STATE OF NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION, EMPLOYMENT SECURITY DIVISION, Appellant, *v.* SIERRA NATIONAL CORPORATION, dba THE LOVE RANCH, a Nevada Corporation, Respondent.

No. 76639

March 26, 2020 460 P.3d 18

Appeal from an order granting a petition for a writ of mandamus seeking the disclosure of audit records under the Nevada Public Records Act. First Judicial District Court, Carson City; James Todd Russell, Judge.

Affirmed.

State of Nevada Department of Employment, Training & Rehabilitation, Employment Security Division, and *Troy Curtis Jordan, Laurie L. Trotter*, and *Tracie K. Lindeman*, Carson City, for Appellant.

Simons Hall Johnston and *Anthony L. Hall* and *Ricardo N. Cordova*, Reno, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

The Nevada Public Records Act (NPRA), codified in NRS Chapter 239, provides that all public records are subject to public inspection unless they are declared by law to be confidential. In this case, Sierra National Corporation, d/b/a the Love Ranch, filed a public records request with the Department of Employment, Training & Rehabilitation (DETR), requesting various records related to audits of the Love Ranch and other legal brothels. The primary issue before us is whether the requested records are confidential under NRS 612.265, which addresses the confidentiality and dissemination of information obtained by DETR's Employment Security Division. Because we conclude that NRS 612.265 does not categorically exempt the requested records from disclosure, we affirm the district court's order granting Love Ranch's petition and compelling DETR to comply with the request.

FACTS

In late 2016, DETR's Employment Security Division (ESD) audited the Love Ranch, a legal brothel located in Lyon County. The

ESD concluded the sex workers at the Love Ranch were employees and that the Love Ranch had to contribute to the Unemployment Compensation Fund accordingly. The Love Ranch filed an administrative appeal and requested the appeal tribunal issue subpoenas compelling DETR to produce all records related to the audit, past audits and decisions regarding the Love Ranch, and audits and decisions related to other brothels.

The Love Ranch then made a formal public records request pursuant to the NPRA to DETR's public records officer. Like its earlier request for subpoenas, the Love Ranch's NPRA request asked for all information and records related to the audit, to past audits and decisions regarding the Love Ranch, and to audits and decisions related to other brothels. The Love Ranch further requested all communications between DETR staff regarding the audit, the pending appeal, and audits of other brothels. To the extent the request encompassed confidential information, the Love Ranch instructed DETR to redact that information and provide citations to the relevant legal authority. DETR denied the NPRA request. The Love Ranch then petitioned the district court for a writ of mandamus, which the district court granted. This appeal followed.

DISCUSSION

The overarching question presented by the parties is whether the requested information is exempt from disclosure under NRS 239.010 and NRS 612.265.[1] Although we "review[ ] a district court's decision to grant or deny a petition for a writ of mandamus

[1]DETR additionally argues the NPRA request lacked the specificity required by the Nevada Administrative Code and the *Nevada Public Records Act Manual*. We conclude that NAC 239.863 requires only that the request be sufficiently specific for the governmental entity to identify the records. The Love Ranch's request provided sufficient information for DETR to identify responsive records. To the extent DETR needed more than five days to comply with the request, or additional information from the Love Ranch regarding whether the request encompassed certain records, NRS 239.0107(1)(c) provides this flexibility.

We also reject DETR's arguments regarding jurisdiction, the separation of powers, and the propriety of writ relief given the Love Ranch's pending administrative appeal. We have repeatedly held that under NRS 239.011(1), a petition for a writ of mandamus is the proper method to contest the denial of a public records request. *See, e.g.*, *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 399-400, 399 P.3d 352, 354-55 (2017); *DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). And barring a party from requesting records under NRS Chapter 239 based upon pending litigation or the motive for the request would place limits on access to public records that are not contemplated by our statutes. *See Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 84 n.2, 343 P.3d 608, 611 n.2 (2015) (observing that a requester's motive is not relevant to the duty to disclose under the NPRA); *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142, 143, 414 P.3d 318, 320 (2018) (addressing a case where a residents' association sued the local board of commissioners and, "[a]s part of that suit," made a public records request for information that pertained to the lawsuit).

under an abuse of discretion standard," when presented with questions of statutory interpretation, our review is de novo. *Pub. Emps.' Ret. Sys. of Nev. v. Reno Newspapers, Inc.*, 129 Nev. 833, 836, 313 P.3d 221, 223 (2013).

NRS 239.010(1)[2] generally states that "all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person." But it also provides for exceptions where a record is "declared by law to be confidential" and includes a long list of statutory exceptions.[3] NRS 239.010(1). One of the listed statutory exceptions is NRS 612.265, which governs the ESD's disclosure of information obtained pursuant to the administration of NRS Chapter 612 or of the determination of a person's unemployment benefit rights. NRS 612.265(1).

Of paramount importance in any public records case is the policy underlying the NPRA. "[T]he purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible," which "promote[s] government transparency and accountability." *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877-78, 266 P.3d 623, 626 (2011).

In furtherance of this purpose, we presume that the requested public records must be disclosed unless the governmental entity demonstrates that either (1) the records are confidential by law or (2) the balance of interests weighs against disclosure. *Comstock Residents Ass'n*, 134 Nev. at 144, 414 P.3d at 320. In either circumstance, the restriction on public access is narrowly construed. *Id.*; *see also Gibbons*, 127 Nev. at 878, 266 P.3d at 626. Similarly, under legislative mandate, we must liberally construe the NPRA's provisions to maximize the public's right to access records. NRS 239.001(2); *Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 703, 429 P.3d 313, 317 (2018). The governmental entity bears the burden of proving by a preponderance of the evidence that any withheld records are confidential by law. NRS 239.0113.

Consistent with these principles, we narrowly interpret the statutes listed in NRS 239.010(1) as exceptions to the broad duty to

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[2]The NPRA was amended in 2019, but those amendments do not apply here. *See* 2019 Nev. Stat., ch. 612, § 11, at 4008. Therefore, all references in this opinion are to the statutes that were in effect prior to 2019.

[3]But to the extent DETR argues that this list of statutory exceptions creates categorical exemptions, this argument is belied by NRS 239.010's plain language, which allows public access to public records insofar as the information is not expressly made confidential by other law. NRS 239.010(1). We are also not persuaded by DETR's argument that the 2013 amendments broadened exemptions to the NPRA. *See, e.g.*, *PERS v. Nev. Policy Research Inst., Inc.*, 134 Nev. 669, 672 n.2, 429 P.3d 280, 284 n.2 (2018) (clarifying the application of the statute at issue in *City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 399 P.3d 352 (2017), and contrasting the statute at issue in *Nevada Policy Research*).

disclose public records. *See, e.g.*, *PERS v. Nev. Policy Research Inst., Inc.*, 134 Nev. 669, 672-76, 429 P.3d 280, 283-86 (2018) (addressing NRS 286.110(3) and NRS 286.117 and concluding the requested information was not confidential by law and that the interest in nondisclosure did not outweigh the public's interest); *Reno Newspapers, Inc.*, 129 Nev. at 838, 313 P.3d at 224 (considering the extent to which governmental entity's records were exempt from the NPRA under NRS 286.110); *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 212, 234 P.3d 922, 923 (2010) (considering whether the identity of a person with a concealed firearms permit was confidential under NRS 202.3662).

