All of Wingco's claims proceed from the mistaken premise that NRS 687B.145(3) requires a written rejection of medpay coverage. Because NRS 687B.145(3) does not require a written rejection of medpay coverage, Wingco's claims fail.

We therefore affirm the district court's order of dismissal.

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

THE POWER COMPANY, INC., A NEVADA CORPORATION DBA CRAZY HORSE TOO GENTLEMEN'S CLUB; AND RICK RIZZOLO, INDIVIDUALLY, APPELLANTS, *v.* KIRK AND AMY HENRY, HUSBAND AND WIFE, RESPONDENTS.

No. 59328

March 27, 2014 321 P.3d 858

Appeal from a district court judgment in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Plaintiff, who was rendered quadriplegic by a club bouncer, brought action against club owner and owner's president for assault, battery, and negligent hiring, retention, and supervision. The parties settled. The district court granted plaintiff's motion to reduce the settlement agreement to judgment. Owner and president appealed. The supreme court, DOUGLAS, J., held that: (1) the action was not subject to dismissal for want of prosecution after plaintiff obtained a settlement, and (2) settlement agreement was not conditioned upon generation of sufficient proceeds to pay the settlement amount.

Affirmed.

[Rehearing denied June 6, 2014]

Patti, Sgro & Lewis and *Anthony P. Sgro*, Las Vegas; *Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.*, and *Daniel E. Carvalho* and *Charles A. Michalek*, Las Vegas, for Appellants.

Campbell & Williams and *Donald J. Campbell* and *Philip R. Erwin*, Las Vegas; *Hunterton & Associates* and *C. Stanley Hunterton*, Las Vegas, for Respondents.

Cf. Ippolito v. Liberty Mut. Ins. Co., 101 Nev. 376, 378-79, 705 P.2d 134, 136 (1985) (court will read coverage mandated by statute into Nevada motor vehicle insurance policies). As *Banks* correctly concludes, courts are "not bound by the legal conclusions of insurance companies" in interpreting Nevada's insurance code. 2012 WL 6697542, at *2.

1. Appeal and Error.
   The supreme court would not address club owner and owner's president's contention that the nonjudicial foreclosure sale of the club did not constitute a "sale" under personal injury settlement agreement requiring owner and president to make a payment to the plaintiff upon sale of the club, in owner's and president's appeal from the district court's reduction of the settlement agreement to judgment, where owner and president failed to support the contention with sufficient argument or legal authority.
2. Appeal and Error.
   The supreme court reviews questions of law de novo.
3. Pretrial Procedure.
   Personal injury action was not subject to dismissal for want of prosecution based on plaintiff's failure to bring the action to trial within five years, where plaintiff obtained a written and signed settlement agreement within five years. NRCP 41(e).
4. Pretrial Procedure.
   Dismissal of an action that has not been brought to trial within five years for want of prosecution is mandatory, and the court may not examine the equities of a case to determine whether the time should be extended. NRCP 41(e).
5. Pretrial Procedure.
   When a motion to dismiss an action that has not been brought to trial within five years for want of prosecution is improperly denied, the district court lacks any further jurisdiction, rendering its subsequent orders going to the merits of the action void. NRCP 41(e).
6. Compromise and Settlement.
   An enforceable settlement agreement has the attributes of a judgment in that it is decisive of the rights of the parties and serves to bar reopening of the issues settled.
7. Pretrial Procedure.
   It is within the district court's purview to determine, on a case-by-case basis, whether judicial economy is best served by allowing an action to remain pending after a settlement agreement has been reached but before the parties have completely performed their obligations, notwithstanding the rule of dismissal for want of prosecution of an action that has not been brought to trial within five years. NRCP 41(e).
8. Pretrial Procedure.
   A plaintiff's dismissal of his or her complaint after the plaintiff entered into an enforceable settlement agreement would deprive the district court of jurisdiction over the parties, potentially requiring a party to initiate a new action in contract to enforce the agreement if the other party fails to perform. NRCP 41(e).
9. Compromise and Settlement.
   A settlement agreement is a contract governed by general principles of contract law.
10. Appeal and Error.
    Like a contract, the interpretation of a settlement agreement is reviewed de novo.
11. Contracts.
    When a contract's language is unambiguous, the supreme court will construe and enforce it according to that language.

12. Compromise and Settlement.
A district court can grant a party's motion to enforce a settlement agreement by entering judgment on the instrument if the agreement is either reduced to a signed writing or entered in the court minutes in the form of an order, so long as the settlement agreement's material terms are certain. EDCR 7.50.

13. Compromise and Settlement.
Personal injury settlement agreement requiring club owner and owner's president to make a payment of $9 million to the plaintiff upon sale of the club was not conditioned upon president's management of the club for one year or upon the generation of sufficient proceeds to pay the settlement amount, even though the settlement agreement stated that the sale of the club would be consistent with the terms of owner's and president's federal plea agreement, where the settlement agreement unequivocally stated that owner and president were required to pay the remaining $9 million regardless of the sufficiency of the proceeds from the club's sale.

Before the Court En Banc.[1]

OPINION

By the Court, Douglas, J.:

In this opinion, we address whether NRCP 41(e)'s provision requiring dismissal for want of prosecution applies to an action in which the parties entered into a written and signed settlement agreement before NRCP 41(e)'s five-year deadline expired, and whether the district court erred in reducing the parties' settlement agreement to judgment. We hold that NRCP 41(e) does not apply to such an action and that the district court did not err in reducing the parties' settlement agreement to judgment. We therefore affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

Respondent Kirk Henry was rendered quadriplegic by a bouncer at the Crazy Horse Too Gentlemen's Club, which was owned and operated by appellant The Power Company, Inc. (TPCI). On October 2, 2001, Mr. Henry and his wife, respondent Amy Henry, filed a civil complaint against TPCI for, among other things, assault, battery, and loss of consortium. The Henrys later amended their complaint to include TPCI's president, appellant Rick Rizzolo, and to add causes of action for negligent hiring, retention, and supervision.

On August 8, 2006, four years and ten months after the Henrys filed their action, they entered into a settlement agreement

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

with TPCI and Rizzolo.[2] The settlement agreement provides that upon TPCI and Rizzolo's payment of $10 million to the Henrys, the Henrys will release TPCI and Rizzolo from all liability related to Mr. Henry's injury. While $1 million was owed to the Henrys at signing, the remaining $9 million was due upon the Crazy Horse Too's sale, regardless of the sale's net proceeds, per the settlement agreement. TPCI and Rizzolo paid the Henrys $1 million at signing.

Several months after entering into the settlement agreement, the Henrys moved the district court to reduce the agreement to judgment. The district court denied the motion on the grounds that the settlement agreement had not been breached. Less than a year later, the Henrys moved the district court to reduce the settlement agreement to judgment for a second time without success because, according to the district court, the club had not been sold to trigger the payment of the remaining $9 million owed to the Henrys according to the agreement's terms.

Prior to the club's sale, and more than five years after the Henrys filed their complaint, TPCI and Rizzolo moved the district court to dismiss the Henrys' action under NRCP 41(e) for want of prosecution on two occasions. The district court denied the first motion to dismiss, stating that the motion had no merit insofar as the Henrys had been diligent in the action. In denying the second motion to dismiss, the district court concluded that NRCP 41(e) did not apply because the settlement agreement obviated the need for a trial on the merits.

[Headnote 1]

Ultimately, the Crazy Horse Too sold at a nonjudicial foreclosure sale for $3 million.[3] Having received no payment from TPCI and Rizzolo for the $9 million owed after the club's sale, the Henrys filed a third motion to reduce the settlement agreement to judgment. The district court granted that motion. TPCI and Rizzolo appeal the

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[2]Two months before entering into their settlement agreement, the Henrys, TPCI, and Rizzolo participated in a global settlement process with the federal government relating to federal criminal charges pending against TPCI and Rizzolo and the potential civil liability to the Henrys. While TPCI and Rizzolo entered individual plea deals with the federal government that required them to pay restitution to the Henrys, the Henrys were not parties to any government agreement.

[3]TPCI and Rizzolo suggest that the nonjudicial foreclosure sale did not constitute a sale for the purpose of the settlement agreement, but they fail to support this contention with sufficient argument or legal authority, and so we do not address it in this opinion. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider an issue when the party failed "to cogently argue, and present relevant authority, in support of his appellate concerns").

judgment and raise arguments regarding the district court's denials of their two motions to dismiss under NRCP 41(e).

DISCUSSION

The district court properly denied TPCI and Rizzolo's two motions to dismiss for want of prosecution under NRCP 41(e)

[Headnote 2]

This court reviews questions of law de novo. *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 872 (2013). The question of law before us is whether NRCP 41(e) requires dismissal of an action in which the parties have entered into a written and signed settlement agreement concerning the action within five years after the plaintiffs filed the complaint.

[Headnote 3]

TPCI and Rizzolo argue that NRCP 41(e)'s language required the district court to grant their motions to dismiss for want of prosecution regardless of the settlement agreement because the Henrys failed to bring the case to trial within five years of filing their complaint. According to TPCI and Rizzolo, it follows that the district court's reduction of the settlement agreement to judgment after the five-year rule had been invoked was void. The Henrys argue that the application of NRCP 41(e) to an action in which the parties have entered into a written and signed settlement agreement is a matter of first impression, and that we should follow the California courts by determining that a valid settlement agreement nullifies a provision mandating dismissal for want of prosecution. *See Gorman v. Holte*, 211 Cal. Rptr. 34 (Ct. App. 1985) (concluding that a settlement agreement renders California's mandatory dismissal-for-want-of-prosecution provision legally irrelevant).

[Headnotes 4, 5]

In Nevada, a district court is required to dismiss an action that has not been brought to trial within five years after the plaintiff filed the complaint, unless the parties stipulate in writing to extend the time for trial. NRCP 41(e) (stating that such an action "shall be dismissed by the court"). Dismissal for want of prosecution under NRCP 41(e) is mandatory, and the court may not examine the equities of a case to determine whether the time should be extended. *Monroe v. Columbia Sunrise Hosp. Ctr.*, 123 Nev. 96, 99-100, 158 P.3d 1008, 1010 (2007). When a motion to dismiss under NRCP 41(e) is improperly denied, the district court lacks any further jurisdiction, rendering its subsequent orders going to the merits of the action void. *Cox v. Eighth Judicial Dist. Court*, 124 Nev. 918, 925, 193 P.3d 530, 534 (2008). Therefore, if NRCP 41(e) applies here, the district court should have dismissed the Henrys' action and the district court's judgment on the settlement agreement is void.

This court has not addressed whether NRCP 41(e) applies when the parties have entered into a written and signed settlement agreement that resolves all of the issues raised in the complaint. TPCI and Rizzolo contend that this court's holding in *Smith v. Garside*, 81 Nev. 312, 402 P.2d 246 (1965), controls our decision in this matter. In *Smith*, this court held that the plaintiff's failure to bring her case to trial within the mandatory time period under NRCP 41(e) required dismissal of her case for want of prosecution when a proper trial date was vacated in light of a settlement understanding that was never completed. 81 Nev. at 313-14, 402 P.2d at 246-47. In concluding that the settlement understanding did not remove the action from the scope of NRCP 41(e), the court stated that once the agreement was reached, the plaintiff was obligated to complete the agreement and obtain a dismissal of the case on that ground. *Id.* at 314, 402 P.2d at 247. Notably, the *Smith* opinion did not discuss the legal principles underlying such a requirement or the consequences of its application. *See id.* Thus, we take this opportunity to clarify *Smith* and address the effect of a settlement agreement on the application of NRCP 41(e)'s mandatory dismissal provision.

In *Smith*, although the plaintiff asserted that a settlement was reached, there was no indication that a binding settlement agreement was formed, such as by putting the terms of the agreement into the record or by reducing the agreement to writing. *See* EDCR 7.50 (providing that an agreement or stipulation between the parties or their attorneys will not be effective "unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same is in writing subscribed by the party against whom the same shall be alleged, or by the party's attorney"); *see also* DCR 16. Absent an enforceable settlement agreement, the parties' unconsummated settlement understanding had no effect on the proceedings, and NRCP 41(e) applied. *See Smith*, 81 Nev. at 314, 402 P.2d at 247.

[Headnote 6]

Had the *Smith* parties entered into a written and signed settlement agreement before NRCP 41(e)'s time period elapsed, the situation would have been different. An enforceable settlement agreement "has the attributes of a judgment in that it is decisive of the rights of the parties and serves to bar reopening of the issues settled." *See Gorman*, 211 Cal. Rptr. at 37. Based on this reasoning, California courts have held that California's mandatory dismissal-for-want-of-prosecution provision does not apply to a case when there is an existing, valid settlement agreement to the dispute that leaves no issues to be tried.[4] *See Gorman*, 211 Cal. Rptr. at 36-37.

