LAS VEGAS SANDS CORP., A NEVADA CORPORATION; AND SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND STEVEN C. JACOBS, REAL PARTY IN INTEREST.

No. 62944

August 7, 2014 331 P.3d 876

Original petition for a writ of prohibition or mandamus challenging a district court order finding that petitioners violated a discovery order and scheduling an evidentiary hearing to determine appropriate sanctions.

President and chief executive officer of corporation brought action against foreign corporation alleging violation of employment agreement. The district court entered order finding that corporation violated a discovery order and scheduling an evidentiary hearing to determine appropriate sanctions. Corporation petitioned for writ of mandamus. The supreme court, GIBBONS, C.J., held that existence of applicable foreign privacy statute did not excuse noncompliance with discovery order.

Petition denied.

Morris Law Group and *Steve L. Morris* and *Rosa Solis-Rainey*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *J. Randall Jones* and *Mark M. Jones*, Las Vegas; *Holland & Hart LLP* and *J. Stephen Peek* and *Robert J. Cassity*, Las Vegas, for Petitioners.

Pisanelli Bice PLLC and *Todd L. Bice, James J. Pisanelli*, and *Debra L. Spinelli*, 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 or to control an arbitrary or capricious exercise of discretion.
2. PROHIBITION.
   A writ of prohibition may be warranted when the district court exceeds its jurisdiction.
3. PROHIBITION.
   Although a writ of prohibition is a more appropriate remedy for the prevention of improper discovery, writ relief is generally unavailable to review discovery orders.
4. COURTS.
   In certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by the supreme court's invocation of its original jurisdiction.

5. MANDAMUS; PROHIBITION.
   The burden is on the petitioner to demonstrate that extraordinary relief through a writ of mandamus or a writ of prohibition is warranted.
6. PRETRIAL PROCEDURE.
   Mere existence of an applicable foreign international privacy statute did not itself preclude the district court from ordering foreign party to comply with Nevada discovery rules, and therefore, party was not permitted to utilize foreign international privacy statute as a shield to excuse their compliance with discovery obligations in Nevada courts; rather, the existence of an international privacy statute was relevant to the district court's sanctions analysis if the court's discovery order was disobeyed.

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, C.J.:

In this opinion, we consider whether a Nevada district court may properly issue a discovery order that compels a litigant to violate a foreign international privacy statute. We conclude that the mere existence of an applicable foreign international privacy statute does not itself preclude Nevada district courts from ordering foreign parties to comply with Nevada discovery rules. Thus, civil litigants may not utilize foreign international privacy statutes as a shield to excuse their compliance with discovery obligations in Nevada courts. Rather, the existence of an international privacy statute is relevant to a district court's sanctions analysis if the court's discovery order is disobeyed. Here, the district court properly employed this framework when it found that the existence of a foreign international privacy statute did not excuse petitioners from complying with the district court's discovery order. And because the district court has not yet held the hearing to determine if, and the extent to which, sanctions may be warranted, our intervention at this juncture would be inappropriate. We therefore deny this writ petition.

FACTS AND PROCEDURAL HISTORY

This matter arises out of real party in interest Steven C. Jacobs's termination as president and chief executive officer of petitioner Sands China. After his termination, Jacobs filed a complaint against petitioners Las Vegas Sands Corp. (LVSC) and Sands China Ltd., as well as nonparty to this writ petition, Sheldon Adelson, the chief executive officer of LVSC (collectively, Sands). Jacobs alleged that Sands breached his employment contract by refusing to award him promised stock options, among other things.

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

Almost three years ago, this court granted a petition for a writ of mandamus filed by Sands China and directed the district court to hold an evidentiary hearing and issue findings as to whether Sands China is subject to personal jurisdiction in Nevada. *See Sands China Ltd. v. Eighth Judicial Dist. Court*, Docket No. 58294 (Order Granting Petition for Writ of Mandamus, August 26, 2011). Due to a string of jurisdictional discovery disputes that have arisen since that order was issued, the district court has yet to hold the hearing.

Throughout jurisdictional discovery, Sands China has maintained that it cannot disclose any documents containing personal information that are located in Macau due to restrictions within the Macau Personal Data Protection Act (MPDPA). Approximately 11 months into jurisdictional discovery, however, Sands disclosed for the first time that, notwithstanding the MPDPA's prohibitions, a large number of documents contained on hard drives used by Jacobs and copies of Jacobs's emails had been transported from Sands China in Macau to LVSC in the United States.[2] In response to Sands's revelation, the district court sua sponte ordered a sanctions hearing. Based on testimony at that hearing, the district court determined that the transferred documents were knowingly transferred to LVSC's in-house counsel in Las Vegas and that the data was then placed on a server at LVSC's Las Vegas property. The district court also found that both in-house and outside counsel were aware of the existence of the transferred documents but had been concealing the transfer from the district court.

Based on these findings, the district court found that Sands's failure to disclose the transferred documents was "repetitive and abusive," deliberate, done in order to stall jurisdictional discovery, and led to unnecessary motion practice and a multitude of needless hearings. The district court issued an order in September 2012 that, among other things, precluded Sands from raising the MPDPA "as an objection or as a defense to admission, disclosure or production of any documents." Sands did not challenge this sanctions order in this court.

Subsequently, Sands filed a report detailing its Macau-related document production. Sands's report indicated that, with respect to all of the documents that it had produced from Macau, it had redacted personal data contained in the documents based on MPDPA restrictions prior to providing the documents to Jacobs. In response to Sands's redactions based on the MPDPA, Jacobs moved for NRCP 37 sanctions, arguing that Sands had violated the district court's September 2012 order.

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[2]Sands stated that the presence of the documents in the United States was not disclosed at an earlier time because the documents were brought to the United States mistakenly, and Sands had been seeking guidance from the Macau authorities on whether they could be disclosed under the MPDPA.

The district court held a hearing on Jacobs's motion for sanctions, at which the court stated that the redactions appeared to violate the September 2012 order. In its defense, Sands argued that the September 2012 order had prohibited it from raising the MPDPA as an objection or defense to ''admission, disclosure or production'' of documents, but not as a basis for *redacting* documents. The district court disagreed with Sands's interpretation of the sanctions order, noting:

> I certainly understand [the Macau government has] raised issues with you. But as a sanction for the inappropriate conduct that's happened in this case, in this case you've lost the ability to use that as a defense. I know that there may be some balancing that I do when I'm looking at appropriate sanctions under the Rule 37 standard as to why your client may have chosen to use that method to violate my order. And I'll balance that and I'll look at it and I'll consider those issues.

Based on the above findings, the district court entered an order concluding that Jacobs had ''made a prima facie showing as to a violation of [the district] [c]ourt's orders which warrants an evidentiary hearing'' regarding whether and the extent to which NRCP 37 sanctions were warranted. The district court set an evidentiary hearing, but before this hearing was held, Sands filed this writ petition, asking that this court direct the district court to vacate its order setting the evidentiary hearing.

DISCUSSION

[Headnotes 1-5]

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 639, 289 P.3d 201, 204 (2012). A writ of prohibition may be warranted when the district court exceeds its jurisdiction. *Id.* Although a writ of prohibition is a more appropriate remedy for the prevention of improper discovery, writ relief is generally unavailable to review discovery orders. *Id.*; *see also Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 679 (2011) (providing that exceptions to this general rule exist when (1) the trial court issues a blanket discovery order without regard to relevance, or (2) a discovery order requires disclosure of privileged information). Nevertheless, ''in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction . . . .'' *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 878, 882, 313 P.3d 875, 878 (2013) (internal quotation marks omitted).

"The burden is on the petitioner to demonstrate that extraordinary relief is warranted." *Valley Health*, 127 Nev. at 171, 252 P.3d at 678.

In its writ petition, Sands argues generally that this court's intervention is warranted because the district court has improperly subjected Sands to discovery sanctions based solely on Sands's attempts to comply with the MPDPA. Sands has not persuasively argued that either of this court's two generally recognized exceptions for entertaining a writ petition challenging a discovery order apply. *See Valley Health*, 127 Nev. at 171, 252 P.3d at 679. Nevertheless, the question of whether a Nevada district court may effectively force a litigant to choose between violating a discovery order or a foreign privacy statute raises public policy concerns and presents an important issue of law that has relevance beyond the parties to the underlying litigation and cannot be adequately addressed on appeal. Therefore, we elect to entertain the petition. *See Aspen Fin. Servs.*, 129 Nev. at 882, 313 P.3d at 878.

Foreign international privacy statutes cannot be used by litigants to circumvent Nevada discovery rules, but should be considered in a district court's sanctions analysis

[Headnote 6]

The intersection between Nevada discovery rules and international privacy laws is an issue of first impression in Nevada. The Nevada Rules of Civil Procedure authorize parties to discover any nonprivileged evidence that is relevant to any claims or defenses at issue in a given action. NRCP 26(b)(1). On the other hand, many foreign nations have created nondisclosure laws that prohibit international entities from producing various types of documents in litigation. *See generally* Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612 (1979).

The United States Supreme Court has evaluated the intersection between these two competing interests and determined that such a privacy statute does not, by itself, excuse a party from complying with a discovery order. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 n.29 (1987) ("It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06 (1958))). Generally, courts in similar situations have considered a variety of factors, including (1) "the importance to the investigation or litigation of the documents or other information requested"; (2) "the degree of specificity of the request"; (3) "whether the information originated in the United States"; (4) "the availability of alternative means of securing the information"; and (5) "the extent

to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.'' Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987); *see also Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 193 (E.D.N.Y. 2010). But there is some disagreement as to when courts should evaluate such factors.

Some jurisdictions, including the United States Court of Appeals for the Second Circuit, generally evaluate these factors both when deciding whether to issue an order compelling production of documents located in a foreign nation and when issuing sanctions for noncompliance of that order. *Linde*, 269 F.R.D. at 196.[3]

The United States Court of Appeals for the Tenth Circuit has espoused an approach in which a court's analysis of the foreign law issue is only relevant to the imposition of sanctions for a party's disobedience, and not in evaluating whether to issue the discovery order. *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 341-42 (10th Cir. 1976). The Tenth Circuit noted that in *Societe Internationale*, the Supreme Court stated that a party's reasons for failing to comply with a production order '' 'can hardly affect the fact of noncompliance and are relevant only to the path which the [d]istrict [c]ourt might follow in dealing with [the party's] failure to comply.' '' *Id.* at 341 (quoting *Societe Internationale*, 357 U.S. at 208). Based on this language, the Tenth Circuit determined that a court should only consider the foreign privacy law when determining if sanctions are appropriate. *Id.*; *see also* Wright, *Discovery*, 35 F.R.D. 39, 81 (1964) (''The effect of those laws is considered in determining what sanction to impose for noncompliance with the order, rather than regarded as a reason for refusing to order production'').