Turning to the statute at issue here, NRS 612.265(1) provides,

> Except as otherwise provided in this section and NRS 239.0115 and 612.642, information obtained from any employing unit or person pursuant to the administration of this chapter and any determination as to the benefit rights of any person is confidential and may not be disclosed or be open to public inspection in any manner which would reveal the person's or employing unit's identity.[4]

Under a narrow construction of that provision, the information provided to the ESD and its benefits determinations are confidential only to the extent those records "would reveal the person's or employing unit's identity."[5] Here, the Love Ranch's public records request specified that it did *not* encompass information that would reveal the identity of any person or employing unit. And the district court compelled DETR to allow access to the *requested* records, nothing more. In short, the request comported with NRS 612.265(1)'s mandate that certain information within the ESD's records is confidential and shall not be disclosed, and DETR can comply with the

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[4]NRS 612.265 was amended in 2019. Those amendments do not apply here. *See* 2019 Nev. Stat., ch. 528, § 16(2), at 3166 (providing that amendments become effective on July 1, 2019).

[5]We are unpersuaded by DETR's reliance on NRS 612.265(2), which provides that a claimant or his or her legal representative may have access to the ESD's records "to the extent necessary for the proper presentation of the claimant's claim in any proceeding [under NRS Chapter 612]" but that the claimant and employer are not entitled "to information from the records of the [ESD] for any other purpose." That subsection enables NRS Chapter 612 litigants to obtain information as necessary for an NRS Chapter 612 proceeding, but it does not broaden the otherwise limited nature of the confidentiality set forth in NRS 612.265(1)—to protect the person's and the employing unit's identity.

As DETR did not address NRS 612.265(13) and (14) in the proceedings below, we do not address them here. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

request and the district court's writ without violating NRS 612.265. Accordingly, we conclude writ relief was appropriate and the district court did not abuse its discretion by granting the petition.[6]

CONCLUSION

The Nevada Public Records Act provides that all public records held by government entities are public information and, unless the records are made confidential by law, they are subject to public inspection. To further the Act's purpose, we presume public records must be disclosed and narrowly construe any restrictions on disclosure. Applying those rules, we conclude that NRS 612.265 protects from disclosure a person's or employing unit's identity but otherwise does not prohibit disclosure of the ESD's records. Because the request here expressly excluded any records that would reveal a person's or employing unit's identity and the district court did not compel disclosure of any records beyond those requested,[7] we affirm the district court's order granting the petition for a writ of mandamus.[8]

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Cadish, JJ., concur.

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[6]The district court concluded that DETR waived any confidentiality and privilege arguments by failing to raise them in its letter denying the public records request. But as we have recently held, a governmental entity does not waive confidentiality or privilege in those circumstances. *Clark Cty. Coroner's Office v. Las Vegas Review-Journal*, 136 Nev. 44, 458 P.3d 1048 (2020); *Republican Att'ys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 458 P.3d 328 (2020).

[7]The district court's order does not preclude DETR or the ESD from redacting identifying information that is confidential under NRS 612.265(1) or providing a privilege log for any records containing information that cannot be redacted, particularly in regards to third parties. *See, e.g.*, *Clark Cty. Coroner's Office*, 136 Nev. 44, 458 P.3d 1048 (explaining a district court may not order production of unredacted juvenile autopsy reports where those reports contain information that should be redacted); *see also Gibbons*, 127 Nev. at 882-83, 266 P.3d at 629 (addressing privilege logs).

[8]Because we agree the district court properly granted the Love Ranch's petition, we likewise affirm the district court's award of attorney fees. *See* NRS 239.011(2).

WILBER ERNESTO MARTINEZ GUZMAN, Petitioner, *v*. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE CONNIE J. STEINHEIMER, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 79079

March 26, 2020 460 P.3d 443

Original petition for a writ of prohibition or, in the alternative, writ of mandamus challenging a district court order denying a motion to dismiss.

Petition granted in part and denied in part.

John L. Arrascada, Public Defender, and *John Reese Petty, Joseph W. Goodnight, Katheryn Hickman*, and *Gianna Verness*, Chief Deputy Public Defenders, Washoe County, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Marilee Cate*, Appellate Deputy District Attorney, and *Travis Lucia*, Deputy District Attorney, Washoe County; *Mark Jackson*, District Attorney, Douglas County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

In resolving this writ petition,[1] we consider the meaning of territorial jurisdiction under NRS 172.105, which is the statute that defines the authority of a grand jury to inquire into criminal offenses. The Washoe County grand jury indicted petitioner Wilber Martinez Guzman on ten counts. Four of the counts concerned offenses committed in Douglas County.[2] Martinez Guzman filed a motion to dismiss the four Douglas County counts, arguing that the Washoe County grand jury did not have the authority to return an indictment for offenses committed in Douglas County. The district court denied Martinez Guzman's motion, finding that a grand jury's authority to

[1]We conclude that mandamus is the most appropriate remedy here, as Martinez Guzman asserts that the law requires the district court to grant his motion to dismiss. NRS 34.160 (permitting this court to issue a writ of mandamus to compel the performance of an act that the law requires).

[2]Washoe County is within the Second Judicial District Court. Douglas County is within the Ninth Judicial District Court.

return an indictment under NRS 172.105 "extends statewide to all felony offenses." The district court based its denial on its interpretation of the statute's language permitting the grand jury to "inquire into all public offenses triable in the district court or in a Justice Court, committed within the territorial jurisdiction of the district court for which it is impaneled." NRS 172.105.

We hold that the district court incorrectly interpreted this language in denying Martinez Guzman's motion to dismiss, as "territorial jurisdiction" of the district court does not extend statewide, thereby encompassing any offense committed within Nevada. Rather, we hold that "territorial jurisdiction" under NRS 172.105 is tied to our existing statutes governing the proper court where a criminal case may be pursued, and thus the statute empowers a grand jury to inquire into an offense so long as the district court that empaneled the grand jury may appropriately adjudicate the defendant's guilt for that offense. We therefore grant the petition in part and vacate the district court's order so that it may reconsider Martinez Guzman's motion to dismiss. In doing so, the district court shall review the evidence presented to the Washoe County grand jury to determine whether there is a sufficient connection between the Douglas County offenses and Washoe County. To do so, the district court must determine whether venue would be proper in Washoe County for the Douglas County offenses. If so, then the Washoe County grand jury has the authority to inquire into the Douglas County offenses, and criminal proceedings may continue. If not, then the Washoe County grand jury does not have the authority to inquire into the Douglas County offenses, and the district court must grant Martinez Guzman's motion to dismiss. We deny the petition to the extent that Martinez Guzman seeks a writ directing the district court to grant his motion to dismiss outright.

FACTS AND PROCEDURAL HISTORY

According to the charging documents, the following was alleged. On January 3, 2019, Martinez Guzman burglarized the home of Gerald and Sharon David in Washoe County. The following day, Martinez Guzman returned to the Davids' home, stealing a revolver from an outbuilding located on the property. On or about January 9, Martinez Guzman entered the home of Constance Koontz located in Douglas County, fatally shot Koontz, and burglarized her home. Martinez Guzman used the revolver stolen from the Davids in the murder. On or about January 12, Martinez Guzman entered the home of Sophia Renken, also located in Douglas County, and fatally shot her with the same revolver. On or about January 15, Martinez Guzman returned to the Davids' home, fatally shot the Davids, and further burglarized the property. Following Martinez Guzman's arrest and subsequent interrogation, police discovered various fire-

arms belonging to the Davids wrapped in a tarp and buried in the hills around Carson City. The State alleges that Martinez Guzman placed the stolen firearms in that location.

The Washoe County grand jury returned an indictment, which the Washoe and Douglas County District Attorneys jointly filed. The indictment charged Martinez Guzman with ten felony counts. Martinez Guzman filed a motion to dismiss the four counts alleging criminal offenses committed in Douglas County. He argued that the Washoe County grand jury lacked the "territorial jurisdiction" to return an indictment for offenses committed in Douglas County.[3] Martinez Guzman relied on NRS 172.105, which provides that "[t]he grand jury may inquire into all public offenses triable in the district court or in a Justice Court, committed within the territorial jurisdiction of the district court for which it is impaneled." Martinez Guzman argued that "territorial jurisdiction of the district court" is a limiting term that confines the grand jury's authority to crimes allegedly committed within the boundaries of Washoe County.