[4]Although the relevant California provisions are different from the Nevada statute insofar as the California provisions include an exception under which dismissal is not required if, for any reason, bringing the action to trial "was

The California courts' reasoning regarding settlement agreements is consistent with this court's treatment of district court orders granting summary judgment. In addressing the effect of a summary judgment motion on the application of NRCP 41(e)'s dismissal provision, this court has looked to the California courts' definition of a trial as " 'the examination before a competent tribunal, according to the law of the land, of questions of fact or of law put in issue by pleadings, for the purpose of determining the rights of the parties.' " *See United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Indus.*, 105 Nev. 816, 819-20, 783 P.2d 955, 957 (1989) (quoting *Bella Vista Dev. Co. v. Superior Court of Cal.*, 36 Cal. Rptr. 106, 109 (Ct. App. 1963)). Applying that definition, this court has concluded that a case was "brought to trial" under NRCP 41(e) when a plaintiff filed a summary judgment motion before the expiration of the five-year rule and the district court subsequently granted that motion because "the granting of a motion for summary judgment involves first finding that no triable issues of fact remain and then determining the rights of the parties by applying the law to the facts." *See United Ass'n of Journeymen*, 105 Nev. at 820, 783 P.2d at 957.

[Headnotes 7, 8]

While a settlement agreement will not necessarily involve a judicial determination, it does resolve the relative legal rights and liabilities of the parties, eliminating the need to try any issues resolved by the agreement. *See id.* Accordingly, we conclude that, when the parties have entered into a binding settlement agreement that resolves all of the issues pending in the action, eliminating the need for a trial, the case has been "brought to trial" within the meaning of NRCP 41(e). Thus, the district court here did not err in denying TPCI and Rizzolo's motions to dismiss the Henrys' action under NRCP 41(e) because the Henrys, TPCI, and Rizzolo entered into an enforceable settlement agreement resolving the pending issues within five years of the Henrys filing their complaint. *See* EDCR 7.50. And because the NRCP 41(e) motions were properly denied, the district court retained jurisdiction over the matter until the final judgment was entered.[5] *Cf. Cox*, 124 Nev. at 925, 193 P.3d at 534.

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impossible, impracticable, or futile," Cal. Civ. Proc. Code § 583.340(c) (West 2011), the *Gorman* court did not rely on this exception when reaching its decision. *See Gorman*, 211 Cal. Rptr. at 36-37.

[5]To the extent that the *Smith* opinion suggests that a plaintiff who has entered into an enforceable settlement agreement must promptly dismiss his or her complaint, such a dismissal would deprive the district court of jurisdiction over the parties, *see SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 173 P.3d 715 (2007), potentially requiring a party to initiate a new action in contract to enforce the agreement if the other party fails to perform. In light of this and other legitimate reasons why an action might remain in the district court when

The district court properly granted the Henrys' motion to reduce the settlement agreement to a judgment

TPCI and Rizzolo alternatively argue that, even if the district court did not err by declining to dismiss the case under NRCP 41(e), the court was precluded from reducing the settlement agreement to judgment in a summary proceeding without considering their contract defenses or resolving existing factual disputes. Specifically, TPCI and Rizzolo contend that their performance under the agreement was contingent on Rizzolo having one year to operate the club so that there would be sufficient proceeds, either generated from the club's sale or saved during the year of operation, to pay the Henrys what was owed. The Henrys contend that the district court properly reduced the settlement agreement to judgment because the agreement's terms were unambiguous and did not include the contingencies alleged by TPCI and Rizzolo.

[Headnotes 9-12]

A settlement agreement is a contract governed by general principles of contract law. *May v. Anderson*, 121 Nev. 668, 672, 199 P.3d 1254, 1257 (2005). Like a contract, the interpretation of a settlement agreement is reviewed de novo. *See id.* We have stated that contracts will be construed from their written language and enforced as written. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (2001). Thus, when a contract's language is unambiguous, this court will construe and enforce it according to that language. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 211, 252 P.3d 681, 693 (2011). A district court can grant a party's motion to enforce a settlement agreement by entering judgment on the instrument if the agreement is either reduced to a signed writing or entered in the court minutes in the form of an order, *see Resnick v. Valente*, 97 Nev. 615, 616, 637 P.2d 1205, 1206 (1981); *see also* EDCR 7.50; DCR 16, so long as the settlement agreement's material terms are certain. *May*, 121 Nev. at 672, 119 P.3d at 1257.

[Headnote 13]

Here, the settlement agreement's language is unambiguous. TPCI and Rizzolo agreed to pay the Henrys $10 million in exchange for a release of all liability related to Mr. Henry's injury at the Crazy Horse Too upon the club's sale. While the settlement agreement stated that the sale of the Crazy Horse Too would be consistent with the terms of TPCI and Rizzolo's federal plea agreements, the terms

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the parties have entered into a settlement agreement, we clarify that it is within the district court's purview to determine, on a case-by-case basis, whether judicial economy is best served by allowing an action to remain pending after a settlement agreement has been reached but before the parties have completely performed their obligations.

of the settlement agreement do not make payment contingent on Rizzolo's management of the Crazy Horse Too for one year or on the generation of sufficient proceeds to pay the settlement amount. Instead, the settlement agreement unequivocally states that TPCI and Rizzolo were required to pay the remaining $9 million to the Henrys regardless of the sufficiency of the proceeds from the club's sale. Thus, the district court properly determined that the settlement agreement must be enforced according to its clear language, *see In re Amerco Derivative Litig.*, 127 Nev. at 211, 252 P.3d at 693, which requires TPCI and Rizzolo to pay the Henrys $9 million upon the sale of the Crazy Horse Too. Because the Crazy Horse Too was sold, TPCI and Rizzolo are obligated to pay the Henrys $9 million.

The parties entered into a written and signed settlement agreement with unambiguous material terms. Accordingly, the district court did not err in reducing the settlement agreement to judgment on the Henrys' motion.[6] *See Resnick*, 97 Nev. at 616, 637 P.2d at 1206.

Based on the foregoing, we affirm the judgment of the district court.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, CHERRY, and SAITTA, JJ., concur.

JOHN COLEMAN, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 60715

March 27, 2014 321 P.3d 863

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

Defendant, who was convicted of lewdness with a child under 14 years of age, filed a petition for a writ of habeas corpus several years after he commenced a special sentence of lifetime supervision. The district court denied the petition. Appeal followed. The supreme court, SAITTA, J., held that a person who is subject only to lifetime supervision is not under a "sentence of imprisonment" within the meaning of the statute allowing a person who is under a sentence of imprisonment to file a post-conviction petition for a writ of habeas corpus.

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[6]We have considered all of TPCI and Rizzolo's remaining arguments and find that they lack merit.

Affirmed.

Turco & Draskovich, LLP, and *Robert M. Draskovich Jr.* and *Gary A. Modafferi*, Las Vegas, for Appellant.

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

1. Habeas Corpus.
   A post-conviction petition for a writ of habeas corpus cannot be filed by a petitioner who is no longer under a sentence of death or imprisonment for the conviction at issue. NRS 34.724(1).
2. Statutes.
   When interpreting a statutory provision, the supreme court will look first to the plain language of a statute and will enforce the statute as written if the statute's language is clear and the meaning plain.
3. Habeas Corpus.
   A "sentence of imprisonment," for purposes of the statute allowing a person who is under a sentence of imprisonment to file a post-conviction petition for a writ of habeas corpus, is one that requires a person to be placed in a prison or some other place of confinement. NRS 34.724(1).
4. Habeas Corpus.
   A person who is incarcerated is under a "sentence of imprisonment" for purposes of the statute allowing a person who is under a sentence of imprisonment to file a post-conviction petition for a writ of habeas corpus. NRS 34.724(1).
5. Habeas Corpus.
   A person who is on probation is under a "sentence of imprisonment" for purposes of the statute allowing a person who is under a sentence of imprisonment to file a post-conviction petition for a writ of habeas corpus, as the person has been sentenced to a prison term but the sentence has been suspended; if the probationer violates a condition of probation, the suspended sentence of imprisonment may be enforced. NRS 34.724(1), 176A.630.
6. Habeas Corpus.
   A person who has been released from prison on parole is under a "sentence of imprisonment" for purposes of the statute allowing a person who is under a sentence of imprisonment to file a post-conviction petition for a writ of habeas corpus, as the person remains subject to an unexpired term of imprisonment; if the parolee violates a condition of parole, the person may be imprisoned on the unexpired sentence. NRS 34.724(1), 213.1517(1), 213.1519(1).
7. Habeas Corpus.
   A person who is subject only to lifetime supervision, as a special sentence for a sex offense, is not under a "sentence of imprisonment," within the meaning of the statute allowing a person who is under a sentence of imprisonment to file a post-conviction petition for a writ of habeas corpus, and therefore cannot file such a petition to challenge his sentence; lifetime supervision begins only after the person has been discharged from any further obligations of probation or has expired his prison term while incarcerated or on parole, and a violation of a condition of lifetime supervision is a new, separate, and distinct offense. NRS 34.724(1), 176.0931(2), 213.1243(1).

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

Appellant John Coleman was convicted of lewdness with a child under the age of 14 years and was given a suspended prison sentence and placed on probation. When he completed his period of probation, he was subject to a special sentence of lifetime supervision. Several years after commencing lifetime supervision, Coleman filed a post-conviction petition for a writ of habeas corpus, asking the district court to release him from lifetime supervision or strike the lifetime supervision requirement. The district court denied the petition. In this appeal, we consider whether a person who is serving a special sentence of lifetime supervision may file a post-conviction petition for a writ of habeas corpus to challenge his judgment of conviction or sentence. We conclude that he cannot. Because lifetime supervision commences only after a person has expired a prison term or period of probation or parole, a person who is subject only to lifetime supervision is not subject to an unexpired prison term that could be imposed upon violation of the conditions of that supervision and therefore is no longer under "sentence of death or imprisonment" as required by NRS 34.724(1). Thus, a person who is subject only to lifetime supervision may not file a post-conviction petition for a writ of habeas corpus. We therefore affirm the district court's order denying Coleman's post-conviction petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

Coleman pleaded guilty in 2002 to lewdness with a child under the age of 14 years. The district court sentenced him to life in prison with the possibility of parole after 10 years, but the court suspended the sentence and placed him on probation for a term of 5 years. As required by NRS 176.0931, the district court also imposed a special sentence of lifetime supervision to begin upon completion of any term of imprisonment, probation, or parole.

In July 2007, Coleman was discharged from probation and began serving his "sentence" or term of lifetime supervision. Consistent with the authority granted by NRS 213.1243, the Board of Parole Commissioners assigned the conditions of Coleman's lifetime supervision. The conditions apparently included restrictions on where Coleman could reside, his consumption of intoxicants and controlled substances, his possession of weapons and association with certain individuals, his conduct in compliance with all laws, out-of-state travel, contact with any victims or witnesses, obtaining a post office box, contact with minors, and presence in or near certain locations

that are frequented by minors.[1] The lifetime supervision agreement also included the conditions required by NRS 213.1243(3)-(5) that further restrict the location of Coleman's residence and his movements. In January 2012, Coleman filed a post-conviction petition for a writ of habeas corpus, seeking release from his sentence and conditions of lifetime supervision. The district court denied his petition.

DISCUSSION

[Headnote 1]

A challenge to the validity of a judgment of conviction or sentence may be raised in a post-conviction petition for a writ of habeas corpus filed in compliance with the requirements set forth in NRS Chapter 34. NRS 34.724(1) provides that a person "convicted of a crime and under sentence of death or imprisonment" may file a post-conviction petition for a writ of habeas corpus to challenge the conviction, the sentence, or the computation of time served. Accordingly, a post-conviction petition for a writ of habeas corpus cannot be filed by a petitioner who is no longer under a sentence of death or imprisonment for the conviction at issue. *See* NRS 34.724(1); *see also Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999) (concluding that a petitioner was not entitled to file a post-conviction petition for a writ of habeas corpus when he was no longer incarcerated pursuant to the judgment of conviction contested); Nev. Const. art. 6, § 6(1) (permitting district courts to issue writ of habeas corpus for a person "who has suffered a criminal conviction . . . and has not completed the sentence imposed pursuant to the judgment of conviction").

[Headnote 2]

Whether a sentence of lifetime supervision, imposed pursuant to NRS 176.0931, qualifies as a sentence of imprisonment within the meaning of NRS 34.724(1) is a matter of statutory interpretation. When interpreting a statutory provision, this court will look first to the plain language of a statute and will enforce the statute as written if the statute's language is clear and the meaning plain. *See Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011); *see also State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous.").

[Headnotes 3, 4]

NRS 34.724(1) allows a person who is "under a sentence of . . . imprisonment" to file a post-conviction habeas petition. A sen-

[1]Coleman has provided a copy of a lifetime supervision agreement in his appendix. Although the document has been redacted such that it is unclear whether it is a copy of Coleman's lifetime supervision agreement, based on the parties' briefing below and on appeal, it appears that the document reflects the conditions that have been imposed on Coleman.

tence of imprisonment is one that requires a person to be placed in a prison or some other place of confinement. *See Black's Law Dictionary* 825 (9th ed. 2009) (defining "imprison"). Obviously, a person who is incarcerated is under a sentence of imprisonment. But lifetime supervision clearly is not itself a sentence of imprisonment. A person who is on lifetime supervision is supervised by parole and probation officers and there are restrictions on where the person may reside, but the person is not placed in a prison or another place of confinement. *See generally* NRS 213.1243.