In our view, the Tenth Circuit's approach is more in line with Supreme Court precedent.[4] *See, e.g.*, *Arthur Andersen*, 546 F.2d at 341-42; *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997 (10th Cir. 1977); Timothy G. Smith, Note, *Dis-*

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[3]Even within the Second Circuit, there is some uncertainty as to when a court should apply these factors. *See In re Parmalat Sec. Litig.*, 239 F.R.D. 361, 362 (S.D.N.Y. 2006) (' '[T]he modern trend holds that the mere existence of foreign blocking statutes does not prevent a U.S. court from ordering discovery although it may be more important to the question of sanctions in the event that a discovery order is disobeyed by reason of a blocking statute.' '' (quoting *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 446 (S.D.N.Y. 2000))).

[4]That is not to say that Nevada courts should never consider a foreign privacy statute in issuing a discovery order. Certainly, a district court has wide discretion to consider a number of factors in deciding whether to limit discovery that is either unduly burdensome or obtainable from some other sources. NRCP 26(b)(2). Thus, it would be well within the district court's discretion to account for such a foreign law in its analysis, but we decline to adopt the Second Circuit's requirement of a full multifactor analysis in ordering the production of such documents.

covery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production, 14 Va. J. Int'l L., 747, 753 (1974) (noting that Second Circuit cases failed to observe the Supreme Court's distinction between a court's power to compel discovery and the appropriate sanctions if a party failed to comply). We are persuaded by the Tenth Circuit's approach, and conclude that the mere presence of a foreign international privacy statute itself does not preclude Nevada courts from ordering foreign parties to comply with Nevada discovery rules. Rather, the existence of an international privacy statute is relevant to the district court's sanctions analysis in the event that its order is disobeyed. *Arthur Andersen*, 546 F.2d at 341-42.

Here, Sands argues that the district court never purported to balance any of the relevant factors before concluding that its MPDPA redactions were sanctionable. But in our view, the district court has yet to have that opportunity. The district court has properly indicated that it would "balance" Sands's desire to comply with the MPDPA with other factors at the yet-to-be-held sanctions hearing. Thus, Sands has not satisfied its burden of demonstrating that the district court exceeded its jurisdiction or arbitrarily or capriciously exercised its discretion. *Aspen Fin. Servs.*, 128 Nev. at 639, 289 P.3d at 204; *Valley Health*, 127 Nev. at 171, 252 P.3d at 678. Because we are confident that the district court will evaluate the relevant factors noted above in determining what sanctions, if any, are appropriate when it eventually holds the evidentiary hearing, we decline to preempt the district court's consideration of these issues by entertaining the additional arguments raised in Sands's writ petition.[5]

CONCLUSION

Having considered the parties' filings and the attached documents, we conclude that our intervention by extraordinary relief

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[5]The majority of Sands's briefing argues that the district court improperly (1) ordered discovery of documents that had no relevance to the issue of personal jurisdiction, and (2) concluded that Sands violated the technical wording of the September 2012 sanctions order. Although this first contention arguably falls within *Valley Health*'s first exception, *see* 127 Nev. at 171, 252 P.3d at 679, the documentation accompanying Sands's writ petition does not clearly support the contention. *Id.* at 171, 252 P.3d at 678 ("The burden is on the petitioner to demonstrate that extraordinary relief is warranted."). In fact, the district court specifically noted that Sands may withhold all documents that were only relevant to merits discovery and thus irrelevant to the district court's jurisdiction over Sands China. Sands's second contention does not fall within either of *Valley Health*'s two exceptions, and Sands does not argue otherwise. *Id.* at 171, 252 P.3d at 679. Further, neither issue raises public policy concerns or presents an important issue of law that has relevance beyond the parties to the underlying litigation. *Aspen Fin. Servs.*, 129 Nev. at 882, 313 P.3d at 878. As a result, we decline to entertain Sands's remaining arguments.

is not warranted. Specifically, we conclude that the mere presence of a foreign international privacy statute does not itself preclude Nevada district courts from ordering litigants to comply with Nevada discovery rules. Rather, the existence of such a statute becomes relevant to the district court's sanctions analysis in the event that its discovery order is disobeyed. Here, to the extent that the challenged order declined to excuse petitioners for their noncompliance with the district court's previous order, the district court did not act in excess of its jurisdiction or arbitrarily or capriciously. And because the district court properly indicated that it intended to "balance" Sands's desire to comply with the foreign privacy law in determining whether discovery sanctions are warranted, our intervention at this time would inappropriately preempt the district court's planned hearing. As a result, we deny Sands's petition for a writ of prohibition or mandamus.

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

CHERRY, J., concurring in the result:

I agree with the majority that our intervention by extraordinary relief is not warranted at this time. However, I do not believe that a lengthy opinion by four members of this court on the conduct leading up to the sanctions hearing, or on the factors that the district court should consider when exercising its discretion in imposing future sanctions, is necessary or appropriate at this juncture of this case, when a thorough and fact-finding evidentiary hearing has not yet been conducted by the district court.

It is premature for this court to anticipate, project, or predict the totality of findings that the district court may make after the conclusion of any evidentiary hearing. At such time as findings of fact and conclusions of law are finalized by the district court, then—and only then—should an appropriate disposition be rendered in the form of a published opinion and made public.

BYRD UNDERGROUND, LLC; AND WELLS CARGO, INC., APPELLANTS, *v.* ANGAUR, LLC; BALAJI PROPERTIES INVESTMENT, LLC; AND US BANK NATIONAL ASSOCIATION, RESPONDENTS.

No. 61978

August 7, 2014 332 P.3d 273

Certified questions, pursuant to NRAP 5, concerning the priority of mechanics' liens based on visible commencement of construction. United States Bankruptcy Court for the District of Nevada; Bruce T. Beesley, Judge.

The supreme court, GIBBONS, C.J., held that: (1) the supreme court's prior statement that "preparatory work on a site, such as clearing or grading, does not constitute commencement of construction" for purposes of lien priority was dictum; (2) grading work can be an integral part of the entire structure or scheme of improvement, so as to establish commencement of construction; and (3) mechanic's lien claimants could claim lien priority based on work performed months before a building permit was issued or the general contractor was hired.

Questions answered in part.

Foley & Oakes, PC, and *Daniel T. Foley*, Las Vegas; *M. Nelson Segel*, Las Vegas; *Peel Brimley LLP* and *Eric B. Zimbelman* and *Richard L. Peel*, Henderson, for Appellants.

Fennemore Craig Jones Vargas and *Craig S. Dunlap* and *Christopher H. Byrd*, Las Vegas; *Meier & Fine, LLC*, and *Glenn F. Meier*, Las Vegas, for Respondents.

1. MECHANICS' LIENS.
   A mechanic's lien takes priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences. NRS 108.225.
2. MECHANICS' LIENS.
   A mechanic's lien is a statutory creature established to help ensure payment for work or materials provided for construction or improvements on land.
3. MORTGAGES.
   If construction has commenced on a "work of improvement" before a deed of trust is recorded, then a mechanic's lien will take a priority position over the deed of trust regardless of when the notice of lien is recorded. NRS 108.225.
4. MORTGAGES.
   To claim priority of its mechanic's lien over a deed of trust recorded after the commencement of construction, a lien claimant itself need not perform before the deed of trust is recorded, so long as the work of im-

provement began before the deed's recordation because all mechanics' liens relate back to the date overall construction is commenced. NRS 108.225.

5. Courts.

The supreme court's statement, in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, 127 Nev. 72, 85, 249 P.3d 501, 509 (2011), that "preparatory work on a site, such as clearing or grading, does not constitute commencement of construction," for purposes of priority of a mechanic's lien, was dictum and, thus, did not preclude a trier of fact from finding that grading work performed on property before construction lender recorded a deed of trust constituted visible commencement of construction; neither clearing nor grading were at issue in *J.E. Dunn*. NRS 108.22112, 108.22188, 108.225(1)(a).

6. Mechanics' Liens.

The trier of fact must look to the entire structure or scheme of improvement as a whole, that is, the overall construction, rather than solely evaluating the activities based on whether they are preparatory or structural or vertical construction, in determining whether construction on a work of improvement has commenced for purposes of priority of a mechanic's lien. NRS 108.22112, 108.22188, 108.225(1)(a).

7. Mechanics' Liens.

Grading work can be an integral part of the "entire structure or scheme of improvement as a whole" and part of the actual on-site construction; if it is, grading may be sufficient to establish commencement of construction, for purposes of priority of a mechanic's lien, as long as it is visible from a reasonable inspection of the site sufficient to provide lenders notice that lienable work has commenced. NRS 108.22112, 108.22188, 108.225(1)(a).

8. Mechanics' Liens.

Mechanic's lien claimants could claim lien priority based on work performed or materials delivered months before a building permit was issued for the construction project or the general contractor for the project was hired; timing of contracts and permits was irrelevant to whether visible construction had commenced, though it could assist in determining whether such work was within the scope of the construction project giving rise to the mechanics' liens. NRS 108.22112, 108.22188, 108.225(1)(a).

9. Mechanics' Liens.

The visibility, scope, and duration of a work of improvement, for purposes of determining when visible construction commenced for purposes of priority of a mechanic's lien, generally are factual questions for the trier of fact to decide. NRS 108.22112, 108.22188, 108.225(1)(a).

10. Federal Courts.

In responding to a certified question, the answering court's role is limited to answering the questions of law posed to it, and the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts; this approach prevents the answering court from intruding into the certifying court's sphere by making factual findings or resolving factual disputes.

11. Federal Courts.

On certified questions from bankruptcy court regarding mechanic's lien priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences, the supreme court would decline to answer certified question that asked whether grading work performed before construction lender recorded deed of trust constituted visible commencement of construction; issue was of an intensively factual nature and was to be resolved by the trier of fact. NRS 108.22112, 108.22188, 108.225(1)(a).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, C.J.:

[Headnote 1]

In Nevada, a mechanic's lien takes priority over other encumbrances on a property that are recorded after construction of a work of improvement visibly commences. The visible-commencement-of-construction requirement often gives rise to dispute, however, and the United States Bankruptcy Court for the District of Nevada has certified three questions of law to this court regarding this aspect of mechanic's lien priority law.[1]

The first question queries whether the placement of dirt material on a future project site before building permits are issued and the general contractor is hired can constitute commencement of construction. The second question asks us to clarify our decision in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, 127 Nev. 72, 249 P.3d 501 (2011), in which we stated that "clearing or grading" does not constitute commencement of construction. 127 Nev. at 85, 249 P.3d at 509. In our view, answering this question requires us to evaluate the appropriate precedential weight that courts should give to the passage in question, and we therefore rephrase the second certified question to include whether this statement was dictum. *See, e.g.*, *Boorman v. Nev. Mem'l Cremation Soc'y*, 126 Nev. 301, 304, 236 P.3d 4, 6 (2010) (rephrasing certified questions under NRAP 5). We rephrase the second question as follows:

> Was the passage in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, 127 Nev. 72, 85, 249 P.3d 501,

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[1]The three certified questions were presented as follows:

> 1. Can a mechanic's lien claimant properly claim lien priority under NRS 108.225 when the dirt/material that is the basis of the lien on the project was placed on a prospective building project site months before the building permit was issued or the general contractor hired? Stated another way, does placing significant quantities of dirt/material on a prospective building project site months before a building permit is issued constitute "commencement of construction" on such a site pursuant to NRS [108.22112]?
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> 2. Did the Nevada Supreme Court in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC*, 249 P.3d 501, 509, 127 Nev. Adv. Op. 5 (Nev. 2011) mistakenly use the term of art "clearing and grading" instead of "clearing and grubbing" when describing preparatory work on a construction project?
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> 3. Does "grading" in the circumstances presented here constitute visible "commencement of construction" under NRS 108.22112 for purposes of establishing lien priority under NRS 108.225?