After considering NRS 172.105's legislative history, as well as other statutes, constitutional provisions, and caselaw, the district court denied the motion. It determined that "territorial jurisdiction" is an expansive term giving Nevada district courts "jurisdiction over felony offenses, not confined to the respective county or counties that are part of their district," and thus "the Second Judicial District Court's territorial jurisdiction extends statewide to all felony offenses." The district court concluded that the Washoe County grand jury had the same statewide authority and thus could properly return an indictment on the Douglas County counts. Martinez Guzman filed the instant petition, requesting that this court order the district court to grant his motion to dismiss.

DISCUSSION

Standards for writ relief

A writ of mandamus is available "to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), *limited on other grounds by Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008); *see* NRS 34.160. A writ of mandamus is an extraor-

[3]Martinez Guzman contemporaneously filed a pretrial petition for a writ of habeas corpus in district court that raised many of the same arguments. The district court denied the petition. We are reviewing the district court's order granting the motion to dismiss because Martinez Guzman specifically challenged that order in his writ petition before this court.

dinary remedy and issuance of such a writ is discretionary. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, writ relief is not appropriate if the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. While an appeal from the final judgment generally constitutes an adequate legal remedy precluding writ relief, *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004), we have exercised our discretion to intervene "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). This petition presents such a case because the meaning of territorial jurisdiction, and thus the scope of a grand jury's authority, under NRS 172.105 is an important question of law that needs clarification. Additionally, under these pretrial circumstances, the interests of sound judicial economy and administration favor consideration of this petition.

Statutory interpretation of NRS 172.105

We review questions of statutory interpretation de novo. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009); *see Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008) ("Even when raised in a writ petition, this court reviews questions of statutory interpretation de novo."). Statutory interpretation concerns determining legislative intent, and the starting point is the statute's plain language. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). When the meaning of the language is clear, the analysis ends, "[b]ut when 'the statutory language lends itself to two or more reasonable interpretations,' the statute is ambiguous," and this court may then look to other tools such as legislative history, reason, and public policy to determine legislative intent. *Id.* (quoting *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004)). The statute at issue here, NRS 172.105, defines the power of the grand jury. The statute states that "[t]he grand jury may inquire into all public offenses triable in the district court or in a Justice Court, committed within the *territorial jurisdiction* of the district court for which it is impaneled." NRS 172.105 (emphasis added). Our criminal procedure statutes do not define the term "territorial jurisdiction." Moreover, both Martinez Guzman's interpretation of the term, as providing a clear geographic limitation within which the crime must have occurred, as well the State's interpretation, relying on the statewide jurisdiction of district judges under NRS 3.220, are plausible interpretations.

Since the meaning of the term is not clear but instead lends itself to more than one reasonable interpretation, we look to tools of statutory construction, including legislative history. *Lucero*, 127

Nev. at 95, 249 P.3d at 1228. During its 54th session, the Legislature adopted NRS 172.105 as part of an omnibus criminal procedure bill, Assembly Bill 81, which amended Nevada's existing criminal procedure laws. *See* 1967 Nev. Stat., ch. 523, §§ 1-468, at 1398-481. The original statute at statehood on the jurisdiction of district courts stated, "[t]he District Courts shall have jurisdiction to inquire, by the intervention of a grand jury, of all public offenses, *committed or triable* in their respective districts, to try and determine all indictments found therein, and to hear and determine appeals from Justices' or other inferior Courts in all cases of a criminal nature." Compiled Laws of Nevada, vol. I, ch. XL, § 25, at 223 (1873) (emphasis added). The words "*committed or triable* in their respective districts," *id.*, were used to define the criminal jurisdiction of district courts and grand juries until the adoption of NRS 172.105. *See* 1967 Nev. Stat., ch. 523, § 83, at 1408-09.

There is no content in the legislative history explaining the reasoning for this change in the description of the grand jury's authority to return an indictment. The original statute was phrased in the disjunctive and thus allowed the grand jury to inquire into public offenses either committed in the respective district for the court by which it was empaneled *or* triable in that district. A plain reading of the language now found in NRS 172.105, while not using the word "and," has a conjunctive meaning, i.e., the crime must be triable in the particular district or justice court and also "committed within the territorial jurisdiction of the district court for which it is impaneled."

Martinez Guzman's reading of the "committed" clause would significantly limit the scope of inquiries permitted by grand juries. Under his reading, multiple categories of cases for which venue is appropriate in a particular district could proceed only by information and not by grand jury indictment. For example, NRS 171.035 provides, "[w]hen an offense is committed on the boundary of two or more counties, or within 500 yards thereof, the venue is in either county." However, under Martinez Guzman's interpretation of NRS 172.105, the grand jury could not investigate such an offense and return a true bill unless it was established that the crime occurred in the county for which it is empaneled, not just within 500 yards of the boundary. As another example, NRS 171.055 provides, "[w]hen the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the venue is in either county." Under Martinez Guzman's interpretation of NRS 172.105, the grand jury could not return an indictment in the county of apprehension. Instead, charges would have to proceed by a preliminary hearing and filing of an information even though venue in the county of apprehension is explicitly authorized by Nevada law. We assume that the Legislature was aware of these preexisting venue statutes when enacting NRS 172.105. *State v. Weddell*, 118 Nev. 206, 213 n.23, 43 P.3d 987, 991 n.23 (2002) (presuming that the

Legislature was aware of existing statutes when it enacted another). Thus, we conclude that interpreting the statute as Martinez Guzman does would lead to an absurd or unreasonable result, and we decline to adopt it. *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001) (recognizing that statutory interpretation that would produce an absurd result should be avoided if an alternative interpretation is consistent with the Legislature's intent or a statutory scheme's purpose).

On the other hand, we also reject the State's proposed interpretation. In the State's view, the statute, which previously allowed the grand jury to investigate an offense that was either triable or committed within the district, now permits the grand jury to inquire into a criminal offense triable in the district court and committed anywhere in the State of Nevada. First, this interpretation ignores the limiting language contained at the end of NRS 172.105, requiring the offense to have been "committed within the territorial jurisdiction of the district court *for which it is impaneled*." (Emphasis added.) This emphasized language would be superfluous if each district court had statewide territorial jurisdiction. *Walker v. Eighth Judicial Dist. Court*, 120 Nev. 815, 820, 101 P.3d 787, 791 (2004) (recognizing that courts should not construe words in a statute "in such a way as to render them mere surplusage").

Second, this interpretation would also present problems in returning an indictment in a case involving interstate crimes. We have recognized that NRS 171.020 expressly confers jurisdiction on Nevada courts "[w]henever a person, with intent to commit a crime, does any act within [Nevada] in execution or part execution of such intent, which culminates in the commission of a crime, either within or without [Nevada] . . . ." *McNamara v. State*, 132 Nev. 606, 611, 377 P.3d 106, 110 (2016) (quoting NRS 171.020). Under the State's reading of NRS 172.105, a grand jury could not return an indictment in a case like *McNamara* if the ultimate commission of the crime were outside Nevada, even if a person with intent to commit a crime did an act within Nevada in part execution of such intent.

Third, while NRS 3.220 provides that "*district judges* shall possess equal coextensive and concurrent jurisdiction and power" and that "[t]hey each shall have power to hold court in any county of this State," it does not provide for statewide jurisdiction of a district court itself. (Emphasis added.) Instead, NRS 3.010 divides the state into 11 judicial districts and specifies, "The County of Washoe constitutes the Second Judicial District." The statutes governing the proper court to consider criminal charges, such as those found in NRS Chapter 171, also contradict the State's argument that a district court has territorial jurisdiction over a felony occurring anywhere in the state. Thus, the State's reading, too, would lead to an absurd or unreasonable result. *Quinn*, 117 Nev. at 713, 30 P.3d at 1120.