[Headnotes 5, 6]

In some circumstances a person who is not in a prison or another place of confinement may nonetheless be under a sentence of imprisonment. For example, a person who is on probation is under a sentence of imprisonment because the person has been sentenced to a prison term but the sentence has been suspended. If the probationer violates a condition of probation, the suspended sentence of imprisonment may be enforced. NRS 176A.630. Similarly, a person who has been released from prison on parole is under a sentence of imprisonment because he remains subject to an unexpired term of imprisonment. If the parolee violates a condition of parole, he may be imprisoned on the unexpired sentence. NRS 213.1517(1); NRS 213.1519(1). Although the conditions of probation or parole may be similar to conditions of lifetime supervision,[2] the conditions are not what place a probationer and parolee under a sentence of imprisonment. The probationer and parolee remain under a sentence of imprisonment because of the suspended or unexpired prison term set forth in the judgment of conviction. The same is not true for a person who is on lifetime supervision.

[Headnote 7]

The special sentence of lifetime supervision "commences after any period of probation or any term of imprisonment and any period of release on parole." NRS 176.0931(2); *see also* NRS 213.1243(1). Under the plain language of the statute, lifetime supervision begins only *after* the person has been discharged from any further obligations of probation or has expired his prison term while incarcerated

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[2]*Compare* NRS 176A.400(1) (providing nonexhaustive list of conditions that may be imposed on probationer), NRS 176A.410 (providing additional conditions of probation for defendant convicted of a "sexual offense"), NRS 176A.420 (providing for random drug testing as condition of probation), NRS 176A.430 (providing for restitution as a condition of probation), *and* NRS 213.12175 (providing nonexhaustive list of conditions that parole board may impose on parolee), *with* NRS 213.1243(3)-(5) (providing conditions of lifetime supervision that must be included in certain circumstances), *and supra* Facts and Procedural History (describing conditions of Coleman's lifetime supervision).

or on parole. Therefore, unlike a probationer or parolee, a person on lifetime supervision is not subject to a suspended or unexpired sentence of imprisonment set forth in the judgment of conviction that may be enforced upon a violation of the conditions of lifetime supervision.[3] Instead, when a person on lifetime supervision violates a condition of that supervision, the violation is a new, separate and distinct offense, NRS 213.1243(8), and will result in the person being under a sentence of imprisonment only if he is charged with, convicted of, and sentenced for that offense.[4] In that event, the person is under a sentence of imprisonment based on the new judgment of conviction, not the lifetime supervision. A person on lifetime supervision therefore is not in the same position as a probationer or parolee. Accordingly, we conclude that a person who is subject only to lifetime supervision is not under a sentence of imprisonment within the meaning of NRS 34.724(1) and therefore cannot file a post-conviction petition for a writ of habeas corpus to challenge his sentence.

Coleman contends that he is left without a remedy if he cannot challenge his sentence and conditions of lifetime supervision in a post-conviction petition for a writ of habeas corpus. Even assuming this was correct, the post-conviction petition for a writ of habeas corpus is a creature of statute and we cannot ignore the plain language of NRS 34.724(1) that restricts its use. The State acknowledges that while traditional post-conviction relief is not available, Coleman could still pursue injunctive relief pursuant to NRS 33.010. Although we do not attempt to catalogue the full panoply of remedies available to challenge the conditions of lifetime supervision including the extent to which the conditions could be challenged in defense of a charge under NRS 213.1243(8) for violating a condition of lifetime supervision, we note that some challenges to those conditions may be pursued in a civil rights action under 42 U.S.C.

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[3]NRS 213.1243(2) deems lifetime supervision to be "a form of parole" for limited purposes that do not affect our analysis of the issue presented here.

[4]Currently, a person who violates a condition of lifetime supervision "is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years." NRS 213.1243(8). A prior version of the statute distinguished between minor and major violations with a minor violation being a misdemeanor and a major violation being a category B felony. NRS 213.1243(3) (2005), *amended by* 2007 Nev. Stat., ch. 528, § 8, at 3257. A "major violation" was one that posed "a threat to the safety or well-being of others" *and* involved: a gross misdemeanor, a felony, or a crime involving a minor victim; the use of a deadly weapon, explosive, or firearm; the use or threatened use of force or violence; death or bodily injury; domestic violence; harassment, threats, or stalking; or the forcible or unlawful entry of any structure or vehicle in which another person was present. NRS 213.1243(5) (2005), *repealed by* 2007 Nev. Stat., ch. 528, § 8, at 3258.

§ 1983. Nevada law also provides a means for Coleman to petition to be released from lifetime supervision if he meets certain conditions. NRS 176.0931(3). Coleman therefore is not left without a remedy.

Because Coleman had been discharged from probation and therefore was no longer under a sentence of imprisonment when he filed his post-conviction petition for a writ of habeas corpus, he was not eligible for post-conviction habeas relief. Therefore, we affirm the order of the district court denying his petition.

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

HUCKABAY PROPERTIES, INC., A NEVADA CORPORATION, APPELLANTS, *v.* NC AUTO PARTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND STEVEN B. CRYSTAL, AN INDIVIDUAL, RESPONDENTS.

No. 61024

HUCKABAY PROPERTIES, INC., A NEVADA CORPORATION; AND JOHN HUCKABAY, JR., APPELLANTS, *v.* NC AUTO PARTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND STEVEN B. CRYSTAL, RESPONDENTS.

No. 61791

March 27, 2014 322 P.3d 429

Petition for en banc reconsideration of an order dismissing appeals for failure to file opening brief and appendix.

Appeals were taken from a judgment following a bench trial in the district court in a real property contract action and a post-judgment order awarding attorney fees and costs. The appeals were consolidated. Respondents filed a motion to dismiss the appeals for appellants' failure to file an opening brief. Appellants opposed the motion and filed a successive motion for an extension of time. The supreme court granted respondents' motion to dismiss. Respondents petitioned for en banc reconsideration. The supreme court, HARDESTY, J., held that: (1) the factual nature of an underlying case is not an appropriate measure to evaluate whether an appeal should be dismissed for violations of court rules or orders, overruling *Hansen v. Universal Health Services of Nevada, Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996); (2) violations of court rules or orders occasioned by counsel acting on the client's behalf may establish a proper basis for dismissal of an appeal, overruling *Hansen*; and

(3) the supreme court would dismiss appeals based on counsel's failures to file opening brief and appendix within extended deadline.

Petition for en banc reconsideration denied.

Hoffman, Test, Guinan & Collier and *John A. Collier*, Reno; *McDonald Carano Wilson LLP* and *Debbie A. Leonard* and *Seth T. Floyd*, Reno; *Sterling Law LLC* and *Beau Sterling*, Las Vegas, for Appellants.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Wm. Patterson Cashill*, Reno, for Respondents.

1. Appeal and Error.
   En banc reconsideration of an appeal is disfavored, and the supreme court will only order reconsideration when necessary to preserve precedential uniformity or when the case implicates important precedential, public policy, or constitutional issues. NRAP 40A(a).
2. Appeal and Error.
   There is no remedial rule in the appellate context that allows an appeal's reinstatement analogous to the rule authorizing a motion to set aside a default judgment based on excusable neglect or mistake. NRAP 40, 40A; NRCP 60(b).
3. Appeal and Error.
   The factual nature of an underlying case is not an appropriate measure to evaluate whether an appeal should be dismissed for violations of court rules or orders, overruling *Hansen v. Universal Health Services of Nevada, Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996).
4. Appeal and Error.
   Although the supreme court has a sound policy preference for deciding cases on the merits, that policy is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious appellate resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment; prejudice to the opposing party; and judicial administration concerns, such as the court's need to manage its large and growing docket. NRAP 9(a)(6), 14(c), 31(d).
5. Appeal and Error.
   Violations of court rules or orders occasioned by counsel acting on the client's behalf may establish a proper basis for dismissal of an appeal, overruling *Hansen v. Universal Health Services of Nevada, Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996).
6. Appeal and Error.
   The supreme court would dismiss consolidated appeals in a real estate contract action based on appellants' counsel's failures to file the opening brief and appendix, even though appellants' trial counsel was not served with respondents' motion to dismiss or appellants' appellate counsel's motions for extensions of time, where appellants' appellate counsel twice missed filing deadlines that had been extended by the supreme court, the supreme court's last extension order warned appellants that dismissal could be forthcoming if the brief was not filed by the deadline imposed by that order, and appellate counsel did not abandon the appellants as clients, abandon his legal practice, suffer from addictive disorder, or engage in criminal conduct. NRAP 31(b)(3), (d), 40A.

7. Trial.
   There is no constitutional protection in the civil context parallel to the constitutional right to effective assistance of counsel under the Sixth Amendment. U.S. Const. amend. 6.
8. Appeal and Error; Constitutional Law.
   Due process did not require service on appellants' trial counsel of respondents' motion to dismiss the appeal based on appellants' appellate counsel's failure to file the opening brief and appendix, or service on trial counsel of appellants' appellate counsel's motions for extensions of time, before the supreme court granted the motion to dismiss, where appellate counsel was served with the motion to dismiss, and both trial and appellate counsel were served with the supreme court's order denying an extension and warning that failure to file the brief could result in the appeals' dismissal. U.S. Const. amend. 14; NRAP 25(b), 31.
9. Attorney and Client.
   In Nevada, notice to an attorney is, in legal contemplation, notice to his client. NRCP 5(b).
10. Attorney and Client.
    Even if only one of two or several attorneys is served with a document, a party represented by the served attorney is deemed to have received notice of the document. NRCP 5(b).
11. Attorney and Client.
    Attorneys who do not participate in the electronic filing system should be served by traditional means. NRAP 25(c).

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

These consolidated appeals were dismissed for failure to timely file the opening brief and appendix. In seeking the en banc court's reconsideration, appellants argue that dismissal of their appeals based on the missteps of their lead appellate attorney is contrary to this court's precedent recognizing public policy favoring dispositions on the merits. Appellants' dissatisfaction with their attorney's performance, however, does not entitle them to the reinstatement of their appeals, and their argument to the contrary is not consistent with general agency principles, under which a civil litigant is bound by the acts or omissions of its voluntarily chosen attorney. Although this court has a sound policy preference for deciding cases on the merits, that policy is not absolute and must be balanced against countervailing policy considerations, including the public's interest in expeditious resolution of appeals, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration concerns, such as the court's need to manage its sizeable and growing docket. We therefore disagree with appellants that precedential uniformity provides a basis to rein-

state these appeals. As appellants' contentions fail to satisfy NRAP 40A's standards, en banc reconsideration is denied.

FACTS AND PROCEDURAL HISTORY

The appeal in Docket No. 61024 challenged a district court judgment following a bench trial in a real property contract action. The appeal in Docket No. 61791 challenged the same court's post-judgment orders awarding attorney fees and costs. The appeals were consolidated on December 12, 2012, and a briefing schedule was set, under which appellants' opening brief was due by no later than March 12, 2013.

Overdue opening brief

On appellants' motion, the brief's due date was extended to April 11, 2013. On April 12, 2013, appellants filed a motion seeking a second extension until May 13, 2013, to file the brief. Because appellants did not submit the brief by the May 13 requested deadline, appellants' motion for a second extension was denied as moot on May 24, 2013. Despite denying the motion, the May 24 order allowed appellants 11 more days, until June 4, 2013, to file and serve the opening brief and appendix, but the order warned that failure to do so could result in the appeals' dismissal. The brief and appendix were not filed by that deadline. Appellants had two attorneys of record in these appeals: Beau Sterling and John A. Collier. Mr. Sterling apparently was responsible for briefing the appeal and filing documents in this court. Mr. Collier, who was trial counsel, received copies of this court's notices and orders.

Motion to dismiss

On June 10, 2013, respondents filed a motion to dismiss these appeals.[1] Appellants, through Mr. Sterling, opposed the motion and again asked for more time to file the brief, until June 12, stating that the "short amount of additional time is requested in order to help spread out the deadlines slightly on a number of matters, including this one, that all fell due around the same time, and most of which are similarly urgent." Mr. Sterling also represented that he had re-

[1]Mr. Sterling is a registered user of the court's electronic filing system and Mr. Collier is not. The Nevada Electronic Filing and Conversion Rules provide that the court must provide notice to all registered users that a document has been electronically filed and is available for review, and registered users are deemed to have consented to receiving service electronically. *See* NEFCR 9(b)-(c). As to nonregistered users, a party filing a document must serve the nonregistered recipient by traditional means. NEFCR 9(d). Here, respondents filed the motion to dismiss electronically, such that Mr. Sterling received service, but they did not serve Mr. Collier by traditional means.

cently filed briefs and prepared for oral argument in other matters and that he had a personal commitment. He stated that his motion for a third extension of time was filed late because he wanted to be sure he could complete the brief by any new deadline requested before making the motion.