> 509 (2011), that states ''preparatory work on a site, such as clearing or grading, does not constitute commencement of construction,'' dictum? If so, can grading work constitute visible commencement of construction under NRS 108.22112?

Finally, the third question inquires whether the grading that took place in this case constituted visible commencement of construction, such that the mechanics' liens at issue take priority.

Because the second question influences our analysis of the other questions, we address it first. We respond to the three questions as follows. Regarding the bankruptcy court's second question, we conclude that this court's use of the term ''clearing or grading'' was dictum, and thus, our holding in *J.E. Dunn* does not preclude a trier of fact from finding that grading property for a work of improvement constitutes visible commencement of construction. Regarding the first question, we conclude that contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test, but may assist the trier of fact in determining the scope of the work of improvement. Finally, we decline to answer the third question because it would require this court to resolve the factual dispute as to whether the grading presented here constituted visible commencement of construction of the work of improvement.

FACTS AND PROCEDURAL HISTORY

The construction project

The debtor respondents Angaur, LLC, and Balaji Properties Investment, LLC (collectively, the owners), jointly purchased a parcel of unimproved real property in Las Vegas, Nevada. No relevant activity took place with respect to the subject property until the spring and summer of 2006, when two different third parties placed, and allegedly spread, between 200 and 300 truckloads of dirt/material on the property.[2] Both of the third parties were performing work on unrelated construction projects on neighboring parcels and roadways. The degree to which the subject property was covered and subsequently spread or graded is unclear given the record before this court.

Meanwhile, the owners solicited bids from general contractors to construct a strip mall on the property. During bidding on the project, appellant Byrd Underground, LLC, submitted a bid to general contractor Joseph's Construction to perform subcontracted grading work, but Atlas Construction Ltd., not Joseph's Construction, was selected as the general contractor. On November 2,

[2]The parties could not agree what to call the substance that was placed on the property, so the bankruptcy court used the term ''dirt/material.'' The bankruptcy court noted that it did not intend the term to carry any specific legal meaning. We also will use the term ''dirt/material'' to remain consistent with the bankruptcy court.

2006, at the request of Atlas, a representative of Byrd dug four to six holes on the subject property with a backhoe. Byrd dug these holes to determine how much dirt/material had been brought onto the subject property since its prior bid in order to submit a revised bid to Atlas incorporating the new scope of work. On November 8, 2006, Atlas and the owners executed the written contract for Atlas to serve as the general contractor on the construction project.

On November 28, 2006, a title company conducted a site inspection of the subject property and concluded that the land was vacant and that there was no evidence of a recent work of improvement. Thereafter, the owners borrowed funds from PFF Bank & Trust for the purpose of constructing the strip mall on the subject property,[3] and on November 29, 2006, a deed of trust for the construction loan was recorded with the Clark County Recorder. Byrd had not performed any work on the subject property prior to November 29, 2006, other than digging the test holes and submitting bids to Joseph's Construction and Atlas.

Subsequently, a dust control permit and a building permit were issued for the subject property. During construction, Atlas used and incorporated at least a portion of the dirt/materials into the construction project. Atlas and Byrd executed three written subcontracts—for wet utilities, dry utilities, and grading—in 2007. Byrd and another subcontractor, appellant Wells Cargo, Inc. (collectively, lien claimants), provided services for the construction project but were not paid. As a result, they commenced mechanic's lien actions in state court and obtained judgments against Angaur, Balaji, and Atlas.

Angaur and Balaji file bankruptcy petitions and the lien claimants' objections lead the bankruptcy court to certify questions to this court

After the construction project was completed, the owners filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Both of the owners' schedules of creditors holding secured claims included (1) a "[f]irst [m]ortgage" to US Bank, and (2) both lien claimants' judgment liens. The owners and US Bank entered into a forbearance agreement and created a disclosure statement and plan of reorganization with the bankruptcy court that stated that US Bank was the only "Class 1" secured creditor.

The lien claimants filed an objection to the owners' disclosure statement and plan of reorganization, and they subsequently filed an adversary complaint in bankruptcy court to determine the priority of liens. At the close of discovery, the owners, US Bank, and the lien claimants filed competing motions for summary judgment.

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[3]PFF Bank eventually went into FDIC receivership and respondent US Bank now claims ownership of the construction loan and deed of trust.

During briefing on the competing motions for summary judgment, the lien claimants requested that the bankruptcy court certify questions to this court in order to clarify whether this court in *J.E. Dunn* mistakenly used the term ''clearing [or] grading'' instead of ''clearing and grubbing'' when describing non-''construction'' preparatory work on a construction project. The lien claimants argued that ''clearing and grubbing'' is a recognized term of art used in the construction industry, whereas ''clearing and grading'' is not. Additionally, the lien claimants argued that evidence of the dirt/materials being spread or graded on the subject property creates genuine issues of material fact regarding when the construction visibly commenced sufficient to avoid summary judgment. In response, the bankruptcy court certified questions to this court.

DISCUSSION

Priority of mechanics' liens in Nevada

[Headnote 2]

A mechanic's lien is a ''statutory creature established to help ensure payment for work or materials provided for construction or improvements on land.'' *In re Fontainebleau Las Vegas Holdings (Fontainebleau II)*, 128 Nev. 556, 573, 289 P.3d 1199, 1210 (2012); *see also* Hearing on S.B. 343 Before the Assembly Judiciary Comm., 73d Leg. (Nev., May 13, 2005) (indicating that mechanics' liens ''assist people who have improved real property so that they can get paid for their efforts''). Here, the parties do not dispute that the lien claimants performed lienable work. But ''whether work is entitled to a lien pursuant to NRS 108.22184 and whether it is entitled to priority over other encumbrances pursuant to NRS 108.225 are two entirely separate issues.'' *J.E. Dunn*, 127 Nev. at 81, 249 P.3d at 507.

[Headnotes 3, 4]

Relevant to the priority issue, Nevada's mechanic's lien priority statute, NRS 108.225, provides that mechanics' liens are entitled to priority over any encumbrance that attaches after construction of a work of improvement began:

> 1. The liens provided for in NRS 108.221 to 108.246, inclusive, are preferred to:
>
> (a) Any lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement.
>
> . . . .
>
> 2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement are subordinate and

> subject to the liens provided for in NRS 108.221 to 108.246, inclusive, regardless of the date of recording the notices of liens.

Thus, if construction has commenced on a "work of improvement" before a deed of trust is recorded, then a mechanic's lien will take a priority position over the deed of trust regardless of when the notice of lien is recorded. NRS 108.225; *see J.E. Dunn*, 127 Nev. at 85, 249 P.3d at 509; *Fontainebleau II*, 128 Nev. at 575-76, 289 P.3d at 1211. Moreover, to claim priority, a claimant itself need not perform before the deed of trust is recorded, so long as the work of improvement began before the deed's recordation, because "all mechanics' liens relate back to the date overall construction commenced." *J.E. Dunn*, 127 Nev. at 76 n.2, 249 P.3d at 504 n.2. As a result, in this case, the lien claimants are entitled to priority positions over the deed of trust if the work of improvement's construction commenced, as those terms are defined by statute, on the subject property before the deed of trust was recorded on November 29, 2006.

Visibility of the work of improvement alone determines priority

NRS 108.22112 defines "[c]ommencement of construction" as the date on which:

> 1. Work performed; or
> 2. Materials or equipment furnished in connection with a work of improvement,
>
> is visible from a reasonable inspection of the site.

This court analyzed NRS 108.22112 in *J.E. Dunn* and concluded that, consistent with "the recognized policy interest in maintaining certainty and predictability in construction financing," which would be hindered if lenders were forced to assume the risk associated with funding a construction project over which nonvisible work could grant contractors priority, "visibility alone determines priority." 127 Nev. at 83, 80, 249 P.3d at 508, 506. We then reviewed the preconstruction activities that Dunn—the lien claimant—had performed, in light of NRS 108.22112's visibility standard. In doing so, we stated, "[o]ther courts have more generally held, and we agree, that preparatory work on a site, such as clearing or grading, does not constitute commencement of construction." *Id.* at 85, 249 P.3d at 509 (citing *Clark v. Gen. Elec. Co.*, 420 S.W.2d 830, 833-34 (Ark. 1967), *superseded by statute as stated in May Constr. Co. v. Town Creek Constr. & Dev., L.L.C.*, 383 S.W.3d 389, 392-95 (Ark. 2011)). Because placing an architect's sign at the project site and removing power lines was "insufficient to provide lenders notice of lienable work entitled to priority," we held that those preconstruction activities failed to constitute visible commencement of " 'actual on-site construction.' " *Id.* at 85, 249 P.3d at 509 (quoting *Aladdin*

Heating Corp. v. Trs. of Cent. States, 93 Nev. 257, 260, 563 P.3d 82, 84 (1977)).

[Headnote 5]

Regarding the second question, the lien claimants take issue with our statement in *J.E. Dunn* that listed ''clearing or grading'' as types of nonvisible preparatory work that fail to establish construction commencement, and they argue that the statutes require merely that construction be visible to a reasonable site inspection to establish lien priority. *J.E. Dunn*, 127 Nev. at 77, 249 P.3d at 504-05 (citing *Aladdin Heating*, 93 Nev. at 260, 563 P.2d at 84). The lien claimants argue that it is unnecessary to declare broad categories of construction activities per se ''nonvisible,'' thereby depriving the trier of fact of the opportunity to evaluate the visibility of such activities on a case-by-case basis. As concerns clearing and grading, we agree.

[Headnote 6]

As noted, mechanics' liens have priority over other encumbrances that attach to the property after ''the [visible] commencement of construction of a work of improvement.'' NRS 108.225(1)(a). NRS 108.22188 defines ''[w]ork of improvement'' as the ''entire structure or scheme of improvement as a whole, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of the property or any improvement thereon.'' Nothing in these provisions excludes preconstruction activities from the definition of work of improvement, and indeed, subsection 2 of NRS 108.22188 expressly recognizes that activities undertaken to prepare the project site can be a work of improvement. NRS 108.22188(2) (stating that ''the improvement of the site'' may be ''contemplated by the contracts to be a separate work of improvement to be completed before the commencement of construction of the buildings''). Moreover, NRS 108.22128 defines ''[i]mprovement,'' in pertinent part, as including buildings, irrigation systems and landscaping, removal of trees or other vegetation, the drilling of test holes, and grading, grubbing, filling, or excavating. In construing these provisions together, as we must, *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 687, 262 P.3d 715, 718 (2011), we conclude that the trier of fact must look to the entire structure or scheme of improvement as a whole—the ''overall construction''—rather than solely evaluating the activities based on whether they are preparatory or structural or vertical construction, in determining whether construction on a work of improvement has commenced. *J.E. Dunn*, 127 Nev. at 76 n.2, 249 P.3d at 504 n.2.

