the brain—the hypothalamus, which continues to secrete vasopressin through the posterior pituitary. . . . [M]any brain-dead patients do not lose all neurological function, as the UDDA and state laws explicitly require to determine brain death."); D. Alan Shewmon, *Brain Death or Brain Dying?*, 27 J. Child Neurology 4, 5 (2012) ("It has long been recognized that in some cases of clinically diagnosed brain death, certain brain structures may not only be preserved but actually function, such as the hypothalamus (in cases without diabetes insipidus), relay nuclei mediating evoked potentials, and cerebral cortex mediating electroencephalographic activity.").

lu and her family. This court does not attempt to replace its judgment for that of medical experts, nor does it attempt to set in stone certain medical criteria for determining brain death. Instead, as an important issue of first impression in Nevada and beyond, we decline to make that determination based on the undeveloped record before us. If St. Mary's continues to advocate for only being required to follow the AAN guidelines, expert testimony is necessary to demonstrate that those guidelines, if met, establish "an irreversible cessation of . . . [a]ll functions of the person's entire brain, including his or her brain stem"[12] and that this is the accepted view of the medical community. As the record does not establish these key points, we reverse the district court's order denying a temporary restraining order and permanent injunction, extend the interim stay entered pending review by this court of the parties' expedited appeal, and remand for further proceedings consistent with this opinion.

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

McDonald Carano Wilson LLP, a Nevada Limited Liability Partnership, Appellant, *v.* The Bourassa Law Group, LLC; Oasis Legal Finance, LLC, a Foreign Illinois Limited Liability Company; California Back Specialists Medical Group, Inc., a California Corporation; California Minimally Invasive Surgery Center; Thousand Oaks Spine Medical Group, Inc., a California Corporation; Conejo Neurological Medical Group, Inc., a California Corporation; and Medical Imaging Medical Group, Respondents.

No. 64658

December 3, 2015 362 P.3d 89

Appeal from a district court order in an interpleader action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Client's attorney brought interpleader action seeking proper distribution of settlement funds from client's underlying personal in-

[12]Although we decline to order specific testing, it gives us pause that St. Mary's conducted three EEG tests in April, all of which showed brain functioning, but has failed to conduct further EEG testing. Instead of conducting a fourth EEG test, for confirmatory value after determining brain death, St. Mary's contends that EEG testing is not necessary. In oral argument, when asked why St. Mary's conducted three EEG tests if it believed that EEG testing was not necessary, counsel stated: "I don't know."

jury action, after client's former law firm withdrew as counsel and perfected charging lien before settlement occurred. The district court concluded law firm could not enforce lien. Law firm appealed. As matter of first impression, the supreme court, PARRAGUIRRE, J., held that law firm was not precluded from enforcing lien.

Reversed and remanded.

McDonald Carano Wilson LLP and *Rory Kay, George F. Ogilvie, III*, and *Patrick J. Murch*, Las Vegas, for Appellant.

The Bourassa Law Group, LLC, and *Mark J. Bourassa* and *Christopher W. Carson*, Las Vegas, for Respondent The Bourassa Law Group, LLC.

Boyack & Taylor and *Edward D. Boyack*, Las Vegas, for Respondent Oasis Legal Finance, LLC.

California Back Specialists Medical Group, Inc.; *California Minimally Invasive Surgery Center*; *Thousand Oaks Spine Medical Group, Inc.*; *Conejo Neurological Medical Group, Inc.*; and *Medical Imaging Medical Group*, in Pro Se.

1. APPEAL AND ERROR.
   The supreme court reviews questions of statutory interpretation de novo.
2. STATUTES.
   When a statute's language is clear and unambiguous, it must be given its plain meaning.
3. STATUTES.
   A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.
4. ATTORNEY AND CLIENT.
   Client's former law firm, which withdrew and perfected charging lien for more than $100,000 in attorney fees plus costs before client settled underlying claim, was not precluded from enforcing charging lien on settlement proceeds; any counsel that worked on a claim was allowed to enforce a charging lien against any affirmative recovery, and charging lien statute made no distinction between attorneys who worked on a case before recovery and those that were working on a case at the moment of recovery. NRS 18.015.

Before PARRAGUIRRE, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

NRS 18.015 provides that "[a]n attorney at law shall have a lien . . . [u]pon any claim, demand or cause of action . . . which has

been placed in the attorney's hands by a client for suit or collection," and that lien "attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action." NRS 18.015(1)(a), (4)(a). Here, we are asked to determine whether NRS 18.015 allows an attorney to enforce a charging lien even if that attorney withdrew before her client secured some form of recovery. We conclude that NRS 18.015 allows an attorney to enforce a charging lien against a client's affirmative recovery, even if that attorney withdrew before recovery occurred. Accordingly, we reverse the district court's order to the contrary and remand for further proceedings.

FACTS

This appeal arises from an order refusing to enforce appellant McDonald Carano Wilson LLP's (McDonald Carano) charging lien against its former client's settlement funds. Robert Cooper initially retained McDonald Carano to represent him in a personal injury action. After three years of representation, the district court granted McDonald Carano's motion to withdraw. McDonald Carano took steps to perfect a charging lien for more than $100,000 in attorney fees plus costs. Thereafter, Cooper retained The Bourassa Law Group (Bourassa), which obtained a $55,000 settlement for Cooper. Bourassa filed an interpleader action seeking proper distribution of the settlement funds among several claimants, including McDonald Carano. The district court concluded that McDonald Carano could not enforce its charging lien because it withdrew before settlement occurred. McDonald Carano appealed.