Respondents opposed any additional time and argued that because this court denied appellants' second motion for an extension of time as moot in the May 24 order, the 11-day grace period allowed in that order for filing the brief could not "possibly have lead Mr. Sterling to believe the court would grant another extension or that the 11-day time limit in the order could be ignored." Respondents also stated that Mr. Sterling misrepresented that he attempted to contact respondents to confer on a third extension of time.

On June 14, 2013, appellants electronically filed in this court a "certificate of service" for the opening brief and appendix, indicating that on June 12, 2013, they submitted to this court and served on respondents by United States mail the opening brief and appendix. The brief and appendix, however, were not submitted to this court for filing with the certificate of service. They were subsequently provisionally received in this court by mail on June 17, 2013. Based on the failure to file the brief and appendix by the June 4 deadline and failure to comply with court rules and directives, the appeals were dismissed by order of this court on June 25, 2013.

Motion for reconsideration and petition for rehearing

Through newly retained counsel, appellants filed a motion for reconsideration and a petition for rehearing to reinstate their appeals, arguing that they had no knowledge of Mr. Sterling's pattern of disregard for this court's orders, and relying on this court's stated policy favoring merit-based consideration of appeals. They also stated that Mr. Sterling and respondents' counsel failed to notify Mr. Collier about respondents' motion to dismiss, which "prevented Mr. Collier from taking steps to salvage the appeal[s]."

Respondents opposed the motion and rehearing petition, arguing that Mr. Collier was aware of the briefing deadlines and was served with this court's notices and order regarding missed deadlines and warning about possible dismissal for failing to file documents. Respondents argued that this awareness, along with the fact that Mr. Collier never received a draft copy of the opening brief from Mr. Sterling at any time before the briefing deadline expired, should have made it clear to Mr. Collier that the appeals were not being managed properly. In that regard, they pointed out that Mr. Sterling contacted Mr. Collier on June 4, 2013, requesting copies of the transcripts from Mr. Collier, which should have alerted Mr. Collier that Mr. Sterling could not have possibly already prepared the brief

because he did not have the necessary transcripts even on the brief's final due date, June 4. Respondents also argued that even though Mr. Collier was not served with a copy of the motion to dismiss, which was filed on June 10, 2013, the opening brief was overdue by that date and this court could have sua sponte dismissed the appeals pursuant to its May 24 order, a copy of which was provided to Mr. Collier.

The motion for reconsideration and petition for rehearing were denied. *See* NRAP 31(b)(3) (requiring a motion for an extension of time to be filed before the filing deadline expires); NRAP 31(d) (explaining consequences for failing to file briefs, including dismissal); *Weddell v. Stewart*, 127 Nev. 645, 261 P.3d 1080 (2011) (addressing counsel's repeated failures to follow court rules and directives and declining to reconsider an order dismissing an appeal based on such failures); NRAP 40(c) (setting forth rehearing standards). This petition for en banc reconsideration followed.

DISCUSSION

In seeking to reinstate their appeals, appellants contend that reconsideration is necessary to maintain uniformity in the court's jurisprudence and to preserve public policy favoring a decision on the merits and disfavoring a "deprivation of appeal rights based solely on the missteps of counsel."[2] Appellants further contend that since Mr. Collier was not served with the motion to dismiss or Mr. Sterling's motions for extensions of time, they were deprived of their constitutional right to receive proper service (on Collier).

[Headnote 1]

En banc reconsideration is disfavored, and this court will only order reconsideration when necessary to preserve precedential uniformity or when the case implicates important precedential, public policy, or constitutional issues. NRAP 40A(a). Neither of those standards have been met here.

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[2]According to appellants, this court's dismissal order punished appellants for their attorney's misconduct in other unrelated cases, notwithstanding that Mr. Sterling belatedly sought a third extension of time and ultimately submitted the opening brief in these matters, albeit late. To the contrary, the order dismissing these appeals was grounded solely on appellants' failure to comply with court rules and orders concerning the overdue documents in these matters. Thus, appellants' contention that they are being punished for their attorney's "misconduct in other cases unrelated to their own" is not supported and lacks merit. Although Mr. Sterling was referred to the state bar in the same order dismissing the appeals, the dismissal was based on the circumstances of these two appeals, only. While Mr. Sterling's referral to the state bar was based in part on the conduct that led to the dismissal of these appeals, and in part on similar conduct in other cases, the inverse is not true, *i.e.*, these appeals were not dismissed based in any part on Mr. Sterling's conduct in other cases. Thus, we do not further address this argument.

Precedential uniformity does not mandate reinstatement of these appeals

[Headnote 2]

In seeking reconsideration, appellants argue that *Hansen v. Universal Health Services of Nevada, Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996), demands that these matters be heard on their merits, but we are not persuaded that it does.[3]

In *Hansen*, the court noted its concern with appellant's counsel's failure to comply with court rules and orders, but nevertheless declined to grant respondents' motion to dismiss the appeal. *Id.* at 1247, 924 P.2d at 1346. The appellant in *Hansen* was a patient who alleged that he was permanently disabled as a result of the respondents' actions in implanting an experimental device in appellant's spine. *Id.* at 1246, 924 P.2d at 1345-46. In the district court, appellant sought over $2,000,000 in damages, and when he lost at trial and judgment was entered against him, he appealed alleging numerous reversible trial errors. *Id.* Appellant's attorney, however, failed to have the record transmitted from the district court to this court despite being given several extensions of time to accomplish that rule-mandated task. *Id.* at 1246-47, 924 P.2d at 1346. Respondents moved to dismiss the appeal, and the court denied the motion, explaining that

> counsel's calendaring error, preoccupation with other trials and failure to contact the court reporter do not constitute extreme or unforeseeable circumstances. Nevertheless, the compelling nature of the facts in the underlying dispute persuades us to allow this appeal to proceed. Moreover, in light of this court's preference for deciding cases on the merits, and because the dilatory conduct in this matter has been occasioned solely by counsel's inexcusable neglect, rather than his client's conduct, we decline to dismiss this appeal.

Id. at 1247-48, 924 P.2d at 1346 (citations omitted). *Hansen*, therefore, is grounded on three reasons: its compelling facts, policy preference for merits-based dispositions, and the dilatory conduct was deemed attributable to counsel, not appellant. *Id.*

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[3]Appellants also rely on *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 154-55, 380 P.2d 293, 295 (1963), but *Frontier* reviewed the district court's denial of an NRCP 60(b) motion to set aside a default judgment, and there is no analogous remedial rule in the appellate context that allows an appeal's reinstatement based on excusable neglect or mistake. Instead, when a party receives an unfavorable decision on appeal, rehearing or reconsideration may be granted if that party meets the standards set forth under NRAP 40 or NRAP 40A. Thus, because *Frontier* was decided under different procedural and factual circumstances than these appeals, we do not further address *Frontier*.

[Headnote 3]

Addressing each of those reasons, we conclude that *Hansen* first is limited in part to its facts, which were determined to be "compelling." *Id.* But the compelling facts-conclusion that the court recognized is not followed by any citation of authority, nor did the court advance any reasoning or explanation why the nature of the facts might be a sustainable basis to allow an appeal to continue despite repeated failures to comply with court rules and orders. *Id.* Because *Hansen* does not provide any reasoning or legal basis for the conclusion that compelling facts may preclude dismissal, we conclude that the factual nature of an underlying case is not an appropriate measure to evaluate whether an appeal should be dismissed for violations of court rules and/or orders. Thus, we disapprove of *Hansen* to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.

[Headnote 4]

Second, although *Hansen* was also partly based on the sound policy preference for deciding cases on the merits, that policy is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious appellate resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment; prejudice to the opposing party; and judicial administration concerns, such as the court's need to manage its large and growing docket. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 406-08 (3d Cir. 1980); *GCIU Emp'r Ret. Fund v. Chi. Tribune Co.*, 8 F.3d 1195, 1199 (7th Cir. 1993) (noting that courts must "perpetually balance the competing interests of keeping a manageable docket against deciding cases on their merits"). Thus, a party cannot rely on the preference for deciding cases on the merits to the exclusion of all other policy considerations, and when an appellant fails to adhere to Nevada's appellate procedure rules, which embody judicial administration and fairness concerns, or fails to comply with court directives or orders, that appellant does so at the risk of forfeiting appellate relief. *See* NRAP 31(d) (describing consequences for failure to file briefs or appendix, which include dismissal of the appeal); *Weddell v. Stewart*, 127 Nev. 645, 261 P.3d 1080 (2011); *City of Las Vegas v. Int'l Ass'n of Firefighters, Local No. 1285*, 110 Nev. 449, 874 P.2d 735 (1994); *Varnum v. Grady*, 90 Nev. 374, 528 P.2d 1027 (1974); *see also* NRAP 9(a)(6) *and* NRAP 14(c) (providing that an appeal may be dismissed for failure to file transcript request forms and docketing statements, respectively). Accordingly, dismissal of an appeal after a party fails to comply with court rules

and orders is not inconsistent with the policy preference to decide cases on the merits when balanced with other policy concerns, and our decision to dismiss these appeals following such failures does not mandate reconsideration to maintain uniformity with *Hansen*.

[Headnotes 5, 6]

Finally, *Hansen*'s reasoning that the appeal should be allowed to proceed in part because the dilatory conduct in that matter was "occasioned solely by counsel's inexcusable neglect, rather than his client's conduct," is inconsistent with general agency principles. 112 Nev. at 1247-48, 924 P.2d at 1346. In particular, an attorney's act is considered to be that of the client in judicial proceedings when the client has expressly or impliedly authorized the act. Restatement (Third) of The Law Governing Lawyers §§ 26, 27 (2000 & Supp. 2013); *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993) (noting that in a representative litigation system, "clients must be held accountable for the acts and omissions of their attorneys"). Thus, to the extent that *Hansen* holds that dismissal will not follow violations of court rules or orders because counsel, acting on the client's behalf, occasioned such violations, that decision is overruled.[4]

Failure to follow court rules as grounds for dismissing civil appeal

The United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for counsel's unexcused conduct, as to do so would offend general agency principles. *Link*, 370 U.S. at 633-34 (rejecting argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent"). While *Link* was decided in

[4]While the United States Supreme Court has recognized an exception to holding a litigant responsible for its attorney's procedural errors when the attorney actually abandons the client without notice, thus severing the principal-agent relationship, the cause necessary for that exception to apply is not present here. *See Maples v. Thomas*, 565 U.S. 266, 280-83 (2012) (distinguishing claims of attorney error, no matter how egregious, from claims of attorney abandonment, in concluding that cause to excuse procedural errors cannot be based on an attorney's error). We have also recognized two exceptions to the general agency rule that the "sins" of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client, but those exceptional circumstances are not present here either. *See NC-DSH, Inc. v. Garner*, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009); *Passarelli v. J-Mar Dev., Inc.*, 102 Nev. 283, 286, 720 P.2d 1221, 1223-24 (1986).

the context of reviewing a trial court dismissal for failure to prosecute, its reasoning that a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal applies to appellate court dismissals with equal force.

For example, in *Kushner v. Winterthur Swiss Insurance Co.*, the Third Circuit Court of Appeals dismissed an appeal for appellant's failure to file an appendix that complied with court rules. 620 F.2d 404, 407 (3d Cir. 1980). In so doing, the court made it clear to the appellate bar the importance and necessity of complying with court rules concerning the content and filing of briefs and appendices. *Id.* The court explained the practical reasons and jurisprudential justification for its decision to dismiss the appeal, noting that the rules of appellate procedure and local court rules were enacted to enable the court to effectively process its increasing caseload, and that the number of appeals filed per judge had swelled dramatically since the rules were enacted. *Id.* at 406-07.[5] The court thus reasoned that it would not expend valuable judicial time in performing the work of errant counsel who failed to properly comply with briefing rules, and who, by failing to abide by appellate rules, hindered the court's efforts to provide speedy and just dispositions of appeals for every litigant. *Id.* at 407; *see also Barber v. Am. Sec. Bank*, 841 F.2d 1159, 1162, (D.C. Cir. 1988) (dismissing appeal based on "counsel's failure to file a brief on time, his failure to file a motion for an extension ten days prior to the date his brief was due, his failure to seek leave to file his time enlargement motion late, and the clearly inadequate grounds he eventually offered for the late filings").