In our view, neither side's readings of NRS 172.105 properly interpret the term "territorial jurisdiction," which is a term of art. In *McNamara*, we observed that our courts obtain "territorial jurisdiction" over interstate criminal offenses when there is "a sufficient connection" between the offense and Nevada. 132 Nev. at 611, 377 P.3d at 110. To determine whether a sufficient connection existed to establish territorial jurisdiction, we looked to our statutes governing local jurisdiction. *Id*. at 610-11, 377 P.3d at 110 (relying on NRS 171.020, which is found in the portion of NRS Chapter 171 entitled "Local Jurisdiction of Public Offenses"). The statute at issue in *McNamara*, NRS 171.020, expressly confers jurisdiction on our courts "[w]henever a person, with intent to commit a crime, does any act within [Nevada] in execution or part execution of such intent, which culminates in the commission of a crime, either within or without [Nevada]." Based on NRS 171.020, we concluded that Nevada courts have territorial jurisdiction to charge a defendant with an interstate criminal offense that began outside Nevada if the offense continues into Nevada. *McNamara*, 132 Nev. at 611-12, 377 P.3d at 110-11. Indeed, we observed that, while the common law required proof that a "crime 'was committed within the territorial jurisdiction of the court and grand jury where the indictment was found,'" *id*. at 610, 377 P.3d at 109-10 (quoting *People v. Gleason*, 1 Nev. 173, 178 (1865), *superseded by statute as stated in McNamara*, 132 Nev. 606, 377 P.3d 106), the adoption by the Nevada Legislature of NRS 171.020 "modified the common-law rule . . . to address territorial jurisdiction in the context of interstate crimes." *Id*. at 610, 377 P.3d at 110.

While that case arose in the context of interstate criminal offenses, its methodology for determining whether "territorial jurisdiction" exists also applies in the intercounty context. The same portion of NRS Chapter 171 similarly provides rules to address territorial jurisdiction for intercounty offenses. *See, e.g.*, NRS 171.030 (providing, "[w]hen a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county").[4] The fact that statutes addressing intercounty crimes refer to "venue" rather than "jurisdiction" does not imply we should engage in a different analysis. In *McNamara* itself, we did not distinguish between the interstate and intercounty contexts in determining the limits of territorial jurisdiction, instead referring to a statute governing the county where a kidnapping prosecution may be instituted as a "jurisdictional rule[ ] for kidnapping."

[4]There are also statutes governing territorial jurisdiction in other sections of the Nevada Revised Statutes, including NRS 200.110 (governing the place of trial for a homicide in certain circumstances) and NRS 200.350 (governing the place of trial for kidnapping).

132 Nev. at 612 n.2, 377 P.3d at 111 n.2 (citing NRS 200.350(1)). Furthermore, the case we discussed in *McNamara* to illustrate the common-law rule of territorial jurisdiction was an intercounty case, rather than an interstate one. *Id*. at 610, 377 P.3d at 109-10 (citing *Gleason*, 1 Nev. at 178 (addressing territorial jurisdiction for a murder trial in Lander County when the defense sought an instruction regarding the need for the prosecution to prove the murder had occurred in that county)). Thus, just as in a case involving interstate offenses, territorial jurisdiction in a case involving intercounty offenses depends on whether the necessary connections, as identified in Nevada's statutes, to the location of the court exist.

Here, the district court denied Martinez Guzman's motion to dismiss based on its determination that the Washoe County grand jury's authority to return an indictment is coextensive with the Second Judicial District Court's general jurisdiction, which it found "extends statewide to all felony offenses." That determination does not comport with the statutory language limiting the grand jury's authority to inquire into crimes "committed within the territorial jurisdiction of the district court for which it is impaneled." NRS 172.105. Nor does it synthesize with NRS Chapter 171 or *McNamara*, which tie "territorial jurisdiction" to our statutes governing the proper jurisdiction and venue for criminal prosecutions. Therefore, territorial jurisdiction under NRS 172.105 cannot and does not extend statewide.

Accordingly, we hold that the term territorial jurisdiction under NRS 172.105 is a term of art that incorporates Nevada's statutes governing venue and, thus, the statute empowers a grand jury to inquire into an offense so long as the district court that empaneled the grand jury may appropriately adjudicate the defendant's guilt for that particular offense. Under NRS 172.105, if venue is proper in a given district court for an alleged criminal offense, then it was committed within that court's territorial jurisdiction and a grand jury empaneled by that district court has the authority to inquire into that offense. This determination is a question reserved for the court. *McNamara*, 132 Nev. at 613, 377 P.3d at 112. While the motion to dismiss in this case did not directly challenge the venue of the Second Judicial District Court, in order to resolve Martinez Guzman's challenge to the authority of the Washoe County grand jury to investigate the counts at issue, the court must analyze the applicable venue provisions to determine whether the grand jury exceeded its power.[5]

[5]In denying Martinez Guzman's pretrial petition for a writ of habeas corpus, the district court addressed some facts that could pertain to whether venue is proper for the Douglas County charges in Washoe County. However, the district court ultimately denied Martinez Guzman's petition and his motion to dismiss based on its conclusion that territorial jurisdiction extends statewide to all offenses.

CONCLUSION

In denying Martinez Guzman's motion to dismiss, the district court erred by concluding that "the Second Judicial District Court's territorial jurisdiction extends statewide to all felony offenses" and "[t]he Grand Jury possesses the same authority." Accordingly, we grant Martinez Guzman's petition in part and vacate the order denying his motion to dismiss. We deny the petition to the extent it seeks a writ requiring the district court to grant his motion to dismiss outright. Instead, in reconsidering the motion, the district court must determine, based on the evidence presented to the Washoe County grand jury, if venue is proper in the Second Judicial District Court for the Douglas County charges under the applicable statutes. If so, then the district court has "territorial jurisdiction" over those criminal offenses and the grand jury thus has authority to return an indictment on those charges. If not, the district court shall grant Martinez Guzman's motion to dismiss the Douglas County charges for lack of territorial jurisdiction. A dismissal at this stage would not prevent Douglas County from initiating its own criminal proceedings regarding Martinez Guzman's alleged Douglas County offenses. *See* NRS 171.075 (preventing prosecution of an offense in one county after "a conviction or acquittal thereof . . . in another"); *Thomas v. Eighth Judicial Dist. Court*, 133 Nev. 468, 479, 402 P.3d 619, 629 (2017) ("It is well settled that double jeopardy attaches when the jury is sworn.").

Accordingly, we grant the petition in part and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Martinez Guzman's motion to dismiss and to reconsider the motion consistent with this opinion. We deny the petition in all other respects.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Silver, JJ., concur.

IN THE MATTER OF THE COLMAN FAMILY REVOCABLE LIVING TRUST, DATED JUNE 23, 2011, A NON-TESTAMENTARY TRUST.

PAUL VALER COLMAN; AND THE COLMAN FAMILY REVOCABLE LIVING TRUST, DATED JUNE 23, 2011, A NON-TESTAMENTARY TRUST, APPELLANTS, *v.* TONYA COLLIER, RESPONDENT.

No. 76950

April 2, 2020 460 P.3d 452

Appeal from a district court order confirming a probate commissioner's report and recommendation in a trust matter. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

TCM Law Group and *Thomas C. Michaelides*, Las Vegas, for Appellants.

Rushforth Lee & Kiefer LLP and *Daniel P. Kiefer* and *Matthew W. Park*, Las Vegas, for Respondent.