[Headnote 7]

Accordingly, grading work can be an integral part of the ''entire structure or scheme of improvement as a whole'' and part of the actual on-site construction. NRS 108.22188. If it is, grading may be sufficient to establish commencement of construction in Nevada

as long as it is visible from a reasonable inspection of the site sufficient to provide lenders notice that lienable work has commenced, and we are unwilling to conclude, as a matter of law, that on-site grading work can never place lenders on notice that lienable work has begun. NRS 108.22112; *see also May Constr. Co.*, 383 S.W.3d at 392-94 (construing Arkansas's mechanic's lien statute "just as it reads, giving the words their ordinary and usually accepted meaning in common language" in determining that grading can constitute commencement of construction).

This holding is consistent with *J.E. Dunn*, in which we explained that the visibility requirement for determining lien priority applies to preconstruction activities. 127 Nev. at 82, 249 P.3d at 507-08. To the extent that the examples of nonconstruction preparatory work in *J.E. Dunn* suggest otherwise, neither clearing nor grading were at issue in that case, and thus the examples are mere dicta. *See St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009). We take this opportunity to clarify that *J.E. Dunn* does not preclude a trier of fact from finding that clearing and grading work constitutes visible commencement of construction of a work of improvement. We thus answer the second question, as we have rephrased it, in the affirmative: our statement in *J.E. Dunn*, 127 Nev. at 85, 249 P.3d at 509, regarding "clearing or grading" was dictum, and grading work may constitute visible commencement of construction under NRS 108.22112.

Contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test set forth by NRS 108.22112

[Headnote 8]

The bankruptcy court's first certified question asks whether a mechanic's lien claimant can properly claim lien priority under NRS 108.225 based on work that was performed or materials that were delivered months before the building permit was issued and the general contractor was hired. The lien claimants argue that the plain language of NRS 108.225 and NRS 108.22112 require visibility, and that nothing in the statutes conditions the priority of a lien on the issuance of permitting or contract dates. The lien claimants argue that the timing of contracts and permits related to a given project is irrelevant to the issue of whether the delivery of materials or the performance of work had, in fact, been furnished prior to the date the deed of trust was recorded. We agree.

Here, "the meaning of NRS 108.22112 is plain and requires visibility for work performed, including preconstruction services, in order for a mechanic's lien to take a priority position over a deed of trust." *J.E. Dunn*, 127 Nev. at 81, 249 P.3d at 506-07; *see also Aladdin Heating*, 93 Nev. at 260, 563 P.2d at 84. Thus, any subjective intent on the part of an owner to commence construction on a

given date, based on either a contract or permit issuance date, is not an element of the commencement of construction and should therefore not be considered dispositive. *See May Constr.*, 383 S.W.3d at 395 (concluding that the district court erred when it failed to make factual determinations regarding objective, visible manifestation of activity on the property, and instead ruled that construction did not commence until after the mortgage was recorded based on the perceived intent of the lender).

But while the date of the contract or permits does not directly affect priority, the contract and permits may have some bearing on the issue, because the fact-finder must define the work of improvement before it can determine when that work of improvement visibly commenced. In this regard, contracts and permits may assist in determining the scope of the work of improvement's "structure or scheme . . . as a whole." NRS 108.22188. If the contract expressly or impliedly excludes certain work, then that work might not be a part of the "work of improvement." *See Schultz v. King*, 68 Nev. 207, 212-13, 228 P.2d 401, 404 (1951) (looking to the contract in addressing the possible scope of a work of improvement); *see also I. Cox Constr. Co. v. CH2 Invs., L.L.C.*, 129 Nev. 139, 145, 296 P.3d 1202, 1205 (2013) (determining a work of improvement's scope by looking to the purpose, impetus, and continuity of the work, the parties' contemplations regarding the project, the building and operating permits, and the timing of the work in relation to the rest of the construction).

Thus, we answer the first question in the affirmative, with a caveat: a mechanic's lien claimant may properly claim lien priority under NRS 108.225 when the work or material forming the basis of the lien's priority was placed or performed on the site "months before the building permit was issued or the general contractor hired," as long as there was, in fact, visible commencement of construction as defined by NRS 108.22112 and as long as all of the work or material placed or performed on the site in the prior months was a part of the same work of improvement under NRS 108.22188 as the later work giving rise to the mechanic's lien.

We decline to answer the third certified question because it asks this court to make findings of fact that should be left to the bankruptcy court

[Headnotes 9, 10]

The third certified question asks: "[d]oes 'grading' in the circumstances presented here constitute visible 'commencement of construction' under NRS 108.22112 for purposes of establishing lien priority under NRS 108.225?" But the visibility, scope, and duration of a work of improvement generally are factual questions for the trier of fact to decide, *I. Cox Construction*, 129 Nev. at 142, 296 P.3d

at 1204, and this court recently noted that it cannot make findings of fact in responding to a certified question. *In re Fontainebleau Las Vegas Holdings (Fontainebleau I)*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011). ''The answering court's role is limited to answering the questions of law posed to it, and the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts.'' *Id.* at 955, 267 P.3d at 794-95. ''This approach prevents the answering court from intruding into the certifying court's sphere by making factual findings or resolving factual disputes.'' *Id.* at 956, 267 P.3d at 795.

[Headnote 11]

The dispute between the parties as to whether the importing and spreading or grading of the dirt/material in this case constituted visible ''commencement of construction'' of one comprehensive ''work of improvement'' is, as explained above, of an intensively factual nature. Given these unresolved factual disputes, we decline to answer the third question.

CONCLUSION

We conclude that this court's use of the term ''clearing or grading'' in *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, L.L.C.*, 127 Nev. 72, 85, 249 P.3d 501, 509 (2011), was dictum and does not alter our ultimate holding that visibility alone determines priority. We therefore clarify that grading work may constitute visible commencement of construction of a work of improvement in some circumstances, as long as it is visible from a reasonable inspection of the site in a manner sufficient to provide notice of lienable work that may be entitled to priority. Additionally, we conclude that contract dates and permit issuance dates are irrelevant to the visible-commencement-of-construction test set forth by NRS 108.22112, but may assist the trier of fact in determining the scope of the work of improvement. Finally, we decline to decide whether the circumstances presented here constitute visible commencement of construction under NRS 108.22112 of a comprehensive work of improvement under NRS 108.22188 because it would require this court to resolve the factual dispute between the parties.

PICKERING, HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

IN THE MATTER OF THE IRREVOCABLE TRUST AGREEMENT OF 1979.

CHARRON C. MONZO, AS BENEFICIARY OF THE CHARRON C. MONZO REAL ESTATE TRUST AGREEMENT OF 2005, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE, RESPONDENTS, AND DAISY MONZO, REAL PARTY IN INTEREST.

No. 62160

August 7, 2014 331 P.3d 881

Original petition for a writ of mandamus or prohibition challenging a district court order granting partial summary judgment.

After donor rescinded gift of 100-percent interest in condominium to daughter's trust, daughter petitioned for an accounting of various family trusts and an order requiring the donor to transfer the condominium back to daughter's trust. The district court granted partial summary judgment in favor of the donor, and daughter petitioned for extraordinary relief to direct the district court to vacate its order. The supreme court, HARDESTY, J., held that: (1) in a matter of first impression, the donor's unilateral mistake in executing a donative transfer may allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence; but (2) a genuine issue of material fact as to the donor's intent at the time of a donative transfer of a condominium to daughter's irrevocable trust, and whether unilateral mistakes effected the donor's execution of the deed transferring the condominium, precluded a grant of partial summary judgment in favor of the donor on her counterclaim for mistake.

Petition granted.

Bailus Cook & Kelesis, Ltd., and *Marc P. Cook* and *Kathleen T. Janssen*, Las Vegas, for Petitioner.

Snell & Wilmer, LLP, and *Patrick G. Byrne*, Las Vegas; *Gordon Silver* and *Bradley J. Richardson* and *Puneet K. Garg*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.

Although the supreme court generally declines to exercise its discretion to consider writ petitions challenging district court orders granting or denying summary judgment, it nevertheless will exercise its discretion to consider such petitions when an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.

2. MANDAMUS.

   The supreme court typically reviews a petition for a writ of mandamus to determine whether the district court engaged in an arbitrary or capricious exercise of discretion, and reviews de novo issues of law presented in the context of such an extraordinary writ proceeding.

3. CONTRACTS.

   A "mutual mistake" sufficient to provide a basis for relief from a contract occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain.

4. DEEDS; GIFTS.

   Mutual mistake is entirely inapplicable in the gift context because a gift, by its very nature, is unilateral; this is because when a deed is exchanged in a contractual relationship, both the grantor and grantee are obligated to perform in some type of fashion, which creates the opportunity for a mutual mistake to occur, whereas, when a deed is given as a gift, the grantor is the only party with an obligation, and, thus, only a unilateral mistake is likely to occur.

5. CONTRACTS.

   A "unilateral mistake" occurs when one party makes a mistake as to a basic assumption of the contract, that party does not bear the risk of mistake, and the other party has reason to know of the mistake or caused it.

6. GIFTS.

   Contractual unilateral mistake is inapplicable in the donative transfer context because, like contract-based mutual mistake, this concept is premised on an agreement between two parties giving rise to mutual obligations amongst the parties, but in the gift context, it is only the grantor whose intent and acts matter; aside from the donee's acceptance or refusal of the gift, the donor is the only party available to bear the risk of mistake, and whether a donee knew of or caused a mistake is likely irrelevant.

7. GIFTS.

   A valid inter vivos gift or donative transfer requires a donor's intent to voluntarily make a present transfer of property to a donee without consideration, the donor's actual or constructive delivery of the gift to the donee, and the donee's acceptance of the gift. Restatement (Third) of Property: Wills and Other Donative Transfers § 6.1.

8. GIFTS.

   Unless conditional, a gift becomes irrevocable once transferred to and accepted by the donee.

9. TRUSTS.

   Once a donor transfers property into an irrevocable trust, the state's trust scheme restricts the donor/trustee's ability to resort to self-help to transfer property back to himself or herself in an attempt to remedy perceived problems with the transfer. NRS 163.050.

10. GIFTS.

    A donor's unilateral mistake in executing a donative transfer may allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence; and depending on whether the unilateral mistake constitutes an invalidating mistake or a mistake in the content of the document, the donor may be entitled to rescission or reformation of the transfer. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 comments.