[Headnote 7]

In imposing the sanction of dismissal, the court in *Kushner* was mindful of the impact on appellants, noting that it could be argued that dismissal of an appeal unduly penalizes the litigant for the dereliction of errant counsel. 620 F.2d at 407. The court reasoned, however, that unlike a defendant in a criminal case, an aggrieved party in a civil case involving only private litigants "does not have a constitutional right to the effective assistance of counsel. The rem-

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[5]Unlike civil procedure rules governing district court actions, appellate court rules generally do not provide a remedial basis for reconsidering a final decision based on a litigant's neglect or mistake in processing its appeal; instead, rehearing or reconsideration of an appeal are not favored and will only be granted for limited reasons. *Compare, e.g.*, the remedial district court rule NRCP 60(b), which provides a mechanism for setting aside a default judgment or order for mistake, inadvertence, surprise, or excusable neglect *with* the appellate rule for rehearing, NRAP 40, which allows rehearing of an appeal only upon demonstration that the court overlooked or misapprehended points of law or fact, and NRAP 40A, which explains the two bases on which en banc reconsideration may be granted, neither of which are grounded on counsel's or the litigant's excusable neglect, mistake, or inadvertence.

edy in a civil case, in which chosen counsel is negligent, is an action for malpractice." *Id.* at 408 (internal quotation marks omitted).[6] Other federal appellate courts have similarly dismissed appeals as a sanction for poorly presenting a case or failing to comply with briefing and appendix content rules. *See Abner v. Scott Mem'l Hosp.*, 634 F.3d 962, 965 (7th Cir. 2011) (summarily affirming district court summary judgment and striking oversized brief that was not accompanied by a timely and supported motion for leave to exceed the type-volume limitation, and announcing a warning that the "flagrancy of the violation" of the appellate rules alone might well have justified the appeal's dismissal); *Snipes v. Ill. Dep't of Corr.*, 291 F.3d 460, 464 (7th Cir. 2002) (noting that an appellate court may dismiss an appeal or summarily affirm the judgment when appellant fails to comply with briefing rules); *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145 (9th Cir. 1997) (dismissing appeal based on briefing violations); *United States v. Green*, 547 F.2d 333 (6th Cir. 1976) (dismissing appeal based on appendix deficiencies); *see generally* Wesley Kobylak, Annotation, *Sanctions, in Federal Circuit Courts of Appeals, for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R. Fed. 521, 526-27 (1981).

Here, appellants did not follow the rules governing briefing and motions practice, and they did not adhere to the briefing deadlines set forth by court order, nor did they provide any adequate basis for their failure to do so. Thus, they cannot expect this court to continue to keep these matters on its docket and then consider the merits of the appeals when appellants eventually decide to submit their brief for consideration. Our May 24, 2013, order in fact warned appellants that dismissal may be forthcoming if the brief was not filed by the deadline imposed by that order. The dismissal therefore should have come as no surprise. Although appellants contend that *Hansen v. Universal Health Services of Nevada, Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996), provides them an out for the dismissal of their

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[6]Although in criminal appeals the constitutional right to effective assistance of counsel under the United States Constitution's Sixth Amendment applies, there is no parallel constitutional protection in the civil context. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense."); *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804-05, 102 P.3d 41, 45-46 (2004) (recognizing that the Sixth Amendment right to counsel applies only in criminal prosecutions); *Sanchez v. U.S. Postal Serv.*, 785 F.2d 1236, 1237 (5th Cir. 1986) ("[T]he sixth amendment right to effective assistance of counsel does not apply to civil litigation."); *Nelson v. Boeing Co.*, 446 F.3d 1118, 1119 (10th Cir. 2006) (providing that "[i]f a client's chosen counsel performs below professionally acceptable standards, with adverse effects on the client's case, the client's remedy is not reversal, but rather a legal malpractice lawsuit against the deficient attorney").

appeals and that *Hansen* should be applied to grant them a mulligan, in a sense, such a do-over is appropriately limited to remedy a poorly executed tee-shot, and not so much in the litigation setting to correct failures to adhere to court rules and orders.[7] This court has in fact on several occasions recognized that an appeal may be appropriately dismissed for just such violations. *See Weddell v. Stewart*, 127 Nev. 645, 261 P.3d 1080 (2011) (declining to reconsider an order dismissing an appeal based on repeated failures to follow court rules and directives); *City of Las Vegas v. Int'l Ass'n of Firefighters, Local No. 1285*, 110 Nev. 449, 453-54, 874 P.2d 735, 738 (1994) (concluding that dismissal was an appropriate sanction for failure to supply the record and take action in an appeal as "the primary responsibility for this transgression must lie with the appellant"); *Varnum v. Grady*, 90 Nev. 374, 528 P.2d 1027 (1974*)* (dismissing an appeal based on appellant's counsel's multiple procedural derelictions and dilatory pursuit of appeal). As explained above, our decision denying reconsideration and declining to reinstate these appeals is consistent with authority from federal jurisdictions and with general agency principles that bind a client to its attorney's acts and omissions.

Respondents' failure to serve appellants' second attorney with their motion to dismiss is not grounds for reconsideration

[Headnote 8]

Appellants argue that because Mr. Collier was not served with the motion to dismiss or Mr. Sterling's motions for extensions of time, the court, in dismissing these appeals, "Condone[d] a Deprivation of Due Process." They argue that "[g]iven the serious due process issues that are implicated by respondents' failure to serve Mr. Collier with the motion to dismiss, the panel should not have deprived appellants of their appeal rights under these circumstances."

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[7]Likewise, appellants' argument that the court could have accepted the late-submitted brief and appendix does not provide a basis for en banc reconsideration. *See* NRAP 40A; NRAP 31(b)(3) (a motion for an extension of time may be made no later than the due date for the brief); *Varnum v. Grady*, 90 Nev. 374, 376, 528 P.2d 1027, 1028-29 (1974) (counsel's caseload is not a reasonable ground for neglect of duties); *Malloy v. WM Specialty Mortg., L.L.C.*, 512 F.3d 23, 27 (1st Cir. 2008) (affirming district court dismissal order, concluding that "plaintiffs proffered no legitimate excuse for the delay," and instead relied on legally insignificant excuses, such as preoccupation with other cases); *Damiani v. R.I. Hosp.*, 704 F.2d 12, 17 (1st Cir. 1983) (affirming district court dismissal order and, in so doing, pointing out counsel's improper conduct in filing self-indulgent motions, not making every effort to comply with court orders, not seeking consent of opposing counsel if compliance was actually impossible, and not seeking "court approval for noncompliance based on a truly valid reason").

We reject appellants' argument that this court approved or condoned any conduct that led to a deprivation of appellants' constitutional rights. Appellants freely chose their appellate counsel, and counsel was served with all documents in this matter, including this court's May 24, 2013, order warning that the appeals were subject to dismissal if appellants failed to file the opening brief and appendix by June 4, and respondents' motion to dismiss, which counsel opposed on appellants' behalf. In fact, both of appellants' attorneys of record were served with the May 24 order and both were aware or should have been aware of the briefing deadlines. Regardless, NRCP 5(b) provides that when service "is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney."[8] The rule refers to "an attorney" and "the attorney" in the singular, and courts interpreting the analogous federal rule have rejected the argument that FRCP 5 requires service on all counsel of record. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (recognizing that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules").

[Headnotes 9-11]

In particular, federal courts—recognizing that FRCP 5 requires service on all parties, not on each attorney appearing on behalf of a party—have held that service on one attorney is effective service of a pleading. *See Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1063 (5th Cir. 1990); *Buchanan v. Sherrill*, 51 F.3d 227, 228 (10th Cir. 1995) (concluding that service of a summary judgment motion on one of plaintiff's attorneys, but not on the other, was effective service under FRCP 5); *see also City of Lincoln v. MJM, Inc.*, 618 N.W.2d 710, 713 (Neb. Ct. App. 2000) (citing *Comstock v. Cole*, 44 N.W. 487, 488 (Neb. 1890)) (concluding that "the law has long been that where there are two attorneys of record, service upon one of them is adequate"). And in Nevada, "[n]otice to an attorney is, in legal contemplation, notice to his client." *Lange v. Hickman*, 92 Nev. 41, 43, 544 P.2d 1208, 1209 (1976). Thus, even if only one of two or several attorneys is served with a document, a party represented by the served attorney is deemed to have received notice of the document. *See id.* Accordingly, appellants' constitutional rights remained intact throughout the appellate process, and respondents' failure to serve Mr. Collier with the motion to dismiss does not provide a basis for en banc reconsideration, as Mr. Sterling was served with that document and both Mr. Sterling and Mr. Collier

[8]NRAP 25(b) uses consistent language, requiring a party to serve documents on other *parties* to the appeal and that "[s]ervice on a party represented by counsel shall be made on the party's counsel."

were served with this court's May 24 order denying the motion for an extension of time and warning that failure to file the brief could result in the appeals' dismissal.[9]

CONCLUSION

While Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders. Although they assert that *Hansen v. Universal Health Services of Nevada, Inc.*, 112 Nev. 1245, 924 P.2d 1345 (1996), mandates reconsideration and reinstatement of their appeals, *Hansen* was a fact-specific decision to some extent, and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions, and thus *Hansen* is overruled to the extent that it holds otherwise. For the reasons stated above, all other arguments advanced by appellants in support of their petition for en banc reconsideration are either not legally sound or do not meet the standards for en banc reconsideration under NRAP 40A. En banc reconsideration is therefore denied.

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

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[9]Although appellant's constitutional deprivation argument lacks merit, we point out that attorneys who do not participate in the electronic filing system should be served by traditional means. *See* NRAP 25(c); NEFCR 9(d).

THE STATE OF NEVADA, APPELLANT, *v.*
JARVIS DEER CANTSEE, RESPONDENT.

No. 59121

April 3, 2014 321 P.3d 888

Appeal from a district court order granting a motion to suppress evidence in a criminal case. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Defendant was charged with felony driving under influence (DUI). The district court granted defendant's motion to suppress, and State appealed. The supreme court, HARDESTY, J., held that: (1) as matter of first impression, deputy's citation to incorrect statute as ground for initiating traffic stop based on defendant's operation of vehicle with cracked windshield was not mistake of law that invalidated stop under Fourth Amendment; (2) State did not waive right to argue correct statute that defendant may have been observed violating, as justification for traffic stop, by failing to note statute in opposition to motion; and (3) remand for determination whether deputy had reasonable suspicion of violation of statute to justify stop was appropriate remedy for the district court's error.

Reversed and remanded.

CHERRY, J., dissented.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Joseph R. Plater*, Chief Deputy District Attorney, Washoe County, for Appellant.

Jeremy T. Bosler, Public Defender, and *Christopher P. Frey*, Deputy Public Defender, Washoe County, for Respondent.

1. AUTOMOBILES.
   Deputy's citation to incorrect statute as ground for initiating traffic stop based on defendant's operation of vehicle with cracked windshield was not mistake of law that invalidated traffic stop under Fourth Amendment, where driving with cracked windshield could be considered violation of statute prohibiting operation of vehicle on highway unless "driver's vision through any required glass equipment is normal." U.S. CONST. amend. 4.
2. AUTOMOBILES.
   Whether an investigatory traffic stop violates the Fourth Amendment's prohibition against unreasonable searches and seizures is a mixed question of law and fact. U.S. CONST. amend. 4.
3. CRIMINAL LAW.
   The supreme court reviews the district court's findings of historical fact for clear error and the legal consequences of those factual findings de novo.
4. ARREST.
   To justify an investigatory stop under the Fourth Amendment, the State must show that the investigating officer had reasonable suspicion that the defendant was engaged in criminal activity. U.S. CONST. amend. 4.

5. AUTOMOBILES.
   When a traffic stop is based on a mistake of law, there is generally no justification for the investigatory traffic stop regardless of the reasonableness of the mistake. U.S. CONST. amend. 4.
6. ARREST.
   A mistake of law occurs when an officer making an investigatory stop believes that the suspected conduct is illegal even though the law does not actually prohibit it.
7. ARREST.
   There is a difference between a mistake of law as to whether an act constitutes a crime, which will invalidate an investigatory stop under the Fourth Amendment, and a mistake as to which law applies, which will not; the incorrect application of a statute is not a mistake of law when the law prohibits the suspected conduct. U.S. CONST. amend. 4.
8. CRIMINAL LAW.
   Whether the State waives its right to argue the validity of a traffic stop is a question of law.
9. CRIMINAL LAW.
   State did not waive right to argue at hearing on motion to suppress that defendant's operation of vehicle with cracked windshield could constitute violation of statute prohibiting operation of vehicle on highway unless "driver's vision through any required glass equipment is normal," in support of claim that police deputy's citation to incorrect traffic statute that served as basis for initiating traffic stop did not invalidate stop under Fourth Amendment, by failing to reference correct traffic statute in its opposition to motion; although defendant asserted that he was not prepared to argue application of new statute, defendant failed to show that he was surprised by reference to statute, especially given that justification for traffic stop remained same, and even if he was surprised, then appropriate remedy was continuance of hearing. U.S. CONST. amend. 4; NRS 484B.163(3).
10. CRIMINAL LAW.
    Remand for determination whether deputy had reasonable suspicion that defendant was violating law by driving vehicle with cracked windshield, as justification for traffic stop, rather than affirmance of order granting motion to suppress out of deference to the district court's finding that crack in windshield was not violation of correct traffic statute that was not cited as basis for stop, was appropriate remedy for the district court's erroneous determination that deputy's citation to incorrect statute was mistake of law that invalidated stop, under Fourth Amendment, where the district court limited scope of deputy's testimony at evidentiary hearing on motion to suppress to issue of whether safety hazard justified stop and did not analyze whether deputy had reasonable suspicion to stop defendant for violation of statute. U.S. CONST. amend. 4; NRS 484B.163(3).
11. ARREST.
    A police officer has reasonable articulable suspicion of criminal activity, as justification for an investigatory stop, if there are specific, articulable facts supporting an inference of criminal activity. U.S. CONST. amend. 4.
12. ARREST.
    To determine whether an officer objectively had reasonable articulable suspicion of criminal activity to justify an investigatory stop, the evidence is viewed under the totality of the circumstances and in the context of the law enforcement officer's training and experience. U.S. CONST. amend. 4.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we must determine whether a police officer's citation to an incorrect statute is a mistake of law that invalidates an investigatory traffic stop under the Fourth Amendment to the United States Constitution. Respondent Jarvis Deer Cantsee was charged with a felony DUI after being pulled over for driving with a cracked windshield. Deputy Wendy Jason, the investigating officer, testified that she stopped Cantsee because his cracked windshield violated NRS 484D.435. However, NRS 484D.435 does not prohibit operating a vehicle with a cracked windshield.[1] Although the cracked windshield could violate another statute, the district court concluded that Deputy Jason's incorrect citation constituted a mistake of law that invalidated the investigatory stop under the Fourth Amendment and granted Cantsee's motion to suppress the evidence obtained from the traffic stop. We conclude that a police officer's citation to an incorrect statute is not a mistake of law that invalidates an investigatory traffic stop under the Fourth Amendment if another statute nonetheless prohibits the suspected conduct. Therefore, we reverse the district court's order.