Before the Supreme Court, PICKERING, C.J., GIBBONS and HARDESTY, JJ.

OPINION[1]

By the Court, PICKERING, C.J.:

Appellant Paul Colman appeals a district court decision concluding that a secondary beneficiary is entitled to property in a trust created by Paul and decedent Chari Colman, Paul's ex-wife. While married, Paul and Chari lived in a home Chari owned as her separate property. Chari later transferred the property to the trust via a quitclaim deed, but did not change its status as her separate property. One month after Chari and Paul divorced, Chari died and respondent Tonya Collier sought to confirm her status as beneficiary of the property under the trust, asserting that the divorce precluded any disposition of the property to Paul. In this appeal, we are tasked with determining whether NRS 111.781, governing the effects of divorce on nonprobate transfers of property, automatically revoked Paul's interest in the property. Because the plain language of NRS 111.781(1) automatically revokes any revocable disposition from

[1]We previously resolved this case by unpublished order but then granted respondent's motion to publish the decision as an opinion.

one spouse to another upon divorce, we affirm the district court order transferring the property to Collier.

FACTUAL AND PROCEDURAL BACKGROUND

Decedent Chari Colman purchased the property at issue before she married appellant Paul Colman, and the couple lived there after marrying. During the marriage, Chari transferred the property into their family trust but did not change its status as her separate property. The trust named Paul and Chari as its primary beneficiaries and provided that, after both of their deaths, respondent Tonya Collier was the beneficiary of the subject property. One month before Chari's death, Paul and Chari divorced, but they continued to live together on the property. After Chari's death, and based on NRS 111.781, Collier filed a petition in district court seeking to confirm her status as beneficiary to the property. Paul objected to Collier's petition, but the probate commissioner found that Collier was the vested beneficiary of the real property and that the property should be distributed to her. The district court adopted the commissioner's findings over Paul's objection and ordered the property transferred to Collier.

DISCUSSION

This court reviews a district court's legal determinations, including matters of statutory interpretation, de novo. *In re Frei Irrevocable Tr.*, 133 Nev. 50, 52, 390 P.3d 646, 649 (2017). We "will not disturb a district court's findings of fact if they are supported by substantial evidence," *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013), which is "evidence that a reasonable mind might accept as adequate to support a conclusion," *id.* (quoting *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008)). Paul challenges the district court's application of NRS 111.781, asserting that Chari did not know of the statute and that she did not intend to remove him as the beneficiary to the property when they divorced.[2]

NRS 111.781 provides that unless "otherwise provided by the express terms of a governing instrument," any revocable dispositions of property to a former spouse, including those made pursuant to a trust, are automatically revoked upon divorce. *See* NRS 111.781(1)(a)(1); NRS 164.960 (explaining that NRS 111.781 ap-

[2]We decline to consider Paul's constitutional challenge to NRS 111.781, raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *see also Mason v. Cuisenaire*, 122 Nev. 43, 48 n.7, 128 P.3d 446, 449 n.7 (2006) (recognizing that the court may, but is not required to, address constitutional arguments raised for the first time on appeal).

plies to transfers of property made pursuant to a trust). *Compare Redd v. Brooke*, 96 Nev. 9, 12, 604 P.2d 360, 362 (1980) (holding that "explicit language in a divorce decree [is required] to divest a former spouse of his or her rights as a designated beneficiary"), *with* NRS 111.781(1)(a)(1) (creating an automatic revocation of certain dispositions made by one spouse to another upon divorce unless certain exceptions apply). Because there was no other governing instrument demonstrating Chari's intent to the contrary, the district court did not err by applying NRS 111.781 and concluding that it required revocation of Paul's interest in the property.

We also reject Paul's argument that, if NRS 111.781 applies, it invalidates the entire trust, including Collier's interest in the property. NRS 111.781(3) provides that, upon revocation of the disposition to the former spouse, the remaining trust provisions are given effect as if the former spouse had disclaimed his interest. Accordingly, the district court did not err by affirming the remaining terms of the trust.

Having considered the parties' arguments regarding transmutation and the record on appeal, we further conclude that substantial evidence supports the finding that the property remained Chari's separate property throughout the marriage. *See Estate of Bethurem*, 129 Nev. at 876, 313 P.3d at 242 (explaining that this court will uphold the district court's findings of fact if they are supported by substantial evidence); *Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284, 286 (1994) ("Transmutation from separate to community property must be shown by clear and convincing evidence."). Indeed, there was no evidence that either Paul or community funds contributed to the purchase of the property or any improvements that increased the value of the home. *See* NRS 123.130 (explaining that property owned by a wife before the marriage is her separate property); *see also Verheyden v. Verheyden*, 104 Nev. 342, 344-45, 757 P.2d 1328, 1330-31 (1988) (holding that where there was no evidence that community funds were used toward the purchase price or to make improvements that increased the home's value, the property maintained its separate nature). This argument therefore does not warrant reversal.

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

Gibbons and Hardesty, JJ., concur.

145 EAST HARMON II TRUST; AND ANTHONY TAN, AS TRUSTEE OF THE 145 EAST HARMON II TRUST, APPELLANTS, *v.* THE RESIDENCES AT MGM GRAND – TOWER A OWNERS' ASSOCIATION, RESPONDENT.

No. 75920

April 2, 2020 460 P.3d 455

Appeal from a district court post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

Affirmed.

David J. Kaplan, Las Vegas, for Appellants.

Singer & Larsen P.C. and *Brent Larsen*, Henderson, for Respondent.

Before the Supreme Court, GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

NRS 18.010(2) and NRS 18.020 allow a "prevailing party" to recover attorney fees and costs, respectively, in certain circumstances. This appeal requires us to consider whether a defendant is a "prevailing party" when an action is dismissed with prejudice. We hold that a voluntary dismissal with prejudice generally conveys prevailing party status upon the defendant. However, district courts should consider the circumstances surrounding the voluntary dismissal with prejudice in determining whether the dismissal conveys prevailing party status. Applying that holding to the circumstances in this case, we conclude that respondent is a prevailing party for purposes of NRS 18.010(2) and NRS 18.020. We further conclude that the district court did not abuse its discretion in determining the amount to award as attorney fees and that the award is supported by substantial evidence. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

Appellant 145 East Harmon II Trust owned a condominium unit in The Signature at MGM Grand. After not visiting the unit for several weeks, appellant Anthony Tan, the trustee of 145 East Harmon II Trust (collectively, the Trust), entered the unit to find it had mold damage and required extensive repairs. The Trust investigated the cause of the damage and determined that an MGM employee was

responsible. The Trust sued four MGM entities, including respondent The Residences at MGM Grand – Tower A Owners' Association (the Association).

Two of the MGM defendants moved to dismiss the claims against them on the basis that they were innocent parties and that The Signature, the entity that owned the building, was the only entity that could be held responsible for the damage to the Trust's condominium unit.[1] The district court granted the motion, and the Trust filed its first amended complaint on June 10, 2016, naming the Association and four other entities. Although not included in the record, the Association states, and the Trust does not contest, that the Trust served the Association with notice of intent to take a default against it on August 1.

On August 11, the Association sent a demand letter to the Trust's counsel, Eric Tan, and requested dismissal from the case because the Association was not a proper party to the action. The Association stated that failure to voluntarily dismiss the Association would force it to incur unnecessary attorney fees and that it would be compelled to file a motion to dismiss.

On September 13, the Association emailed Tan, stating, "On August 26th you telephoned me to tell me that you were going to proceed with filing a voluntary dismissal . . . . You also told me that you would have the dismissal filed by the end of the next week. To date I have not seen the dismissal." A week later, Tan responded that he was "swamped" with work and would be out of the country for two weeks but would complete the voluntary dismissal upon his return.