11. JUDGMENT.

    A genuine issue of material fact as to the donor's intent at the time of a donative transfer of a condominium to daughter's irrevocable trust,

and whether unilateral mistakes affected the donor's execution of the deed transferring the condominium, precluded a grant of partial summary judgment in favor of the donor on her counterclaim for mistake. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 comments.

12. GIFTS.

Demonstrating unilateral mistakes in the execution or transfer of a gift depends on the donor's intent at the time of the donative transfer; thus, unilateral mistakes cannot be said to have been made without first determining the donor's intent at the time when delivery and all other elements necessary to complete a donative transfer were completed. Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1 comments.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Real party in interest Daisy Monzo executed a deed gifting a condominium that she owned to an irrevocable trust for the benefit of her daughter, petitioner Charron C. Monzo. Daisy later rescinded that transfer based on alleged unilateral mistakes in the execution of the deed conveying the property to the trust. We are asked to determine whether unilateral mistakes, if proven, will allow the donor to rescind or reform an errant gift. We hold that a donor may obtain relief from an erroneous gift if he or she proves by clear and convincing evidence that the donor's intent was mistaken and was not in accord with the donative transfer. Further, remedies available to correct such mistakes, which include rescission or reformation of the deed transferring the property, depend on the nature of the unilateral mistake in question.

FACTS AND PROCEDURAL HISTORY

Daisy and her three adult daughters, Charron, Charlene, and Michelle, established three irrevocable inter vivos real estate trusts, each benefiting a daughter, and into each of which a one-third interest in properties located in Arizona and New York was transferred. Daisy was the sole original trustee of each of the trusts. Michelle lived in the Arizona property and Charlene lived in the New York property. These properties were each valued at approximately $500,000. Charron lived with Daisy in a Las Vegas condominium owned by Daisy that is valued at over $2 million, but that had not been transferred into any of the trusts.

When Charron and Daisy considered transferring the Las Vegas condo into a trust for Charron's use, Charron introduced Daisy to Las Vegas attorney Michael Rasmussen who met with them several

times about the proposed transfer. During these meetings, they discussed whether Daisy would retain control over the Las Vegas condo if it was transferred into a trust, whether Daisy needed to transfer the condo to avoid having it escheat to the state upon her death, and how the condo should be transferred and titled if it were to be placed into a trust. Despite the ongoing consultations with Rasmussen over the transfer of the condo, Daisy never provided Rasmussen with any of her prior estate planning documents or authorized him to contact her other attorneys.

Rasmussen prepared a deed, which Daisy signed, gifting a 100-percent interest in the Las Vegas condo from Daisy to Charron's trust. But Rasmussen later learned that, when transferring real property into her family trusts, Daisy typically transferred a one-third interest in the subject properties to each daughter's trust, rather than the 100-percent interest in the condo that she had transferred to Charron's trust. Rasmussen prepared a correction deed to rectify this situation, but Daisy refused to sign that deed. Instead, three months after Daisy signed the deed transferring the Las Vegas condo into Charron's trust, Daisy signed another deed, prepared by a different attorney, transferring the condo back into her own name.

After Daisy rescinded the prior gift, Charron filed a petition in the district court seeking accountings of the various family trusts and an order requiring Daisy to transfer the Las Vegas condo back to Charron's trust. The accounting actions were consolidated and the Las Vegas condo issue was addressed separately. Daisy filed counterclaims against Charron based on the original transfer of the Las Vegas condo into Charron's trust for, among other things, fraudulent misrepresentation, elder abuse, breach of contract, conversion, undue influence, and mistake. Daisy also moved the district court for partial summary judgment, seeking rescission of the initial gift deed based on at least three mistakes that Daisy allegedly made in transferring the condo into Charron's trust. First, Daisy asserted that she mistakenly believed that the deed would transfer the condo into a trust that she controlled while granting her estate planning flexibility. Second, she argued that she mistakenly thought that transferring the property was necessary to avoid having it escheat to the state upon her death. And third, she contended that she mistakenly believed that, consistent with prior estate planning practices, the deed would transfer a one-third interest in the property to each daughter's trust, rather than conveying the full interest to Charron's trust. Charron filed a countermotion for partial summary judgment on Daisy's counterclaims and, in the alternative, for reformation of the deed transferring the condo into Charron's trust, if the district court ultimately determined that Daisy mistakenly transferred a 100-percent interest in the condo into Charron's trust, instead of a one-third interest into each daughter's trust.

Following briefing and a hearing on these motions, the district court denied Charron's countermotions and entered partial summary judgment in Daisy's favor, concluding that Daisy made unilateral mistakes in executing the gift deed and rescinding the initial deed. The district court purported to apply Nevada's general unilateral mistake law, together with gift law from other jurisdictions, in granting summary judgment. But although the district court held that Daisy's execution of the deed transferring title to the condo into the trust was based on unilateral mistakes, it made no findings as to what specific mistakes affected the execution of the deed or what Daisy's intent was when she made the donative transfer. Charron then filed this original writ petition challenging the district court's partial summary judgment order.

DISCUSSION

In her petition, Charron contends that summary judgment was improperly granted in Daisy's favor on the unilateral mistake and rescission issues because questions of material fact remained as to Daisy's intent in transferring a 100-percent interest in the Las Vegas condo into Charron's trust. Charron contends that the summary judgment evidence demonstrated that Daisy did not make any mistake in the transfer, but alternatively asserts that if a mistake was made, this court should clarify the proper remedy to address mistakes in a donative transfer. In response, Daisy argues that no genuine issues of material fact remained, as the evidence demonstrated that she made unilateral mistakes in executing the deed transferring the property into Charron's trust, and that she, as the donor, was entitled to elect rescission to correct these mistakes. The parties and the district court all recognize that this court has not addressed unilateral mistake in the context of a donative transfer.

Standard of review

[Headnote 1]

Although this court generally declines to exercise its discretion to consider writ petitions challenging district court orders granting or denying summary judgment, *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997), we nevertheless will exercise our discretion to consider such petitions when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008). We have not previously addressed whether a donor making an inter vivos gift or donative transfer may rely on his or her unilateral mistake in making the gift to obtain relief from the property transfer. As this original writ

proceeding provides us with the opportunity to address and clarify this important issue of donative transfer law, we exercise our discretion to consider this matter on the merits. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[Headnote 2]

This court typically reviews a petition for a writ of mandamus to determine whether the district court engaged in an arbitrary or capricious exercise of discretion, and we review de novo issues of law presented in the context of such an extraordinary writ proceeding.[1] *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59.

Mutual and unilateral mistake in the contract context do not apply to donative transfers

In granting rescission of the transfer deed, the district court held that Daisy's transfer of the property into Charron's trust was affected by unilateral mistake. Charron's arguments in her original writ petition, however, initially focus on whether a mutual mistake occurred in this transfer, although she also subsequently addressed the application of unilateral mistake to this dispute in responding to Daisy's assertion that the transfer of the property was, as the district court concluded, based on unilateral mistakes.

Contract-based mistake

[Headnotes 3, 4]

We have previously held, in the contract context, that a mutual mistake may provide a basis for relief from a contract. *Gramanz v. Gramanz*, 113 Nev. 1, 8, 930 P.2d 753, 758 (1997). A "[m]utual mistake occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain." *Id.* (internal quotation omitted). But as other courts have concluded, mutual mistake is entirely inapplicable in the gift context because a gift, by its very nature, is unilateral. This is because "[w]hen a deed is exchanged in a contractual relationship, both the grantor and grantee are obligated to perform in some type of fashion, which creates the opportunity for a mutual mistake to occur. Whereas, when a deed is given as a gift, the grantor is the only party with an obligation, and, thus, only a unilateral mistake is likely to occur." *Wright v. Sampson*, 830 N.E.2d 1022, 1027 (Ind. Ct. App. 2005).

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[1]Because mandamus, rather than prohibition, constitutes the proper vehicle for challenging the rulings at issue here, we deny Charron's alternative request for a writ of prohibition. *See* NRS 34.320 (noting that prohibition relief is available to address proceedings in excess of a tribunal's jurisdiction).

[Headnotes 5, 6]

This court has also recognized that the occurrence of unilateral mistakes may allow a party to a contract to obtain relief from that agreement. *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-59, 741 P.2d 1355, 1356-57 (1987) (adopting Restatement (Second) of Contracts § 153 (1981)). A unilateral mistake occurs when one party makes a mistake as to a basic assumption of the contract, that party does not bear the risk of mistake, and the other party has reason to know of the mistake or caused it. *Id.* Although the district court in this case partially relied on this line of reasoning in making its decision, and Daisy likewise relies on this authority in responding to Charron's petition, contractual unilateral mistake is also inapplicable in the donative transfer context because, like contract-based mutual mistake, this concept is premised upon an agreement between two parties giving rise to mutual obligations amongst the parties. *See Wright*, 830 N.E.2d at 1027. But in the gift context, it is only the grantor whose intent and acts matter. *See Twyford v. Huffaker*, 324 S.W.2d 403, 406 (Ky. Ct. App. 1958). Aside from the donee's acceptance or refusal of the gift, the donor is the only party available to bear the risk of mistake. *See id.* Whether a donee knew of or caused a mistake is likely irrelevant. *See id.*

Donative transfer and trust law

[Headnotes 7, 8]

In Nevada, a valid inter vivos gift or donative transfer requires a donor's intent to voluntarily make a present transfer of property to a donee without consideration, the donor's actual or constructive delivery of the gift to the donee, and the donee's acceptance of the gift.[2] *Schmanski v. Schmanski*, 115 Nev. 247, 252, 984 P.2d 752, 756 (1999); *Edmonds v. Perry*, 62 Nev. 41, 61, 140 P.2d 566, 575 (1943); *Simpson v. Harris*, 21 Nev. 353, 362, 31 P. 1009, 1011 (1893); *see also* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 6.1 (2003). Unless conditional, a gift becomes irrevocable once transferred to and accepted by the donee. *Simpson*, 21 Nev. at 362-63, 31 P. at 1011 (noting that a donor giving a gift may not reclaim or expect repayment for the gift). In this regard, Nevada's long-standing position on the issue is consistent with that of other jurisdictions that have also opined, in more recent decisions, that a gift becomes irrevocable once the transfer and acceptance of that

[2]Although the deed at issue here recited that the Las Vegas condo was given "for good and valuable consideration," the district court found that the Las Vegas condo was a gift to Charron's trust, and Charron does not challenge that determination in her writ petition. As a result, we do not consider the effect of this language on the nature of the transfer in this writ proceeding.

gift have occurred. *See Albinger v. Harris*, 48 P.3d 711, 719 (Mont. 2002) (''Such a gift, made without condition, becomes irrevocable upon acceptance.''); *Cooper v. Smith*, 800 N.E.2d 372, 379 (Ohio Ct. App. 2003) (''Generally, a completed inter vivos gift is absolute and irrevocable.''). Given the irrevocable nature of a gift, it is apparent that the donor cannot simply resort to self-help to undo the donative transfer, absent the donee's agreement to return or modify the gift.