FACTS

Deputy Jason pulled over Cantsee after she observed him driving past her in the opposite direction with a "crack across the windshield." Upon pulling him over, Deputy Jason observed that Cantsee appeared to be intoxicated. Cantsee failed the field sobriety and breathalyzer tests, and a subsequent blood test revealed that his blood alcohol levels were above the legal limit. Although Deputy Jason arrested him for felony DUI, violating Nevada's open container law, failing to have car insurance, and driving with a cracked windshield, she confirmed at the preliminary hearing that her sole reason for stopping Cantsee was the cracked windshield.

Cantsee filed a motion to suppress on the ground that Deputy Jason's reason for pulling him over was a mistake of law that invalidated the investigatory traffic stop under the Fourth Amendment. He relied on Deputy Jason's citation to NRS 484D.435 that justified stopping him for driving with a cracked windshield because that statute does not prohibit that conduct. In opposition, the State initially argued that the stop was justified for either one of two reasons: first, that a windshield crack would satisfy the reasonable suspicion

[1]NRS 484D.435(1) prohibits driving a vehicle "with any sign, poster or other nontransparent material upon the front windshield."

standard for a possible NRS 484D.435 violation or second, that the windshield crack constituted a safety hazard.

At the hearing on the motion to suppress, Deputy Jason testified that she thought Cantsee had violated NRS 484D.435 when she pulled him over. She also stated that she knew at the time of the hearing that NRS 484D.435 was not the correct statute, but that she was never trained to give specific NRS statute numbers whenever she stopped a vehicle. The State then argued for the first time that NRS 484B.163(3),[2] rather than NRS 484D.435, justified the traffic stop. Cantsee objected and argued that the State waived its right to argue NRS 484B.163(3) because this argument was not included in the State's opposition to the motion to suppress. Cantsee also objected to any testimony that the crack in the windshield provided a reasonable suspicion of a violation of NRS 484B.163(3). The court sustained Cantsee's objection and limited the scope of Deputy Jason's testimony to whether the crack in the windshield constituted a safety hazard.

The district court granted the motion to suppress, finding that the investigatory traffic stop based on NRS 484D.435 was not objectively reasonable because that statute does not prohibit driving with a cracked windshield. The court further concluded that the State's arguments as to NRS 484B.163 "unfairly surprised" Cantsee. Thus, the court deemed the State's argument waived because the State did not show good cause as to why it did not mention the statute in its opposition. The State appeals.

DISCUSSION

The State raises two arguments on appeal: (1) Deputy Jason's citation to the wrong statute is not a mistake of law that invalidates the investigatory traffic stop under the Fourth Amendment, and (2) the State did not waive its right to argue that NRS 484B.163(3) justified the traffic stop.

The traffic stop was valid under the Fourth Amendment

[Headnotes 1-3]

Whether an officer's citation to an incorrect statute is a mistake of law that invalidates an investigatory traffic stop under the Fourth Amendment is an issue of first impression in Nevada. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Whether an investigatory traffic stop violates the Fourth Amendment's prohibition

[2]NRS 484B.163(3) states that "a vehicle must not be operated upon any highway unless the driver's vision through any required glass equipment is normal."

against unreasonable searches and seizures is a mixed question of law and fact. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157 (2008). This court "review[s] the district court's findings of historical fact for clear error [and] the legal consequences of those factual findings de novo." *Id.* at 441, 187 P.3d at 157-58.

[Headnotes 4-6]

To justify an investigatory traffic stop under the Fourth Amendment, the State must show that the investigating officer had reasonable suspicion that the defendant was engaged in criminal activity. *State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006). When the traffic stop is based on a mistake of law, there is generally no justification for the investigatory traffic stop regardless of the reasonableness of the mistake. *See United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001). A mistake of law occurs when an officer believes that the suspected conduct is illegal even though the law does not actually prohibit it. *See United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000).

[Headnote 7]

But there is a difference between a mistake of law and a mistake as to *which law* applies. The incorrect application of a statute is not a mistake of law when the law prohibits the suspected conduct. An example of such a scenario is addressed in *United States v. Wallace*, 213 F.3d 1216, 1220-21 (9th Cir. 2000). In *Wallace*, the officer pulled the defendant over for having tinted front windows because the officer believed that California law prohibited all front window tints when in fact California law only prohibited window tints past a certain degree of light transmittance. *Id.* at 1220. The Ninth Circuit Court of Appeals held that the traffic stop was constitutionally valid even though the officer was mistaken about the law because the officer's observations about the heavy tint obstructing the view into the vehicle "correctly caused him to believe that Wallace's window tinting was illegal; he was just wrong about exactly why." *Id.* The Ninth Circuit reasoned that police officers are not attorneys, and "[t]he issue is not how well [the officer] understood California's window tinting laws, but whether he had objective, probable cause to believe that these windows were, in fact, in violation." *Id.* at 1220. The Ninth Circuit held that this was not a mistake of law which would invalidate the stop under the Fourth Amendment, stating that "[t]he circumstances here stand in sharp contrast to cases in which the defendant's conduct does not in any way, shape or form constitute a crime."[3] *Id.*

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[3]Many jurisdictions have reached similar conclusions. *See, e.g.*, *United States v. Eckhart*, 569 F.3d 1263, 1272 (10th Cir. 2009) (holding that an investigating "officer need not be able to quote statutes" and that "[s]ome confusion about the details of the law may be excused so long as there was . . . reasonable articulable

We agree with the reasoning of the Ninth Circuit. Deputy Jason initiated the traffic stop because of the cracked windshield. She cited Cantsee for violating NRS 484D.435(1), believing that it was the applicable statute. She was mistaken. NRS 484D.435(1) prohibits driving a vehicle "with any sign, poster or other nontransparent material upon the front windshield." Although this statute does not prohibit Cantsee's conduct, a crack that obstructs the driver's vision through the windshield could be an infraction under NRS 484B.163(3). We conclude that this statute provides a lawful ground to justify the stop because the crack in the windshield might have obstructed Cantsee's view. Therefore, Deputy Jason's mistake was not a mistake of law, but a mistake as to *which* law applied. Accordingly, we conclude that the district court erred in finding that Deputy Jason's citation to the incorrect statute was a mistake of law that invalidated the traffic stop under the Fourth Amendment.[4] However, a question remains as to whether the State waived its right to argue that NRS 484B.163(3) justifies the traffic stop because it failed to include the statute in its opposition to the motion to suppress and raised it for the first time during the suppression hearing.

The State did not waive its right to argue that NRS 484B.163(3) justified the investigatory traffic stop

[Headnote 8]

Whether the State waived its right to argue that NRS 484B.163(3) justified the traffic stop is a question of law. *See Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 89, 110 P.3d 481, 484 (2005). This court reviews the district court's legal conclusions de novo. *Somee*, 124 Nev. at 441, 187 P.3d at 157-58.

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suspicion that [an actual] traffic . . . violation has occurred" (third alteration in original) (internal quotations omitted)); *In re Justin K.*, 120 Cal. Rptr. 2d 546, 550 (Ct. App. 2002) (holding that "an officer's reliance on the wrong statute does not render his actions [constitutionally] unlawful if there is a right statute that applies to the defendant's conduct"); *State v. Munoz*, 965 P.2d 349, 352 (N.M. Ct. App. 1998) (holding that a traffic stop was constitutional despite the investigating officer's citation to the wrong statute because the conduct observed actually violated a different statute); *State v. Heien*, 737 S.E.2d 351, 354-55 (N.C. 2012) (noting that North Carolina will uphold a traffic stop based on an officer's mistake as to which law applies if "the totality of the circumstances indicates that there is reasonable suspicion that the person stopped is violating some other, actual law"); *State v. Higley*, 237 P.3d 875, 878 (Or. Ct. App. 2010) (holding that "a stop is lawful even if the officer who executes it does so under the mistaken belief that the defendant has violated one law if the facts the officer perceives amount to a violation of a different law").

[4]We do not address the State's argument that NRS 484D.570(1)(b) also justifies the traffic stop because it was not raised before the district court. *See Walch v. State*, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996) ("[I]f a party fails to raise an issue below, this court need not consider it on appeal.").

[Headnote 9]

We are not aware of any authority stating that the failure to include a statute in an opposition to a motion to suppress waives the right to argue that statute at a subsequent hearing. Nevada does have statutes and rules of local practice providing that the failure to file a motion to suppress or an *opposition* to a motion to suppress waives argument. *See* NRS 174.105(2) (failure to file a motion to suppress prior to trial waives exclusionary rule argument); DCR 13(3) (failure to file an opposition to a motion "may be construed as an admission that the motion is meritorious"). But, there is no rule, statute, or other authority providing that failure to include an argument in a timely filed opposition is grounds for finding a waiver of that argument. Further, although new arguments may not be raised for the first time on appeal, *see Walch v. State*, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996), we see no reason why an argument on an issue may not be raised for the first time before the district court in a hearing held prior to trial.

The district court found that the State waived its right to argue this statute because raising it for the first time at the hearing unfairly surprised Cantsee. However, we are also unaware of any authority providing that the State may not direct the district court to a controlling statute solely because doing so will surprise the defendant. In addition, although Cantsee stated that he was not prepared to argue NRS 484B.163, he did not indicate how the addition of this statute prejudiced him. Given that the reason for justifying the traffic stop remained the same, *i.e.*, that the cracked windshield may have obstructed Cantsee's view, it is unclear what prejudice could have resulted from arguing that NRS 484B.163(3) rather than NRS 484D.435(1) justified the traffic stop when both of these statutes involve obstruction of the driver's view. *Cf. Viray v. State*, 121 Nev. 159, 162-63, 111 P.3d 1079, 1082 (2005) (holding that "[a]n inaccurate information does not prejudice a defendant[ ] . . . if the defendant had notice of the State's theory of prosecution").

And, even if Cantsee was unfairly surprised, "[t]he remedy for prejudicial surprise resulting in a defendant's inability to present his defense adequately is a continuance." *Zessman v. State*, 94 Nev. 28, 32, 573 P.2d 1174, 1177 (1978) (determining that the district court violated defendants' due process rights when it orally amended the information immediately prior to trial but then denied defendants' motion to continue the trial). Here, the district court did not continue the hearing or request supplemental briefing. Therefore, even if the State unfairly surprised Cantsee when it raised NRS 484B.163 for the first time at the hearing, we conclude that the district court erred in concluding that the State waived its right to argue this statute rather than continuing the hearing.[5]

[5]Given our conclusions in this opinion, we decline to address the State's remaining arguments on appeal.

The district court did not decide whether Deputy Jason had reasonable suspicion to stop Cantsee

[Headnotes 10-12]

The dissent argues that we should not remand this decision to the district court, but rather grant deference to the district court's determination that the crack in the windshield was not a violation of NRS 484.163(3). We disagree. Whether Deputy Jason had reasonable suspicion to stop Cantsee for an NRS 484B.163(3) violation is a much different question than whether she had reasonable suspicion to stop him for a safety hazard or whether he actually violated NRS 484B.163(3). An officer has reasonable articulable suspicion "if there are specific, articulable facts supporting an inference of criminal activity." *State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006); *Walker v. State*, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997) ("The officer must be able to point to specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant intrusion."). To determine whether an officer objectively had reasonable articulable suspicion, "the evidence is viewed under the totality of the circumstances and in the context of the law enforcement officer's training and experience." *Rincon*, 122 Nev. at 1173-74, 147 P.3d at 235. Here, the district court limited the scope of the evidentiary hearing on the motion to suppress to the issue of whether a safety hazard justified the stop. Further, the order did not analyze whether Deputy Jason had a reasonable suspicion to stop Cantsee for a possible NRS 484B.163(3) violation.