On December 12, because the Trust had not yet dismissed the Association from the case, the Association again emailed Tan, asking why he had "never followed through with [the] promise to dismiss [the Association] from this case? Do I need to file a motion to dismiss and ask for sanctions? I need to hear from you ASAP." Tan responded that there was a substitution of attorney filed the preceding week and that the Association should speak with the new attorney on the case, Stephen Lewis. That same day, the Association emailed Lewis, notifying him of Tan's assurance that the Association would be dismissed from the case. The Association supplied Lewis with the August 11 demand letter requesting dismissal and inquired as to whether he was similarly willing to dismiss the Association from the case. Lewis responded that he had not read the file yet but would review all claims and then discuss the matter.

Thereafter, communication between the Association and the Trust ceased. The Trust did not file a notice of voluntary dismissal as to the Association, nor did the Association make another demand of

[1]That motion to dismiss pointed out that the Association could make the identical argument.

the Trust to dismiss the Association.[2] The lawsuit proceeded. The Association remained a named defendant, and the Trust continued to prosecute the case against the other defendants. The Trust did not ask the Association for discovery, and the Association was not included in the joint case conference report. The lawsuit between the Trust and the other defendants settled on confidential terms.

Before the settlement between the Trust and the other defendants, on March 15, 2017, the Association moved to dismiss or in the alternative for summary judgment. The Trust did not respond to the motion. Instead, the parties resolved the matter by stipulating to dismiss the Association from the case with prejudice. The stipulation expressly reserved the Association's right to move for attorney fees and costs.

The Association thereafter moved for attorney fees and costs, and the Trust opposed the motion. The Trust argued that the Association could not be considered a prevailing party under NRS 18.010(2) and NRS 18.020 because the case had not proceeded to judgment. The district court held a hearing on the motion and found that the Association was the prevailing party. The district court pointed out during the hearing that the Trust likely would have lost had it replied to the Association's dispositive motion. More specifically, the district court stated that "[i]f the Court—and I looked at the motion for summary judgment—the Court would have been inclined to grant the motion for summary judgment, there would have been a judgment entitling them to attorneys' fees and costs." In its written order, the district court found the following: (1) the Association was the prevailing party due to the resolution of the pending motion for summary judgment through the parties' stipulation that the Association would be dismissed with prejudice, (2) the Association set forth sufficient grounds to establish that it was entitled to attorney fees under NRS 18.010(2)(b), (3) $9,431.25 was a reasonable amount of fees based on the *Brunzell* factors, and (4) the Association was entitled to $497.56 in costs as the prevailing party. The Trust appealed.

DISCUSSION

The district court correctly determined that the Association was a prevailing party

The primary issue before us is whether a dismissal with prejudice is sufficient to confer prevailing party status on the defendant for purposes of NRS 18.010(2) and NRS 18.020. The Trust contends that a litigant cannot be a "prevailing party" when the underlying

[2]The Trust asserts that it attempted to make one phone call to the Association in January 2017. The Association denies receiving any call and points out that the Trust never supported its assertion with any evidence.

action has not "proceeded to judgment" and an action has not proceeded to judgment when the parties agree to dismiss the action. The Association argues that it was a prevailing party because the stipulation to dismiss with prejudice was in effect a final judgment.

"[W]hen [an] attorney fees matter implicates questions of law, the proper review is de novo." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). The issue here implicates a question of law because it involves statutory interpretation—the meaning of "prevailing party," as used in NRS 18.010(2) and NRS 18.020. *See Gonor v. Dale*, 134 Nev. 898, 899, 432 P.3d 723, 724 (2018) (observing that statutory interpretation presents a question of law). Therefore, our review is de novo.

NRS 18.010(2)(a)-(b) provides that "the court may make an allowance of attorney's fees to a prevailing party" when the "party has not recovered more than $20,000" or when the claim "was brought or maintained without reasonable ground." NRS 18.020 provides that "[c]osts must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered" under certain circumstances. At issue here is the meaning of "prevailing party."

The Trust relies on *Works v. Kuhn* to support its position that a party cannot be a prevailing party when the action has not proceeded to a judgment on the merits. 103 Nev. 65, 732 P.2d 1373 (1987), *disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001). There, the parties reached a good-faith settlement, and in the spirit of that settlement, the defendant voluntarily dismissed his counterclaim with prejudice. *Id.* at 68, 732 P.2d at 1376. This court concluded that the plaintiff could not "be considered as having prevailed" in those circumstances. *Id.* But the circumstances are different here. The parties did not enter into a good-faith settlement—the stipulation for a voluntary dismissal was in response to the Association's pending dispositive motion that the Association likely would have prevailed on. Thus, the Association essentially obtained the dismissal with prejudice it sought in its dispositive motion, as opposed to settling with the Trust. Additionally, although we indicated in *Works* that a party cannot prevail unless the case proceeds to judgment, we did not announce a bright-line rule that a case that has been dismissed with prejudice has not "proceeded to judgment." Nor has this court ever expressly held that an action has not proceeded to judgment when it has been dismissed with prejudice. Thus, it remains an open question whether a defendant who successfully obtains a dismissal with prejudice can seek attorney fees and costs as a prevailing party under NRS 18.010(2) and NRS 18.020. *See Menken v. Emm*, No. 98-17288, 2000 WL 531506, at *2-3 (9th Cir. May 1, 2000) (stating that the Nevada Supreme Court has never held that a dismissal with prejudice does not amount to proceeding to judgment).

Although we have not answered that question, federal courts have done so. The weight of federal authority is that a voluntary dismissal with prejudice confers prevailing party status on the defendant or nonmoving party. *See* 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2667 (4th ed. 2014) (explaining that a dismissal with prejudice, whether or not on the merits, generally conveys prevailing party status upon the defendant).

For example, the United States Court of Appeals for the Fifth Circuit held that a dismissal with prejudice equates to a judgment on the merits. *See United States ex rel. Long v. GSDMidea City, LLC*, 807 F.3d 125, 128 (5th Cir. 2015) (" '[A] dismissal with prejudice is tantamount to a judgment on the merits' and renders a defendant the prevailing party for the purpose of allocating costs." (quoting *Schwarz v. Folloder*, 767 F.2d 125, 130 (5th Cir. 1985))); *Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2d 533, 539 (5th Cir. 1990) (explaining "that the dismissal of a plaintiff's suit with prejudice is tantamount to a judgment on the merits for the defendants, thereby rendering them the prevailing parties"). In doing so, the Fifth Circuit reasoned that the defendant prevailed when an action is dismissed with prejudice because, "[a]lthough there has not been an adjudication on the merits in the sense of a weighing of facts, there remains the fact that a dismissal with prejudice is deemed an adjudication on the merits for the purposes of *res judicata*." *Anthony v. Marion Cty. Gen. Hosp.*, 617 F.2d 1164, 1169-70 (5th Cir. 1980). In a Fifth Circuit case addressing civil rights complaints, the court explained that to determine whether a dismissal with prejudice conveys prevailing party status for an award of attorney fees, the court must determine that the plaintiff voluntarily dismissed the case to avoid a judgment on the merits. *Dean v. Riser*, 240 F.3d 505, 511 (5th Cir. 2001).

The United States Court of Appeals for the Second Circuit explained that to merit prevailing party status, the party must have gained a "material alteration" of the parties' legal relationship through litigation. *Carter v. Inc. Vill. of Ocean Beach*, 759 F.3d 159, 165 (2d Cir. 2014) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (internal quotation marks omitted)). And it reasoned that a voluntary dismissal with prejudice alters the parties' legal relationship because it is "an adjudication on the merits for purposes of *res judicata*." *Id.* (quoting *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 (2d Cir. 1995)).