As Charron points out, in the trust context, Nevada statutes place similar restrictions on the unwinding of transfers into irrevocable trusts like the one at issue here. In particular, NRS 163.560(1) provides that if a donor transfers property into a trust that is expressly irrevocable, that trust, and the donative transfer, ''shall be irrevocable for all purposes.'' And NRS 163.050, which applies to trusts in general, requires a trustee to either obtain the consent of all trust beneficiaries or seek court approval before engaging in a self-interested transaction, such as transferring property from the trust into the trustee's name.

[Headnote 9]

Considering these statutes in light of the situation presented here, once the donor transfers property into an irrevocable trust, of which the donor is also the trustee, Nevada's trust scheme restricts the donor/trustee's ability to resort to self-help to transfer trust property to himself or herself in an attempt to remedy perceived problems with the transfer. *See* NRS 163.050. Resort to such self-help remedies may also raise concerns surrounding the donor/trustee's possible breach of fiduciary duties to the trust beneficiaries. While Charron argues that these statutes prohibited Daisy's second transfer of the property out of the trust and back into her own name, the subsequent transfer of this property is not at issue here, as the district court has not addressed the effect of Daisy's actions in this regard.[3] Instead, the focus of this petition is limited to the district court's determination that unilateral mistake affected the initial transfer of the property into Charron's trust and its rescission of the transfer deed. Thus, the issues before us involve the applicability of unilateral mistake to the original donative transfer, what remedies are available if unilateral mistake does apply, and whether the district court properly granted partial summary judgment to Daisy and rescinded the initial transfer.

[3]We note that, in the absence of the donee's or a trust beneficiary's consent, the preferred method for a donor to seek relief for perceived problems with a donative transfer is to petition a district court for relief. We decline to further address Daisy's resort to self-help in this case, because that question is not before us. The impact, if any, of Daisy's resort to self-help through the second deed transferring the Las Vegas condo from the trust back into her own name remains to be determined, in the first instance, by the district court.

Unilateral mistake in the donative transfer context

Having examined our existing contract-based mistake law and gift law, it is apparent that Nevada's established law does not address the instant matter, and we therefore review extrajurisdictional approaches to this issue. In this regard, Charron's arguments before this court focus on whether genuine issues of material fact preclude partial summary judgment and whether reformation is a more appropriate remedy than rescission. Her arguments do not substantively address a donor's unilateral mistake in a donative transfer. Daisy, however, strenuously argues that a donor's unilateral mistakes in executing a donative transfer permits the donor to elect a remedy, at his or her discretion, to correct his or her mistakes in executing the donative transfer.

The vast majority of jurisdictions address this issue consistently with the modern Restatement approach, which allows a donor to obtain relief from a donative transfer based on unilateral mistake through reformation or rescission.[4] *See, e.g.*, *Pullum v. Pullum*, 58 So. 3d 752, 757-58 (Ala. 2010); *Yano v. Yano*, 697 P.2d 1132, 1135-36 (Ariz. Ct. App. 1985); *Wright*, 830 N.E.2d at 1027-28; *Twyford*, 324 S.W.2d at 406; *Estate of Irvine v. Oaas*, 309 P.3d 986, 990-91 (Mont. 2013); *Generaux v. Dobyns*, 134 P.3d 983, 989-90 (Or. Ct. App. 2006). Under the Restatement approach, a donor whose gift is induced by a unilateral mistake, who mistakenly transfers something more than or different from the intended transfer, or who mistakenly makes a gift to someone other than the intended recipient, may pursue an action to remedy his or her unilateral mistake. Restatement (Third) of Restitution & Unjust Enrichment § 11 (2011). In such an action, the party advocating the mistake has the burden of proving the donor's intent and the alleged mistake by clear and convincing evidence. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 & cmts. c, e & g (2003).

The Restatements identify two types of unilateral mistakes that may occur: invalidating mistakes and mistakes in the content of a document. Restatement (Third) of Restitution & Unjust Enrichment § 5 (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 (2003). An invalidating mistake occurs when ''but for the mistake the transaction in question would not have taken place.'' Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011). ''The donor's mistake must have induced the gift;

[4]A minority of courts have declined to grant relief from a donative transfer based on allegations of unilateral mistake absent fraud or inequitable conduct. *See, e.g.*, *Willis v. Willis*, 722 S.E.2d 505, 507-08 (N.C. 2012) (holding that reformation is not available for unilateral mistakes not induced by fraud even in cases of a gift). This approach, however, is inconsistent with Nevada's general formulation of unilateral mistake, which is not limited to cases of fraud or inequitable conduct. *See generally Home Savers*, 103 Nev. at 358-59, 741 P.2d at 1356-57.

it is not sufficient that the donor was mistaken about the relevant circumstances." *Id.* § 11 cmt. c. A mistake in the content of a document arises through either a mistake of expression or a mistake of inducement. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 & cmt. i (2003). A mistake of expression occurs when a document misstates the donor's intention, fails to include a specific term that the donor intended to be included, or includes a term that was not intended. *Id.* A mistake of inducement occurs when a donor intentionally includes or omits a term, but the intent to include or omit the term was a product of mistake. *Id.* Whether a donor's mistake is characterized as a mistake of fact or law is irrelevant. Restatement (Third) of Restitution & Unjust Enrichment § 11 cmt. c (2011).

The Restatement affords the donor different remedies depending on the type of mistake.[5] Rescission is an appropriate remedy to address an invalidating mistake. Restatement (Third) of Restitution & Unjust Enrichment § 5(1) (2011); *see also Generaux*, 134 P.3d at 990. In contrast, reformation is an appropriate remedy to address mistakes in the content of the document, where the donative transfer was intended but mistakes affected the expression of the transfer. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 cmts. a, g & h (2003); *see also Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012); *Pullum*, 58 So. 3d at 757-60; *Estate of Irvine*, 309 P.3d at 990-91. The Restatements' discussion of when rescission or reformation may be appropriate is consistent with Nevada contractual law addressing remedies. *See Home Savers v. United Sec. Co.*, 103 Nev. 357, 358-59, 741 P.2d 1355, 1356 (1987) (permitting rescission for a mistake "as to a basic assumption on which" the contract was made (internal citations omitted)); *25 Corp. v. Eisenman Chem. Co.*, 101 Nev. 664, 672, 709 P.2d 164, 170 (1985) (stating that reformation is available to correct drafting mistakes in a contract to reflect the parties' true intentions).[6]

[Headnote 10]

Based on our review of the relevant Restatement sections and extrajurisdictional decisions evaluating the Restatement approach to unilateral mistake in the donative transfer context, we conclude that the Restatement's position corresponds with Nevada's overall treatment of mistake and our application of the remedies of rescis-

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[5]The Restatement permits a party to seek other restitutionary remedies in addition to the equitable remedies of rescission and reformation. Restatement (Third) of Restitution & Unjust Enrichment § 11(1) (2011). Because neither party here seeks remedies other than rescission or reformation, we do not address other potential remedies at this time.

[6]In light of our adoption of the Restatement approach to donative transfers and the consistency of the Restatement remedies with Nevada's contractual remedies, we necessarily reject Daisy's assertion that, as the donor, she possesses the exclusive right to determine what remedy is applied.

sion and reformation in the contract realm. Accordingly, we join the majority of jurisdictions in recognizing that a donor's unilateral mistake in executing a donative transfer may allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence.[7] And depending on whether the unilateral mistake constitutes an invalidating mistake or a mistake in the content of the document, the donor may be entitled to rescission or reformation of the transfer. Having adopted this approach, we now examine whether the district court arbitrarily or capriciously exercised its discretion when determining that Daisy's execution of the transfer deed was affected by unilateral mistakes and whether no genuine issues of material fact remained.

Genuine issues of fact remain as to Daisy's alleged intent and unilateral mistakes

[Headnote 11]

In the underlying case, Daisy moved for partial summary judgment and rescission on her unilateral mistake counterclaim, which the district court granted over Charron's opposition and competing motion for partial summary judgment. In reaching this conclusion, the district court found that Daisy made unilateral mistakes in executing the gift deed and that rescission of the deed transferring the property to Charron's trust was warranted. In her petition challenging the district court's determination, Charron argues that there were no mistakes in the execution of the transfer deed but that, if mistakes were made, reformation of the deed, rather than rescission, was the appropriate remedy. Daisy disagrees, asserting that her execution of the deed was based on several unilateral mistakes and that rescission was the correct remedy.

[Headnote 12]

Under the Restatement approach adopted here today, the party advocating unilateral mistake as a basis for obtaining relief from a donative transfer (in this case Daisy, the donor/trustee) must prove his or her case by clear and convincing evidence. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 & cmts. c, e & g (2003). And demonstrating unilateral mistakes in the execution or transfer of a gift depends on the donor's intent at the time of the donative transfer. *McClung v. Green*, 80 So. 3d 213, 216 (Ala. 2011) (examining the donors' intent to determine whether a mistake was made); *Generaux*, 134 P.3d at 990 ("[T]he mistake must have existed when the instrument was created."). Thus, unilateral mis-

[7]While we phrase our opinion in terms of the donor obtaining relief, circumstances may exist where other interested parties, such as the donee, the intended donee, or the beneficiary, may also request relief for a donative transfer affected by mistake. Because that issue is not directly before us, we do not further address it here.

takes cannot be said to have been made without first determining the donor's intent at the time when delivery and all other elements necessary to complete a donative transfer were completed. If the donor's intent is not in accord with the facts, then a mistake may have occurred warranting relief. Determining a donor's donative intent and beliefs is a question for the fact-finder, and the presence of ambiguity in a donor's intent in making a gift creates genuine issues of material fact that preclude summary judgment. *Anvui, L.L.C. v. G.L. Dragon, L.L.C.*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007); *Mullis v. Nev. Nat'l Bank*, 98 Nev. 510, 513, 654 P.2d 533, 535-36 (1982).

In this case, Daisy argues that she made three unilateral mistakes in transferring the condo into Charron's trust. First, even though she was sole trustee of the trust, she alleged that she mistakenly believed that she would retain control over the Las Vegas condo once it was transferred into trust. Second, she purported that she mistakenly thought that the transfer was necessary to avoid having the Las Vegas condo escheat to the state upon her death. And third, she asserted that she mistakenly believed that the deed would transfer a one-third interest in the condo to each daughter's trust. The evidence presented regarding Daisy's intent and these alleged mistakes is also conflicting.