The district court specifically stated on the record that the scope of Deputy Jason's testimony at the evidentiary hearing would be limited to the issue of safety. As a result, neither attorney elicited testimony from Deputy Jason about the circumstances surrounding Cantsee's stop or any other facts about what she observed during her initial contact with him. While some of these facts were addressed at the preliminary hearing, the district court's decision to limit the scope of the hearing foreclosed any consideration of Deputy Jason's testimony from the preliminary hearing. The district court specifically noted at the end of its order that after the suppression hearing, "the historical facts known to the deputy at the time of the traffic stop [were] unclear[,]" such that it "prevent[ed] the [district court] from assessing *whether* the stop could have been independently justified under NRS 484B.163" (emphasis added). If the district court had held an evidentiary hearing on whether Deputy Jason had reasonable suspicion that Cantsee violated NRS 484B.163(3), then the district court likely would have been able to make a determination on this issue. Multiple courts have upheld stops premised on an officer observing a windshield crack. *See State v. Galvan*, 37 P.3d 1197, 1201 (Utah Ct. App. 2001) (citing several courts that have upheld traffic stops based on windshield cracks).

Accordingly, we reverse the district court's order, and we remand this matter for further proceedings consistent with this opinion.

PARRAGUIRRE, J., concurs.

CHERRY, J., dissenting:

I dissent from the majority's decision because I believe that the district court, despite some errant legal analysis, explicitly found that the facts did not support the State's argument. The district court rejected the State's factual contention that Deputy Jason could have reasonably suspected that Cantsee was violating NRS 484B.163 at the time of the traffic stop. This court should defer to the district court's findings of fact. Accordingly, I would affirm.

There are two issues in this appeal. The first is a legal issue and is adequately addressed by the majority. It is undoubtedly correct that a mistaken application of law does not make a traffic stop illegal, where the conduct observed is actually prohibited by the law. *See United States v. Wallace*, 213 F.3d 1216, 1220-21 (9th Cir. 2000). The second issue is factual. Did the officer possess a reasonable suspicion, at the time of the stop, that the conduct observed was actually prohibited by law? If so, then the stop was justified. The majority ignores the district court's findings on this second issue and remands the case for a repeat consideration of it.

A district court's findings of fact in a suppression hearing are reviewed for clear error. *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000). Under this standard of review, "factual determinations . . . are given deference on appeal if they are supported by substantial evidence." *Goudge v. State*, 128 Nev. 548, 554, 287 P.3d 301, 304 (2012). This is a lenient standard: "Substantial evidence is 'evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Thompson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 715 (2009) (quoting *Brust v. State*, 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992)).

The district court apparently went on to decide the factual issue, whether Deputy Jason possessed a reasonable suspicion that Cantsee's conduct was illegal, even though its legal analysis obviated the need to do so. The district court stated that "*even if* " the court's legal analysis were ignored, the State's "contention that NRS 484B.163 alternatively justifies the stop would be difficult to sustain on the record" (emphasis added). The district court unequivocally found that Deputy Jason did not suspect that Cantsee was violating NRS 484B.163: "Although, at the hearing the State attempted to justify this traffic stop under an alternative statute . . . this Court finds that the deputy did not believe Mr. Cantsee had violated another applicable statute." The district court found not only that Deputy Jason did not reasonably suspect that Cantsee was committing a crime, but also that Deputy Jason could not have rea-

sonably suspected as much. The district court found that "there was no evidence that the crack was positioned in Mr. Cantsee's field of vision, or actually obstructed his 'normal' view of the road." This finding is a death blow to the State's argument that Deputy Jason, at the time of the stop, could have reasonably suspected that Cantsee was violating NRS 484B.163(3) (prohibiting the operation of a vehicle on a highway "unless the driver's vision through any required glass equipment is *normal*" (emphasis added)).

The district court also made a finding as to the credibility of Deputy Jason's testimony. The district court found that "[w]hile the deputy claimed that the crack in the windshield went all the way across and up on the passenger side . . . . the deputy acknowledged describing the crack in the past as only six to eight inches." The court went on to say that the lack of clarity resulting from Deputy Jason's contradictory statements prevented the court from determining that the stop was justified under NRS 484B.163.[1] Hence, the district court incorrectly decided the legal issue, but then declared that even had it decided the legal issue in favor of the State, the facts did not support the State's ultimate position.

The State appears, at least to some extent, to be aware that this court should defer to the district court's finding that the facts did not justify a stop under NRS 484B.163(3). At oral argument, the State proffered the extraordinary opinion that *any* crack in a windshield justifies a reasonable suspicion that the driver is violating NRS 484B.163(3) and, therefore, that the district court legally erred by not finding the cracked windshield to be sufficient to justify a stop. *See* Oral Argument at 07:45, *State v. Cantsee*, Docket No. 59121 (Sept. 18, 2013), *available at* http://goo.gl/wuT7qW ("Our position is [that] the field of vision constitutes the entire windshield."). The State evidently believes that the district court's factual determination, that there was a crack in the windshield but that it did not obstruct Cantsee's normal vision, was legal error because any crack in a windshield obstructs vision and thereby violates NRS 484B.163(3).[2] In making this argument, the State implicitly accepts

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[1]The majority points out that the district court narrowed the scope of the evidentiary hearing to the safety hazard issue. It goes on to say that, had the district court held an evidentiary hearing on the NRS 484B.163 issue, the court might have been able to make a determination as to whether the stop was justified. But the decision whether to hold an evidentiary hearing is within the discretion of the district court; the State does not have an a priori right to an evidentiary hearing on a motion to suppress. *See Cortes v. State*, 127 Nev. 505, 509, 260 P.3d 184, 187 (2011). Furthermore, the district court noted the contradictions in Deputy Jason's testimony. I fail to see how remanding for another hearing with an expanded scope might make her testimony more credible.

[2]Of course, this argument is troubling; its adoption would make any citizen who was the victim of a pebble lodged in a windshield, a frequent occurrence on those long drives across our vast state, susceptible to a traffic stop.

the district court's findings and asks this court to evade them by generously construing the statute in the State's favor.

The fact that the district court made a determination in the alternative is nothing new. We regularly affirm district court decisions that were decided on alternative grounds. *See, e.g.*, *Mason v. Mason*, 115 Nev. 68, 69-71, 975 P.2d 340, 341 (1999) (affirming on one of the alternate grounds for the district court's ruling). This court reviews the district court's judgment, not its opinion: "It is well settled that the opinion of the trial judge is no part of the judgment roll, and that it can only be used to aid this court in the proper determination of the appeal." *Hunter v. Sutton*, 45 Nev. 430, 439, 205 P. 785, 787 (1922). We do not reverse a correct judgment merely because the opinion contained some extraneous errors.

The facts, as found by the district court, show that Deputy Jason could not have formed an objectively reasonable suspicion that Cantsee was violating the law at the time of the traffic stop. These findings warrant deference. I would affirm the district court's order suppressing the evidence acquired from the illegal stop.

RANDALL GEORGE ANGEL, Appellant, *v.*
MICHAEL CRUSE, Respondent.

No. 59278

April 3, 2014 321 P.3d 895

Proper person appeal from a district court summary judgment in a civil rights action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Prisoner filed suit against corrections officer for First Amendment retaliation, based on prisoner's claim that officer filed disciplinary charge against him and he was placed in administrative segregation for having attempted to file grievance against officer. The district court entered summary judgment for officer, and prisoner appealed. The supreme court, Cherry, J., held that: (1) the district court was required to construe evidence in prisoner's favor, as nonmovant, not in officer's favor; (2) fact issue remained whether disciplinary proceedings were motivated by prisoner's attempt to file grievance; (3) fact issues remained whether prisoner threatened corrections officer and whether actions taken by corrections officer furthered legitimate penological goal of promoting prison safety; (4) in determining whether initiation of disciplinary proceedings had chilling effect on prisoner's First Amendment rights, issue was not whether prisoner's First Amendment rights in filing grievance against officer were actually chilled, but whether disciplinary proceedings would

have chilled or silenced person of ordinary firmness; and (5) officer was not entitled to qualified immunity if initiation of prison disciplinary proceedings was in retaliation for prisoner's stated intent to file grievance against officer.

Reversed and remanded.

Randall George Angel, Reno, in Proper Person.

Catherine Cortez Masto, Attorney General, and *Clark G. Leslie*, Senior Deputy Attorney General, Carson City, for Respondent.

1. Appeal and Error.
   The supreme court reviews a district court summary judgment de novo, without deference to the district court's findings.
2. Judgment.
   Summary judgment is appropriate if the pleadings and other evidence presented, viewed in the light most favorable to the nonmovant, demonstrate that the movant is entitled to judgment as a matter of law and that no genuine issues of fact remain in dispute.
3. Constitutional Law.
   A prisoner alleging retaliation for the exercise of his or her First Amendment rights must demonstrate that (1) the prisoner engaged in protected conduct, (2) a state actor took adverse action against the prisoner, (3) the adverse action was taken because of the prisoner's protected conduct, (4) the adverse action had a chilling effect on the prisoner's protected conduct, and (5) the adverse action did not reasonably advance a legitimate correctional goal. U.S. Const. amend. 1.
4. Constitutional Law.
   To prevail on a First Amendment retaliation claim, a plaintiff must show that his or her protected conduct was the substantial or motivating factor behind the defendant's conduct. U.S. Const. amend. 1.
5. Constitutional Law; Judgment.
   To survive summary judgment on the retaliatory motive element of a First Amendment retaliation claim, a prisoner only has to submit evidence of a retaliatory motive sufficient to create a factual issue in this regard, and while the timing of a punishment alone is not sufficient to establish motivation, it may be circumstantial evidence of motivation. U.S. Const. amend. 1.
6. Judgment.
   In determining whether summary judgment evidence created fact issue as to whether corrections officer's initiation of disciplinary proceeding against prisoner was motivated by prisoner's filing of grievance against officer, as required for prisoner to survive prison officer's motion for summary judgment on prisoner's First Amendment retaliation claim, the district court was required to construe evidence in prisoner's favor, as nonmovant, not in officer's favor. U.S. Const. amend. 1.
7. Judgment.
   Genuine issue of material fact remained as to whether disciplinary proceedings initiated by corrections officer against prisoner were motivated by prisoner's attempt to file grievance against officer, thus precluding summary judgment on prisoner's claim for First Amendment retaliation. U.S. Const. amend. 1.

8. JUDGMENT.
   Genuine issues of material fact remained as to whether prisoner threatened corrections officer and whether actions taken by corrections officer in placing prisoner in handcuffs and removing him, based on prisoner's alleged threat, which was allegedly made while prisoner was attempting to file grievance against officer, furthered legitimate penological goal of promoting prison safety in light of alleged threat, thus precluding summary judgment on prisoner's claim for First Amendment retaliation. U.S. CONST. amend. 1.
9. CONSTITUTIONAL LAW; PRISONS.
   In determining whether corrections officer's initiation of disciplinary proceedings against prisoner had chilling effect on First Amendment rights, issue was not whether prisoner's First Amendment rights in filing grievance against officer were actually chilled, but whether disciplinary proceedings would have chilled or silenced person of ordinary firmness. U.S. CONST. amend. 1.
10. CIVIL RIGHTS.
    Corrections officer was not entitled to qualified immunity from suit for First Amendment retaliation if initiation of prison disciplinary proceedings against prisoner was in retaliation for prisoner's stated intent to file grievance against officer; prohibition against such retaliation was clearly established. U.S. CONST. amend. 1.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

In this appeal, we consider whether the district court erred by granting summary judgment to respondent in a civil rights action alleging retaliation in response to appellant's exercise of his rights under the First Amendment to the United States Constitution. Because we conclude that genuine issues of material fact existed with regard to several elements of the retaliation claim, we reverse the summary judgment and remand this matter to the district court for further proceedings consistent with this opinion.

BACKGROUND

In the district court, proper person appellant Randall George Angel, then an inmate, filed a civil rights complaint against respondent corrections officer Michael Cruse, in his individual capacity only. In the complaint, Angel alleged that Cruse had violated his civil rights by filing a disciplinary charge against him and having him placed in administrative segregation in retaliation for Angel attempting to file a grievance against Cruse. Specifically, Angel asserted that he was filling out a grievance form when Cruse asked him what he was doing. Angel maintains that his response was, "you violated my constitutional right and I'm going to make you pay for it." Cruse then stopped Angel from completing the grievance, hand-

cuffed him, and escorted him to a senior officer's office. According to Angel, he was then placed in administrative segregation and charged with threatening Cruse. The charge was upheld following a disciplinary hearing.

Cruse subsequently filed a motion for summary judgment on Angel's complaint in which he largely did not dispute the sequence of events set forth by Angel. But he asserted that, rather than saying "you violated my constitutional rights and I'm going to make you pay for it," Angel had actually threatened him by saying, "I'll get you, believe me you're going to get yours." Cruse argued that the adverse action taken against Angel following this exchange was carried out in response to this threat and not because Angel was attempting to file a grievance against him. Thus, Cruse contended that the adverse action was taken for a nonretaliatory purpose and that it advanced the legitimate correctional goal of institutional security. Cruse further argued that the adverse action had not chilled Angel's exercise of his First Amendment rights, as demonstrated by the fact that Angel had continued to file grievances related to this and other unrelated incidents. Alternatively, Cruse asserted that he was entitled to qualified immunity because he could not have known that the adverse action violated Angel's constitutional rights.