The United States Court of Appeals for the Ninth Circuit likewise views a dismissal with prejudice as a judgment on the merits sufficient to confer prevailing party status on the defendant. *See, e.g.*, *Zenith Ins. Co. v. Breslaw*, 108 F.3d 205, 207 (9th Cir. 1997), *abrogated on other grounds by Ass'n of Mex.-Am. Educators v. California*, 231 F.3d 572 (9th Cir. 2000). The Ninth Circuit distin-

guishes between dismissals with and without prejudice, explaining that a "dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing." *Cadkin v. Loose*, 569 F.3d 1142, 1148 (9th Cir. 2009) (quoting *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008)).

The United States Court of Appeals for the Seventh Circuit also suggested that a dismissal with prejudice is sufficient to confer prevailing party status. *See Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-77 (7th Cir. 1987). In deciding that a dismissal without prejudice does not decide the case on the merits because the plaintiff may refile the complaint and therefore is not sufficient to confer prevailing party status, the court observed that a dismissal with prejudice allows a "defendant to say that he has 'prevailed.'" *Id.* at 1077. Observing that "[c]apitulation or settlement is the practical equivalent of success," the court reasoned that a surrender by means of a dismissal with prejudice "should be treated similarly." *Id.*

We agree with the reasoning of the federal courts and therefore hold that a voluntary dismissal with prejudice generally equates to a judgment on the merits sufficient to confer prevailing party status upon the defendant. This rule is not absolute, as there may be circumstances in which a party agrees to dismiss its case but the other party should not be considered a prevailing party. For instance, a party may have a strong case or defense but nonetheless stipulate to a dismissal with prejudice because it is without funds to pursue litigation. Thus, the district court should consider the reason for the voluntary dismissal with prejudice when determining whether a dismissal with prejudice equates to a judgment for purposes of awarding attorney fees and costs.

Here, the circumstances surrounding the dismissal with prejudice are sufficient to confer prevailing party status to the Association. First, the Trust had multiple opportunities to dismiss the Association from the case before the Association incurred attorney fees, and it failed to do so, despite expressly agreeing to dismiss the Association. Critically, the Trust's first counsel had five months from the date he first received the Association's demand letter and numerous requests from the Association to dismiss the Association. He failed to do so. The Trust's second counsel had three months from the time he first spoke to the Association to dismiss the Association. He also failed to do so. Altogether, the Association waited roughly eight months after first broaching the voluntary dismissal with the Trust before filing a dispositive motion. Second, the stipulation followed on the heels of the Association's dispositive motion. As the district court acknowledged that the Association likely would have prevailed on the dispositive motion, it appears that the Trust agreed to dismiss the case with prejudice to avoid an adverse decision on the

merits of the dispositive motion. *See Dean*, 240 F.3d at 511 (holding that a dismissal with prejudice conveys prevailing party status for an award of attorney fees where "the plaintiff's case was voluntarily dismissed to avoid judgment on the merits"). Moreover, the parties expressly stipulated that the Association "reserves its right to file a [m]otion to recover [fees]." Thus, under these facts, the dismissal with prejudice was substantively a judgment on the merits. Accordingly, the Association was the prevailing party for purposes of NRS 18.010(2) and 18.020.

The district court did not abuse its discretion in awarding attorney fees

The Trust also challenges the amount of the attorney fees award, arguing that the district court did not adequately consider all of the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), and that the award was unreasonable. We review the amount of fees awarded "for an abuse of discretion, and will affirm an award that is supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015) (citation omitted).

When determining a reasonable amount to award as attorney fees, the district court must consider the four factors set forth in *Brunzell*:

> (1) *the qualities of the advocate:* his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done:* its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) *the work actually performed by the lawyer:* the skill, time and attention given to the work; (4) *the result:* whether the attorney was successful and what benefits were derived.

85 Nev. at 349, 455 P.2d at 33 (internal quotation marks omitted). Although the district court should "expressly analyze each factor," the district court does not have to make "express findings on each factor . . . to properly exercise its discretion" so long as the record demonstrates that the court "considered the required factors" and that "the award [is] supported by substantial evidence." *Logan*, 131 Nev. at 266, 350 P.3d at 1143.

Here, the district court did not make express findings as to the *Brunzell* factors, but the record clearly shows that the district court considered each factor. The record also shows that substantial evidence supports the award. As to the first *Brunzell* factor, counsel for the Association, Brent Larsen, has been a licensed attorney since 1977 and was the senior partner at Deaner, Malan, Larsen & Cuilla when he started representing the Association in this matter in 2016. As to the second factor, while this case was admittedly not complex,

counsel did serve a demand letter detailing why the Association should be dismissed, diligently pursued the Association's interests, and filed a motion to dismiss and/or for summary judgment. These documents show the character of work done and skill required. As to the third factor, counsel provided a detailed time schedule and billing statement of the work performed along with the motion for attorney fees. In making its determination, the district court rejected some of the entries on the billing statement and reduced the Association's requested amount from $10,987.50 to $9,431.25. This deduction shows the district court carefully considered the third factor in determining a reasonable amount of fees. As to the final *Brunzell* factor, counsel obtained a favorable result as his client was dismissed from the case with prejudice. In this respect, counsel gave the Trust numerous opportunities to dismiss the Association from the case before taking any action on the Association's behalf that would incur additional attorney fees. Accordingly, we conclude that the amount awarded was not an abuse of discretion. We therefore affirm the order awarding attorney fees and costs to the Association.

Gibbons and Stiglich, JJ., concur.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, *v.* THE CENTER FOR INVESTIGATIVE REPORTING, INC., a California Nonprofit Organization, Respondent.

No. 77617

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Appellant, *v.* THE CENTER FOR INVESTIGATIVE REPORTING, INC., a California Nonprofit Organization, Respondent.

No. 77965

April 2, 2020 460 P.3d 952

Consolidated appeals from a final judgment and post-judgment order awarding attorney fees in a public records action. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

[Rehearing denied July 1, 2020]

[En banc reconsideration denied October 8, 2020]

Marquis Aurbach Coffing and *Nicholas D. Crosby* and *Jacqueline V. Nichols*, Las Vegas, for Appellant.

Campbell & Williams and *Philip R. Erwin* and *Samuel R. Mirkovich*, Las Vegas, for Respondent.

Before the Supreme Court, GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

The Nevada Public Records Act (NPRA) requires governmental entities to make nonconfidential public records within their legal custody or control available to the public. NRS 239.010. If a governmental entity denies a public records request, the requester may seek a court order compelling production. NRS 239.011(1). If the requesting party prevails, the requester is entitled to attorney fees and costs. NRS 239.011(2). Here, we are asked to determine whether the requesting party prevails for purposes of an award of attorney fees and costs when the parties reach an agreement that affords the requesting party access to the requested records before the court enters a judgment on the merits. To answer that question, we adopt the catalyst theory. "Under the catalyst theory, attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation." *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 144 (Cal. 2004). Applying the catalyst theory here, we agree with the district court that respondent was entitled to reasonable attorney fees and costs under NRS 239.011(2). We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, American rap artist Tupac Shakur was shot and killed at the intersection of Flamingo Road and Koval Lane in Las Vegas. The case is still an open investigation.

In December 2017, the Center for Investigative Reporting, Inc. (CIR) submitted a public records request to the Las Vegas Metropolitan Police Department (LVMPD) under the NPRA. CIR sought records related to Tupac's murder. One month later, when LVMPD still had not responded to the request, CIR followed up and pointed out that LVMPD had not complied with the NPRA's five-day period for responding to public records requests. LVMPD responded that same day and notified CIR that the public records request was forwarded to a Public Information Officer for follow-up. Twelve days later, CIR reached out again and notified the Office of Public Information that LVMPD was more than one month overdue in responding to the public records request under the NPRA. CIR did not receive a response.