At various times in her deposition, Daisy testified that she did not have a problem with the transfer to Charron's trust, that she wanted the transfer to be one-third into each daughter's trust, and that she did not want to transfer the Las Vegas condo at all.[8] Rasmussen testified in his deposition that he thoroughly reviewed the proposed transaction with Daisy, including whether she would retain control over the Las Vegas condo, whether it would escheat to the state, and that the entire interest in the condo would be transferred into Charron's trust. Rasmussen further testified that he believed that Daisy understood the ramifications of the donative transfer, that she was making her own decisions, and that she intended to transfer a 100-percent interest in the Las Vegas condo into Charron's trust. And although this transfer was inconsistent with Daisy's prior estate planning, Daisy expressly prohibited Rasmussen from contacting her other attorneys before she executed the transaction. Finally, while Charron appeared to concede in her deposition testimony that Daisy intended a one-third interest in the Las Vegas condo to be

[8]While Daisy's counsel sought to dismiss this conflicting testimony as something to be expected from someone who is 86 years old, such conflicts, regardless of their basis, are inherently inappropriate for resolution through a summary judgment motion. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (recognizing that summary judgment is only appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law).

placed into each daughter's trust, rather than a 100-percent interest in Charron's trust, her testimony is conflicting in this regard, and she nonetheless testified that Daisy intended to make the donative transfer.

Given the conflicting testimony from Daisy, Charron, and Rasmussen, it is uncertain what Daisy's donative intent was at the time of the donative transfer. Because the donor's intent at the time of the transaction is determinative of whether unilateral mistakes affected the execution or transfer of the gift, *McClung*, 80 So. 3d at 216, genuine issues of fact necessarily remain as to whether unilateral mistakes affected Daisy's execution of the deed transferring the Las Vegas condo into Charron's trust, and thus, the district court was precluded from granting partial summary judgment. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

With regard to the issue of available remedies, however, even if Charron had conceded that Daisy intended the transfer, but made a mistake in the content of the deed by transferring 100 percent of the interest in the property to Charron, rather than one-third to each daughter, we would still decline to address the appropriate remedy for this mistake. In this regard, Daisy did not move for reformation and the ultimate remedy in this matter will depend on the Restatements' treatment of available remedies, as discussed above, for this or any other mistake that Daisy is found to have made and the remedies available for the parties' other causes of action, if they are also proven. Accordingly, it is inappropriate to discuss a remedy on extraordinary review of a partial summary judgment when conflicting testimony and other causes of action remain to be resolved.

For the reasons discussed above, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate the portion of its order granting Daisy's motion for partial summary judgment and enter an order denying that motion. We do not disturb the remainder of the district court's order denying Charron's countermotions.[9]

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

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[9]Charron's writ petition primarily addressed the district court's grant of Daisy's motion for partial summary judgment, but also included a request for reformation of the deed transferring the Las Vegas condo into trust. As discussed herein, however, genuine issues of material fact remain concerning Daisy's intent that precludes summary judgment. We thus decline to disturb the portion of the district court's order denying Charron's countermotions.

In light of our resolution of this matter, we vacate the stay imposed by our March 26, 2013, order and clarified by our July 1, 2013, order.

ERISTEO CAMPOS-GARCIA, INDIVIDUALLY, APPELLANT, *v.* ANN JOHNSON, INDIVIDUALLY, RESPONDENT.

No. 62578

August 7, 2014 331 P.3d 890

Jurisdictional prescreening of an appeal from a district court judgment and amended judgment on the jury verdict in a tort action. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Following a jury trial in a tort action, the district court entered judgment on the jury verdict in favor of plaintiff and subsequently entered an order awarding plaintiff attorney fees and costs. Defendant appealed from judgment entering verdict, but not from order awarding fees and costs. The supreme court, DOUGLAS, J., held that post-judgment order awarding attorney fees and costs was appealable separate from original judgment.

Dismissed in part.

Hutchison & Steffen, LLC, and *Michael K. Wall*, Las Vegas, for Appellant.

Glen Lerner Injury Attorneys and *Paul D. Powell*, Las Vegas, for Respondent.

1. APPEAL AND ERROR; JUDGMENT; MOTIONS.
   An appeal must be taken from an appealable order when first entered; superfluous or duplicative orders and judgments, those filed after an appealable order has been entered that do nothing more than repeat the contents of that order, are not appealable and, generally, should not be rendered. NRCP 54(a).
2. JUDGMENT.
   When district courts, after entering an appealable order, go on to enter a judgment on the same issue, the judgment is superfluous.
3. APPEAL AND ERROR.
   Post-judgment order awarding plaintiff attorney fees and costs in tort action did not constitute an amended judgment, and therefore defendant was required to take separate appeal from order after already filing notice of appeal from the district court's entry of judgment on jury verdict in favor of plaintiff, where, although the order was labeled as an amended judgment, order did not in any way alter the legal rights and obligations set forth in the original judgment. NRCP 54(a); NRAP 3A(b)(8).

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

What is an appealable order? We issue this opinion to address an increasingly frequent practice in our district courts that, for those

caught unaware, often results in the unintentional loss of the right to appeal. In particular, we emphasize that an appeal must be taken from an appealable order when first entered; superfluous or duplicative orders and judgments—those filed after an appealable order has been entered that do nothing more than repeat the contents of that order—are not appealable and, generally, should not be rendered.

FACTS AND PROCEDURAL HISTORY

After the jury rendered a verdict in favor of the plaintiff in the tort action below, the district court entered judgment on the verdict against defendant/appellant Eristeo Campos-Garcia, thereby resolving all of the rights and liabilities of the parties before it and all of the issues in the case, except for attorney fees and costs. Campos-Garcia timely filed a notice of appeal from the judgment, and our review of the appeal with respect to that judgment has revealed no jurisdictional concern. Later, the district court entered an order awarding the plaintiff attorney fees and costs, but Campos-Garcia did not file a notice of appeal from that order. Subsequently, however, the district court signed and entered an ''amended judgment'' prepared by the plaintiff's attorney, which incorporated the attorney fees and costs award into the original judgment. Campos-Garcia then filed an amended notice of appeal identifying the amended judgment.

Concerned that the amended judgment was not substantively appealable because it merely reiterated, without alteration, the terms of the original judgment and the attorney fees and costs award, and noting that Campos-Garcia had failed to timely appeal from the earlier order awarding attorney fees and costs, this court ordered Campos-Garcia to show cause why the appeal from the amended judgment should not be dismissed for lack of jurisdiction. Campos-Garcia timely responded, explaining that all parties and the district court anticipated that the attorney fees and costs award would be incorporated into an amended judgment to make it official and executable, as is the customary practice in the Eighth Judicial District Court. Respondent filed a reply, arguing that the appeal from the attorney fees and costs order was untimely.

DISCUSSION

[Headnotes 1, 2]

Under NRCP 54(a), the term ''[j]udgment'' includes ''any order from which an appeal lies.'' We have consistently explained that the appealability of an order or judgment depends on ''what the order or judgment actually does, not what it is called.'' *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (emphasis omitted); *see Lee v. GNLV Corp.*, 116 Nev. 424, 426-27, 996 P.2d 416, 417-18 (2000); *Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959). Thus, we have recognized that a post-judgment order awarding attorney fees and costs is appealable, even though not termed a

"judgment" or incorporated into the final judgment. *Lee*, 116 Nev. at 426, 996 P.2d at 417 (citing the special-order-after-final-judgment rule, now NRAP 3A(b)(8)). Such post-judgment orders may also be executed on, even if not labeled "judgment." NRCP 54(a) (equating orders with judgments). When district courts, after entering an appealable order, go on to enter a judgment on the same issue, the judgment is superfluous. *Lee*, 116 Nev. at 427, 996 P.2d at 417-18 (citing *Taylor*, 75 Nev. at 410, 344 P.2d at 676-77). Because superfluous judgments are unnecessary and confuse appellate jurisdiction, we disapprove of this practice, generally.

[Headnote 3]

In *Morrell v. Edwards*, we explained that an appeal is properly taken from an amended judgment only when the amendment "disturb[s] or revise[s] legal rights and obligations which the prior judgment had plainly and properly settled with finality." 98 Nev. 91, 92, 640 P.2d 1322, 1324 (1982). Here, the original judgment resolved all of the issues in the case and thus was the final, appealable judgment. NRAP 3A(b)(1); *Lee*, 116 Nev. at 426, 996 P.2d at 417. The order awarding attorney fees and costs was independently appealable as a special order after final judgment, NRAP 3A(b)(8); *Lee*, 116 Nev. at 426, 996 P.2d at 417, but appellant's amended notice of appeal was untimely as to that order. NRAP 4(a)(1). And the amended judgment identified in the amended notice of appeal did not in any way alter the legal rights and obligations set forth in either the original judgment or the order awarding attorney fees and costs; thus, the amended judgment was superfluous and cannot be appealed. As a result, we lack jurisdiction and dismiss this appeal as to the amended judgment and the related attorney fees and costs award, only. Briefing as to the remainder of this appeal from the final judgment will be reinstated in a separate order.

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

KELLY BARRETT, an Individual; DEAN AND WENDY COOPER, Husband and Wife; RICHARDS ZIEMELIS AND SHELLY CONNELL-ZIEMELIS, Husband and Wife; HARRY AND LISA BURGESS, Husband and Wife; MICHAEL SOUSOUAY, an Individual; KIM COLBERT, an Individual; JAMES AND KAREN TIPPEL, Husband and Wife; ROSA MARTINEZ, an Individual; JOSEPHINE MARTINEZ, an Individual; RANDY AND JOHNNA REECE, Husband and Wife; PATRICIA MONTEROS, an Individual; DONALD ROBBINS AND HOPE ILEEN KELLER-ROBBINS, Husband and Wife; LENA HAYCOCK, an Individual; TRELYNN GUICE, an Individual; ENRIQUE CABRERA, an Individual; MARVIN AND ROSALYN RANDALL, Husband and Wife; JOHN AND SUSAN POLYAK, Husband and Wife; KENYETTA BANKS, an Individual; AMANDA MATTOS, an Individual; RONNE R. CRAMER AND CYNTHIA L. CRAMER, Husband and Wife; RICHARD J. LAHEY AND DIANE C. LAHEY, Husband and Wife; NICHOLAS D. MARQUEZ AND CATHERINE M. MARQUEZ, Husband and Wife; DONALD J. WYMAN AND MACHELLE A. WYMAN, Husband and Wife; and APRIL WASHINGTON, an Individual, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ALLAN R. EARL, District Judge, Respondents, and UPONOR INC., a Minnesota Corporation; RCR PLUMBING & MECHANICAL, INC. dba RCR COMPANIES, a California Corporation, Real Parties in Interest.

No. 63871

August 7, 2014 331 P.3d 892

Petition for a writ of mandamus or, in the alternative, prohibition challenging a district court order requiring a subcontractor to provide NRS Chapter 40 prelitigation notice to another subcontractor, prior to filing a fourth-party complaint against it.

Homeowners in subdivision brought action against general contractor, alleging that homes had been constructed with defective plumbing parts. General contractor filed third-party complaint against subcontractor, who filed fourth-party complaint against supplier. The district court entered order requiring subcontractor to provide prelitigation notice to supplier. Homeowners petitioned for writ of mandamus or, in the alternative, prohibition. The supreme court, Gibbons, C.J., held that subcontractor was not required to provide prelitigation notice to supplier.

Petition granted.