Angel opposed the summary judgment motion, again asserting that Cruse had prevented him from completing the grievance and falsely charged him with making threats in retaliation for his attempt to file the grievance. Angel disputed Cruse's contentions regarding his reason for taking action against Angel, the action's chilling effects, and Cruse's entitlement to qualified immunity. In support of his opposition, Angel submitted an affidavit detailing his version of the events leading up to the adverse action, including his assertion that what he had said to Cruse was, "you violated my constitutional right and I'm going to make you pay for it." He further attested that this statement was not a threat and that Cruse had falsely charged him with issuing a threat in retaliation for attempting to file the grievance. Cruse filed a reply to Angel's opposition, reiterating his arguments in support of summary judgment.

The district court subsequently granted summary judgment to Cruse,[1] finding that the evidence demonstrated that Angel was handcuffed, placed in administrative segregation, and charged with issuing threats because he had actually threatened Cruse by saying, "I'll get you, believe me you're going to get yours." The court also found that, even if Cruse took this action because of Angel's attempt to file the grievance, Angel could not demonstrate that it had a chilling effect when he had continued to file grievances related to this and

[1]The district court also dismissed any claims against Cruse in his official capacity. As the complaint only named Cruse in his individual capacity, this dismissal was unnecessary, and is therefore not addressed further in this opinion.

other incidents. The district court further concluded that, regardless of the first two findings, the undisputed evidence established that Cruse took action against Angel for the legitimate penological purpose of ensuring institutional security. Thus, the court concluded that Cruse was entitled to judgment as a matter of law with regard to the retaliation claim. Alternatively, the court found that Cruse was entitled to qualified immunity because, "[e]ven assuming for the sake of argument that a violation occurred, as a matter of law, Defendant Cruse could not have reasonably known that the actions he took, pursuant to administrative regulations, as a result of [Angel] threatening him violated established statutory or constitutional rights." This appeal followed.[2]

DISCUSSION

Standard of review

[Headnotes 1, 2]

This court reviews a district court summary judgment de novo, without deference to the district court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment was appropriate in this case if the pleadings and other evidence presented, viewed in the light most favorable to Angel, demonstrated that Cruse was entitled to judgment as a matter of law and that no genuine issues of fact remained in dispute. *Id.*

Retaliation

On appeal, Angel argues that there were genuine issues of fact remaining that precluded summary judgment on his retaliation claim.[3] Cruse, on the other hand, asserts that the undisputed evi-

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[2]On appeal, Angel argues that this court lacks jurisdiction over his appeal because his claims against corrections officer Patrick McNamara were not resolved, and thus, a final judgment was not entered below. But the district court record demonstrates that McNamara was never made a party in district court because he was not served with process. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action). As a result, the judgment in this matter was final and appealable, and we therefore have jurisdiction to consider this appeal. *See* NRAP 3A(b)(1) (providing for an appeal from a final judgment).

[3]Both in the district court and in this court, Angel sometimes discussed his claim in terms of a denial-of-access-to-the-courts issue. Although Angel's complaint alleged that Cruse stopped him from filing his grievance at the time that he intended to file it, he did not assert that he was unable to file the grievance at a later time, and thus, he did not state a claim for denial of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 349-55 (1996) (holding that a prisoner seeking to state a denial-of-access-to-the-courts claim must demonstrate actual injury by showing that he or she was hindered in attempting to pursue a legal claim). Thus, we limit our discussion in this opinion to Angel's retaliation claim.

dence demonstrated that he took action against Angel in response to a threat and not in retaliation for Angel's attempt to file a grievance against him. Cruse further contends that the action taken against Angel did not chill Angel's exercise of his First Amendment rights and that it was taken to advance the legitimate correctional goal of prison safety.[4]

[Headnote 3]

A prisoner alleging retaliation for the exercise of his or her First Amendment rights must demonstrate that (1) the prisoner engaged in protected conduct, (2) a state actor took adverse action against the prisoner, (3) the adverse action was taken because of the prisoner's protected conduct, (4) the adverse action had a chilling effect on the prisoner's protected conduct, and (5) the adverse action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004). Cruse does not dispute that Angel engaged in protected conduct or that he took adverse action against Angel. Instead, he contends that the adverse action was not taken because of the protected conduct, Angel's exercise of his First Amendment rights was not chilled, and the adverse action advanced a legitimate correctional goal. As the considerations underlying whether Cruse took action against Angel because of Angel's exercise of protected conduct and whether that action advanced a legitimate correctional goal are related, we discuss those issues first before turning to whether the action had a chilling effect.

Whether the action was taken because of Angel's protected conduct

[Headnotes 4, 5]

Cruse argues that Angel failed to submit any evidence creating a genuine issue of fact as to whether Cruse took action against Angel in response to Angel's filing of the grievance, as opposed to his threatening of Cruse. "To prevail on a retaliation claim, a plaintiff must show that his protected conduct was the substantial or motivating factor behind the defendant's conduct." *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009) (internal quotation marks omitted).

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[4]In his initial response, Cruse asked this court to apply the "some evidence" standard discussed in *Superintendent, Massachusetts Correctional Institution at Walpole v. Hill*, 472 U.S. 445, 455 (1985) (holding that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits"), to uphold the district court's grant of summary judgment with regard to the decision to find Angel guilty after a disciplinary hearing. Angel's claims with regard to the disciplinary hearing, however, applied to McNamara, who, as noted above, was never made a proper party to the district court's action and is thus not a party to this appeal. Because the "some evidence" standard does not apply to a corrections officer's initial accusation that a prisoner violated a rule when the prisoner argues that the accusation was false and retaliatory, *Hines v. Gomez*, 108 F.3d 265, 268-69 (9th Cir. 1997), we do not apply it here.

To survive summary judgment on this element of a retaliation claim, a prisoner only has to submit evidence of a retaliatory motive sufficient to create a factual issue in this regard. *Id.* While the timing of a punishment alone is not sufficient to establish motivation, it may be circumstantial evidence of motivation. *See Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003).

[Headnote 6]

Initially, contrary to Cruse's contention that Angel failed to submit any evidence in support of his opposition to summary judgment, Angel did submit his own affidavit, sworn under the penalty of perjury, to support his opposition. In that affidavit, Angel asserted that, in response to Cruse asking why he was filling out the grievance, Angel had stated, "you violated my constitutional right and I'm going to make you pay for it." He further attested that this was not a threat and that Cruse had falsely charged him with issuing a threat in retaliation for attempting to file the grievance. Despite the submission of this evidence by Angel, the district court accepted Cruse's version of events, finding that Angel had threatened Cruse by saying, "I'll get you, believe me you're going to get yours." In so doing, the district court failed to properly apply the well-established standard for evaluating summary judgment motions, which required it to construe the evidence in Angel's favor. *See Wood*, 121 Nev. at 732, 121 P.3d at 1031. Instead, by accepting Cruse's characterization of Angel's statement, the court construed the evidence against Angel.

[Headnote 7]

Accepting Angel's version of the events, Angel said, in response to Cruse asking him why he was filling out a grievance, that Cruse had violated his rights and would have to pay for that violation. While Angel's statement that he would make Cruse pay for violating his constitutional rights was literally a threat insofar as Angel communicated an intent to inflict loss on Cruse, *see Black's Law Dictionary* 1618 (9th ed. 2009) (defining "threat" as "[a] communicated intent to inflict harm or loss on another or on another's property, esp[ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent"), viewing the circumstances in the light most favorable to Angel, a reasonable person could conclude that Cruse's actions were actually a response to Angel's stated intent to file the grievance against Cruse, rather than a response to a purported security threat. In particular, Angel's version of the statement arguably only communicated to Cruse that Angel intended to pursue the grievance, a protected activity, and did not imply any intent to engage in acts of violence or other improper activity on Angel's part. Moreover, Cruse's adverse action took place while Angel was actually in the process of filling out the grievance. *See Bruce*, 351 F.3d at 1288 (recognizing that the timing of a punishment may

provide circumstantial evidence of a retaliatory motive). Construing this set of facts in Angel's favor, we conclude that the evidence was sufficient to raise a genuine issue of material fact with regard to whether the adverse action was taken against Angel because of his exercise of protected conduct.

Whether the action advanced a legitimate correctional goal

[Headnote 8]

With regard to whether the action taken against Angel advanced a legitimate correctional goal, to the extent that Cruse actually handcuffed and removed Angel because Angel made a threat, such an action could, at least arguably, be seen as promoting prison safety, which is a legitimate concern for a correctional facility. *See Turner v. Safley*, 482 U.S. 78, 91 (1987) (recognizing prison security as a legitimate concern for a correctional institution). But if a factual inquiry revealed that Angel's statement was no more than a communication that Angel intended to seek legal relief through the grievance process and that Cruse took the adverse action because Angel was exercising his right to file a grievance, then it would follow that the action was not taken out of a concern for prison safety. *See Rhodes*, 408 F.3d at 567-68 (explaining that a retaliation claim may be valid when the adverse action "did not reasonably advance a legitimate correctional goal"). Thus, for the same reason that a genuine issue of material fact remains with regard to Cruse's motivation, a factual issue also remains as to whether the action taken by Cruse served a legitimate correctional goal.

Chilling effect

[Headnote 9]

As for the requirement that the adverse action have a chilling effect, Cruse contends that the undisputed evidence demonstrated that Angel's exercise of his First Amendment rights was not chilled because he continued to file grievances related to this and other incidents. While a prisoner stating a First Amendment retaliation claim must show that the adverse action "chilled the inmate's exercise of his First Amendment rights," in *Rhodes*, the United States Court of Appeals for the Ninth Circuit discussed the difficulties an inmate faces in establishing this element if a subjective standard is used to evaluate it, *i.e.*, if the court considers whether the inmate himself or herself has actually been deterred from engaging in protected conduct by the adverse action. 408 F.3d at 567-69. In *Rhodes*, the lower court had dismissed the inmate's retaliation claim based on its conclusion that his filing of the lawsuit demonstrated that the inmate's exercise of his First Amendment rights had not been chilled. *Id.* at 566. But on appeal, the *Rhodes* court held that "[b]ecause it would be unjust to allow a defendant to escape liability for a First Amend-

ment violation merely because an unusually determined plaintiff persists in his protected activity, [an inmate plaintiff] does not have to demonstrate that his speech was actually inhibited or suppressed." *Id.* (internal quotation marks omitted). Instead, the proper question was whether the adverse action "would chill or silence *a person of ordinary firmness* from future First Amendment activities." *Id.* at 568 (emphasis added) (internal quotation marks omitted); *see also Brodheim*, 584 F.3d at 1271 (applying this objective standard to a prisoner's First Amendment retaliation claim).

Here, the district court applied a subjective standard, concluding that because Angel had continued to use the grievance process, he could not show that Cruse's actions had a chilling effect on his exercise of his First Amendment rights. But under *Rhodes*, the district court should have applied an objective standard, asking whether Cruse's actions would have had a chilling effect on "a person of ordinary firmness." *See Rhodes*, 408 F.3d at 568. And because Cruse did not make any arguments or present any evidence to demonstrate that Angel could not meet this objective standard, the grant of summary judgment on this element of Angel's claim was improper. *See id.* at 569.

As there were genuine issues of material fact remaining with regard to each of the disputed elements of Angel's retaliation claim, the district court erred by concluding that Cruse was entitled to summary judgment on this claim. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Nevertheless, if the district court correctly determined that Cruse was entitled to qualified immunity, we may affirm the court's decision on that basis. Thus, we now consider whether Cruse was entitled to qualified immunity.

Qualified immunity

[Headnote 10]

In concluding that Cruse was entitled to qualified immunity, the district court found that "[e]ven assuming for the sake of argument that a violation occurred, as a matter of law, Defendant Cruse could not have reasonably known that the actions he took, pursuant to administrative regulations, as a result of [Angel] threatening him violated established statutory or constitutional rights." But this conclusion assumes that Cruse took the actions because of the purported threat, and not in retaliation for Angel's attempt to file the grievance. And as discussed above, a genuine issue of fact exists with regard to the motivation behind Cruse's actions.

To the extent that Cruse may have taken action against Angel in retaliation for filing the grievance, the Ninth Circuit has recognized "that the prohibition against retaliatory punishment is clearly established law . . . for qualified immunity purposes." *Rhodes*, 408 F.3d at 569 (internal quotation marks omitted). Thus, if it is determined

that Cruse took action against Angel in retaliation for Angel's exercise of his First Amendment right to file a grievance, such action was in violation of clearly established law, and Cruse was not entitled to qualified immunity. *See id.* We therefore conclude that granting summary judgment to Cruse on qualified immunity grounds was inappropriate. *See id.*

CONCLUSION

As detailed above, there were genuine issues of material fact remaining with regard to each of the disputed elements of the retaliation claim and with regard to Cruse's entitlement to qualified immunity. Accordingly, we reverse the district court's order granting summary judgment to Cruse and remand this matter to the district court for further proceedings consistent with this opinion.

HARDESTY and PARRAGUIRRE, JJ., concur.