DISCUSSION

[Headnotes 1-3]

This court has not yet determined whether an attorney's withdrawal prevents her from enforcing a charging lien under NRS 18.015. We review questions of statutory interpretation de novo. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). "When a statute's language is clear and unambiguous, it must be given its plain meaning." *Id.* "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.*

McDonald Carano's withdrawal does not prevent it from enforcing its charging lien

Charging liens are governed by NRS 18.015, which provides that "[a]n attorney at law shall have a lien . . . [u]pon any claim, demand or cause of action . . . which has been placed in the attorney's hands by a client for suit or collection," and that lien "attaches to any verdict, judgment or decree entered and to any money or property

which is recovered on account of the suit or other action." NRS 18.015(1)(a), (4)(a).

The district court held McDonald Carano could not enforce its "charging lien because McDonald Carano withdrew from the Cooper matter prior to any settlement being obtained and did not obtain a settlement for the client." The district court based its decision on this court's statement that "[a] charging lien is a lien on the judgment or settlement that *the attorney has obtained for the client*." *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 534, 216 P.3d 779, 783-84 (2009) (emphasis added).

The district court's reliance on *Argentena* is misplaced. *Argentena* said nothing about whether withdrawn attorneys can enforce charging liens. It held that charging liens only apply when a client is entitled to affirmative monetary recovery. *Id.* at 534, 216 P.3d at 784. The language from *Argentena* that the district court relied on—"[a] charging lien is a lien on the judgment or settlement that the attorney has obtained for the client"—merely provided a general explanation of what a charging lien is.[1] *Id.* We did not consider whether withdrawing prior to settlement precluded the enforcement of a charging lien; therefore, nothing in *Argentena* compels the conclusion that attorneys cannot assert a charging lien if they withdraw before judgment or settlement.

[Headnote 4]

NRS 18.015's language unambiguously allows any counsel that worked on a claim to enforce a charging lien against any affirmative recovery. According to NRS 18.015(1)(a), "[a]n attorney at law shall have a lien" when a claim "has been placed in the attorney's hands by a client for suit or collection." In other words, an attorney "shall have a lien" if employed by a client; there is no requirement that the attorney serve the client at the moment of recovery. Instead, there is a generalized requirement of recovery so that the lien can actually attach to something of value. NRS 18.015(4)(a) (providing that charging liens "attach[ ] to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action"). Contrary to Bourassa's arguments,

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[1]The full paragraph reads as follows:

> A charging lien is a lien on the judgment or settlement that the attorney has obtained for the client. Here, it is undisputed that Argentena did not file an affirmative claim against the plaintiff in the underlying action. And although Jolley Urga obtained a dismissal of all claims against Argentena, the settlement did not result in any recovery for Argentena. In the absence of affirmative relief that Jolley Urga obtained for Argentena, we conclude that Jolley Urga did not have an enforceable charging lien over which the district court had incidental jurisdiction to adjudicate in the underlying case. Thus, we turn to whether the district court had jurisdiction to adjudicate Jolley Urga's retaining lien.

Argentena, 125 Nev. at 534, 216 P.3d at 783-84 (internal citations omitted).

NRS 18.015 does not distinguish between pre- and post-recovery attorneys. It says that *any* attorney who worked on the case "shall have a lien" on the claim and that the lien attaches to *any* recovery. Therefore, the district court erred in holding that McDonald Carano's withdrawal precluded it from enforcing a charging lien because NRS 18.015's plain language makes no distinction between attorneys who worked on a case before recovery and those who were working on a case at the moment of recovery.

On remand the district court must make additional findings

Because the district court based its decision solely on McDonald Carano's withdrawal, it did not address certain necessary issues regarding disbursement of the settlement funds. Specifically, "the court must make certain findings and conclusions before distribution," including whether (1) NRS 18.015 is available to the attorney, (2) there is some judgment or settlement, (3) the lien is enforceable, (4) the lien was properly perfected under NRS 18.015(2), (5) the lien is subject to any offsets, and (6) extraordinary circumstances affect the amount of the lien. *Michel v. Eighth Judicial Dist. Court*, 117 Nev. 145, 151-52, 17 P.3d 1003, 1007-08 (2001). Further, the district court must determine the actual amount of the lien pursuant to the retainer agreement or, if there is no agreement, set a reasonable fee. *Id.* at 152, 17 P.3d at 1008. Finally, the district court must ensure that McDonald Carano's and Bourassa's fee agreements are not unreasonable. *See Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1160-61, 146 P.3d 1130, 1138-39 (2006); *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33-34 (1969); RPC 1.5.

CONCLUSION

NRS 18.015's language unambiguously allows any counsel that worked on a claim to enforce a charging lien against any affirmative recovery. Thus, the district court erred in holding that McDonald Carano cannot enforce its charging lien simply because it withdrew before its client's settlement. However, additional findings are needed to determine whether McDonald Carano is entitled to a disbursement and, if it is, the amount of that disbursement. Accordingly, we reverse the district court's order and remand for further proceedings consistent with this opinion.

DOUGLAS and CHERRY, JJ., concur.