Canepa Riedy & Rubino and *Scott K. Canepa* and *Terry W. Riedy*, Las Vegas; *Carraway & Associates* and *James D. Carraway*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *Michael J. Gayan* and *J. Randall Jones*, Las Vegas; *Lynch, Hopper & Salzano, LLP*, and *Charles D. Hopper* and *Francis Lynch, II*, Las Vegas; *Maddox, Segerblom & Canepa, LLP*, and *Robert C. Maddox*, Reno, for Petitioners.

Bremer Whyte Brown & O'Meara, LLP, and *Peter C. Brown* and *Prescott T. Jones*, Las Vegas; *Hansen Rasmussen, LLC*, and *R. Scott Rasmussen* and *Vadim Veksler*, Las Vegas; *Helm & Associates* and *Kevin E. Helm*, Las Vegas; *Grotefeld, Hoffman, Schleiter, Gordon & Ochoa* and *Lindsay E. Dansdill, Howard L. Lieber*, and *John R. Schleiter*, Chicago, Illinois, for Real Parties in Interest.

1. Mandamus.
   A writ of mandamus is available to compel the performance of a legal duty or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. Mandamus.
   Mandamus relief was appropriate for subdivision homeowners challenging the district court order requiring subcontractor to provide supplier with prelitigation notice before allowing subcontractor to file fourth-party complaint against supplier, in homeowners' underlying action alleging that homes had been constructed with defective plumbing parts; homeowners' writ petition involved an issue of first impression and statewide importance, supplier elected to make repairs after receiving notice, homeowners would not have an adequate legal remedy after supplier made repairs, and underlying action had already existed in prelitigation stage for over five years, during which time supplier had refused to make repairs. NRS 34.160, 34.170, 40.645, 40.646.
3. Antitrust and Trade Regulation.
   Under statutes governing prelitigation notices in construction defect cases, subcontractor was not required to provide supplier with prelitigation notice before filing fourth-party complaint against supplier, in action by subdivision homeowners alleging that homes had been constructed with defective plumbing parts; although general contractor was required to forward any notices of defect to subcontractors and suppliers or forgo suit against those subcontractors and suppliers, neither homeowners nor the subcontractors were required to give prelitigation notice to another subcontractor or supplier. NRS 40.645, 40.646.
4. Appeal and Error; Mandamus.
   The supreme court reviews issues of statutory construction de novo, even in the context of a petition for writ of mandamus.
5. Statutes.
   To determine the Legislature's intent in enacting a statute, the supreme court will not look beyond the statute's plain language when a statute is clear on its face.

Before the Court En Banc.[1]

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, GIBBONS, C.J.:

In this opinion, we address whether a defendant subcontractor must provide NRS Chapter 40 prelitigation notice, which is statutorily followed by an opportunity to repair, prior to filing a fourth-party complaint against a supplier. We conclude that nothing in NRS Chapter 40 requires this notice.

FACTS AND PROCEDURAL HISTORY

Petitioners, homeowners in the Tropical Breeze subdivision in Las Vegas, found allegedly defective plumbing parts in their residences. They provided NRS Chapter 40 notice to the general contractor/developer Centex Homes, informing it of this alleged defect. Centex then forwarded this notice to its numerous subcontractors and suppliers, including real party in interest Uponor, Inc. Despite receiving the notice, Uponor declined to make repairs, asserting that it was not a supplier under NRS Chapter 40. Then, the homeowners filed a complaint against Centex, who, in turn, filed a third-party complaint against numerous subcontractors, including real party in interest RCR Plumbing & Mechanical, Inc. RCR then filed a fourth-party complaint against Uponor. Uponor moved to dismiss the fourth-party complaint against it, asserting that it had not been provided with notice of the alleged defects.

The district court found that Uponor was a supplier under NRS Chapter 40 and that RCR was required to give notice of the alleged construction defect to Uponor prior to filing its fourth-party complaint.[2] As a result, the district court stayed the proceedings and allowed RCR to provide Uponor notice. Once RCR provided notice, Uponor elected to make repairs. The homeowners now petition this court for a writ of mandamus or prohibition, arguing that neither they nor RCR were required to give Uponor NRS Chapter 40 notice and an opportunity to repair prior to RCR's filing of its fourth-party complaint.

DISCUSSION

[Headnote 1]

A writ of mandamus is available to compel the performance of a legal duty or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Its counterpart, a writ of prohibition, may issue to arrest the proceedings of a district court exercising its judicial functions in excess of its juris-

[2]Around this time, the homeowners requested and were granted leave to amend their complaint to add claims against RCR and Uponor.

diction. *See* NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Writ relief is typically not available, however, when the petitioners have a plain, speedy, and adequate remedy at law. *See* NRS 34.170; NRS 34.330; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558.

[Headnote 2]

Preliminarily, RCR and Uponor argue that writ relief is inappropriate and unwarranted in this case. We choose to entertain this petition because it involves an issue of first impression and statewide importance, and because an appeal will not provide the homeowners with a speedy and adequate remedy. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004); NRS 34.170; NRS 34.330. Since Uponor elected to make repairs after RCR gave notice, the homeowners will not have an adequate legal remedy once Uponor makes these repairs. *See D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007). Further, this case has already existed in the prelitigation stage for over five years, during which time Uponor previously refused to make repairs. *Id.* at 475, 168 P.3d at 736. Thus, we conclude that writ relief is appropriate.

NRS Chapter 40 does not require a subcontractor to give prelitigation notice before filing a fourth-party complaint against a supplier

[Headnote 3]

Before claimant homeowners may assert construction defect claims in the district court, they must provide the contractor written notice of the alleged defect, followed by an opportunity to repair. NRS 40.645; NRS 40.647(1). The homeowners here argue that, while NRS Chapter 40 compels the contractor to forward any notices of defect to the subcontractors and suppliers or forgo suit against those subcontractors and suppliers, the chapter does not require either the claimant homeowners or the subcontractors to give prelitigation notice to another subcontractor or supplier like Uponor. We agree.

[Headnotes 4, 5]

Although the homeowners assert that nothing in NRS Chapter 40 requires them or a defendant subcontractor/fourth-party plaintiff to give notice to a subcontractor or supplier, Uponor contends that such notice is mandated by NRS 40.645, NRS 40.646, NRS 40.647(2), NRS 40.690, and the overall purpose of the notice requirement underlying these statutes. This court reviews issues of statutory construction de novo, even in the context of a writ peti-

tion. *D.R. Horton*, 123 Nev. at 476, 168 P.3d at 737. To determine the Legislature's intent, this court will not look beyond the statute's plain language when a statute is clear on its face. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012).

NRS 40.645(1) lays out the prelitigation notice requirements that a claimant must follow:

> [B]efore a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant:
>
> (a) *Must* give written notice . . . to the contractor . . . ; and
>
> (b) *May* give written notice . . . to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect, if the claimant knows that the contractor is no longer licensed in this State or that the contractor no longer acts as a contractor in this State.

(Emphases added.) Based on the plain language of NRS 40.645, a claimant "must" give notice to a contractor. The contractor "shall" forward that notice to any subcontractors and suppliers that it believes contributed to the alleged defect, so that they can decide whether to repair the defect. NRS 40.646; NRS 40.647. A claimant "may" give notice to a subcontractor, supplier, or design professional, if the contractor is unavailable, but the claimant is not required to do so. If a claimant fails to comply with the prelitigation notice requirements of NRS Chapter 40, then, under NRS 40.647(2), the district court must dismiss the action without prejudice or stay the proceedings until the claimant complies. And if a contractor fails to forward a prelitigation notice to its subcontractors and suppliers, it generally may not sue them. NRS 40.646(2). Although "claimant" is defined as the owner of the residence or a representative of a homeowner's association responsible for the residence, NRS 40.610, NRS 40.690 allows a contractor to be treated as a claimant for purposes of requiring another party to appear and participate in the NRS Chapter 40 proceedings after that party receives notice of the proceedings from the contractor or claimant. Thus, as we have broadly recognized, NRS Chapter 40 is designed to avoid costly litigation by providing all contractors and subcontractors with notice of and an opportunity to repair construction defects. *D.R. Horton*, 123 Nev. at 476, 168 P.3d at 737.

Given the permissive language in NRS 40.645(1)(b), however, we conclude that neither it nor any of the other statutes mentioned requires the homeowners or RCR to give notice to Uponor prior to filing a fourth-party complaint against it since Uponor is a supplier.

The statutes distinguish between a ''contractor'' and a ''subcontractor,'' providing each with specific and sometimes distinct requirements regarding prelitigation notice. Beginning with NRS 40.645, the claimaint ''may'' give notice to ''any subcontractor'' prior to ''commenc[ing] an action . . . for a constructional defect against a contractor.'' Moreover, while a ''claimant'' may include a contractor based on NRS 40.690, there is no language in NRS Chapter 40 that allows a subcontractor to be defined as a claimant.[3] Thus, we conclude that RCR, in its role as a subcontractor, was not required to give notice to Uponor prior to filing a fourth-party complaint. Further, we conclude that the homeowners, as claimants, ''may'' have given notice to Uponor, based on its role as a supplier, but were not required to.

Briefly addressing the remaining pertinent statutes raised by Uponor, NRS 40.646 requires a contractor to forward notice to a subcontractor ''whom the contractor reasonably believes is responsible,'' however it does not provide any notice requirement for a subcontractor who believes another subcontractor or supplier is responsible. Similarly, NRS 40.690 governs NRS Chapter 40 proceedings, such as mediation under NRS 40.680, not the district court proceedings, and it requires notice of those NRS Chapter 40 proceedings, not of construction defects. It further does not create any notice requirements that a subcontractor must follow in order to file a fourth-party complaint against another subcontractor or supplier. Therefore, the homeowners and RCR were not required under NRS 40.690 to give notice to Uponor. Moreover, while the statutes' and, indeed, chapter's purpose is, in part, to allow defendants an initial opportunity to repair, the Legislature chose to carry out that purpose in the manner provided by the statutes, and this court will not read into the statutes a notice requirement between a subcontractor and another subcontractor or supplier where one does not exist.

CONCLUSION

We conclude that neither NRS 40.645 nor any other provision require that claimant homeowners or subcontractors give notice to other subcontractors, suppliers, or design professionals prior to commencing or adding an action against them. Thus, the district court erred in requiring RCR to give notice of the construction defects to Uponor. We therefore order the clerk of this court to issue

[3]Similarly, while NRS 40.647 prevents a claimant from commencing an action if the claimant did not provide proper notice pursuant to NRS 40.645, a subcontractor is not included in the NRS Chapter 40 definition of claimant, thus it does not prevent a subcontractor from commencing an action against another subcontractor.

[4]In light of this conclusion, the homeowners' alternative request for a writ of prohibition is denied.

a writ of mandamus ordering the district court to vacate the portion of its August 2, 2013, order directing RCR to give notice of the construction defects to Uponor.[4]

PICKERING, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

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[4]In light of this conclusion, the homeowners' alternative request for a writ of prohibition is denied.