In March 2018, roughly three months after its initial request, CIR followed up for a third time, to no avail. About two weeks later, CIR's counsel sent a letter to LVMPD's Director of Public Information setting forth LVMPD's failure to comply with its statutory obligations under the NPRA and demanding a response within seven days. LVMPD responded eight days later by producing a two-page police report but failed to indicate whether additional records existed or were otherwise exempt. Then, CIR contacted LVMPD and inquired whether it had withheld records that were responsive to CIR's request and, if so, under what legal authority. Assistant General Counsel for LVMPD responded the following day, acknowledging that LVMPD should have originally advised CIR that it would research the request and respond within 30 days. Further, LVMPD stated that because Tupac's murder was an "open active investigation," any other records in the investigative file were (i) not public records under NRS 239.010(1), (ii) declared by law to be confidential, (iii) subject to the "law enforcement privilege," and (iv) protected from disclosure because law enforcement's policy justifications for nondisclosure outweigh the public's interest in access to the records.

Dissatisfied with LVMPD's response, CIR contacted LVMPD and disputed that the records were confidential because LVMPD labeled the investigation "open" and "active" and again asked LVMPD to comply with its statutory obligations under the NPRA. However, LVMPD maintained the records were not subject to disclosure.

CIR then filed a petition for a writ of mandamus, seeking to inspect or obtain copies of all records related to Tupac's murder within LVMPD's custody and control. The district court indicated during a hearing on the petition that LVMPD had not met its burden of demonstrating that all records in the investigative file were confidential under Nevada law. The district court gave LVMPD two options: produce the requested records with redactions or participate in an in-camera evidentiary hearing regarding confidentiality. LVMPD opted for the latter, and the district court scheduled a sealed evidentiary hearing. But before the scheduled hearing, LVMPD and CIR reached an agreement: LVMPD would produce portions of its records along with an index identifying and describing any redacted or withheld records. As part of the agreement, CIR reserved the right to challenge LVMPD's redactions or withholdings and reserved the right to seek attorney fees and costs pursuant to NRS 239.011(2). Over the next three months, LVMPD provided CIR with roughly 1,400 documents related to Tupac's murder.

At a subsequent status check, LVMPD and CIR informed the district court that they disagreed as to whether CIR "prevailed" for purposes of an award of attorney fees and costs under NRS 239.011(2). CIR asserted that the district court should follow the catalyst theory

of recovery, which allows a petitioner to recover fees as the prevailing party in a public records case where the petitioner's actions led to the disclosure of information. LVMPD argued CIR had not prevailed because it did not obtain a judgment in its favor, given that the parties had reached an agreement before the district court entered a judgment on the merits. The district court entertained argument on the issue and ruled that CIR prevailed because the filing of its petition caused LVMPD to produce the records.[1] The district court subsequently entered a written order dismissing the petition as moot based on the parties' agreement, concluding that CIR had prevailed for purposes of NRS 239.011(2), and affording CIR time to file a motion for attorney fees and costs.

CIR thereafter filed its motion for attorney fees and costs. LVMPD opposed the motion and argued that NRS 239.012, which provides immunity from "damages" for withholding records in good faith, precluded an award of attorney fees and costs against it here. LVMPD also asserted that CIR improperly sought prelitigation fees, which it was not entitled to under NRS 239.011(2). The district court rejected LVMPD's immunity argument and awarded CIR attorney fees and costs. These appeals challenging the award of attorney fees followed.

DISCUSSION

The primary issue before us is whether CIR prevailed for purposes of NRS 239.011(2). LVMPD argues that CIR did not prevail because the district court did not enter an order compelling production of the requested records.[2] LVMPD contends that the district court erroneously applied the catalyst theory to determine whether CIR prevailed, instead of applying the prevailing party standard laid out in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 343 P.3d 608 (2015). CIR argues that it prevailed because the filing of its petition caused LVMPD to turn over the records, which it originally refused to disclose. Instead of requiring that the requester receive a judgment on the merits, CIR argues that this court should follow other courts that apply a catalyst theory to determine whether a requester prevailed and therefore is entitled to attorney fees.

The parties' arguments present a matter of statutory interpretation, which we review de novo. *Clark Cty. Coroner's Office v.*

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[1]Before the hearing, the case was transferred from Judge Joanna Kishner to Judge Elizabeth Gonzalez.

[2]LVMPD alternatively argues that NRS 239.012 immunizes it from an attorney fees award under NRS 239.011(2) because it acted in good faith. We recently rejected that argument in *Clark County Coroner's Office v. Las Vegas Review-Journal*, 136 Nev. 44, 61, 458 P.3d 1048, 1061 (2020).

Las Vegas Review-Journal, 136 Nev. 44, 48, 458 P.3d 1048, 1052 (2020). "When a statute is clear on its face, we will not look beyond the statute's plain language." *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006). However, when a statute is ambiguous, we look to legislative history for guidance. *Id.* Finally, "we consider the policy and spirit of the law and will seek to avoid an interpretation that leads to absurd results." *Id.* (quoting *City Plan Dev., Inc. v. Office of the Labor Comm'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) (internal citations omitted)).

NRS 239.011(1) provides that if a governmental entity denies a public records request, the requester may seek a court order permitting inspection of the record or requiring the government to provide a copy of the record to the requester. NRS 239.011(2) provides that "[i]f the requester *prevails*, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record."[3] (Emphasis added.) However, the Legislature did not define "prevails."

We have addressed NRS 239.011(2) once before in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 343 P.3d 608 (2015). There, we held that a requester prevails for NPRA purposes if the requester "succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." 131 Nev. at 90, 343 P.3d at 615 (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)). Ultimately, we determined that the requester there was a "prevailing party" for purposes of NRS 239.011(2) because it obtained a writ compelling the production of records that were wrongfully withheld. *Id.* Notably, the two cases cited in *Blackjack Bonding* addressed statutory provisions that allow an attorney fees award to a "prevailing party." *Id.*; *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (interpreting 42 U.S.C. § 1988, which allows an attorney fees award to a "prevailing party" in federal civil rights actions); *Overfield*, 121 Nev. at 10, 106 P.3d at 1200 (addressing NRS 18.010, which allows an attorney fees award to a "prevailing party" in civil actions under certain circumstances). However, the Legislature utilized the broader term "prevails" in drafting NRS 239.011(2). Moreover, here, the district court did not enter an order compelling production of the records because the parties came to an agreement before the district court could enter an order on the merits. Thus, *Blackjack Bonding*

[3]The Legislature amended NRS 239.011 during the 2019 session. 2019 Nev. Stat., ch. 612, § 7, at 4007-08. The amendments apply to actions filed on or after October 1, 2019. *Id.* § 11, at 4008. As the underlying action was filed in 2018, those amendments do not apply. But notably, the language relevant to the issue presented here was not materially changed.

does not address the specific issue raised by this appeal: whether a requester prevails under NRS 239.011(2) where the governmental entity voluntarily produces the requested records before the court enters an order on the merits.

Although we have not addressed that issue, other state courts have done so in the context of attorney fee provisions in public records statutes similar to NRS 239.011(2). Those courts have rejected a stringent requirement that public records requesters must obtain an order on the merits to prevail for purposes of an attorney fees award. *See, e.g.*, *Belth v. Garamendi*, 283 Cal. Rptr. 829, 831-32 (Ct. App. 1991); *Uptown People's Law Ctr. v. Dep't of Corr.*, 7 N.E.3d 102, 108-09 (Ill. App. Ct. 2014). For example, in *Mason v. City of Hoboken*, the New Jersey Supreme Court considered a statute that closely resembles NRS 239.011(2) in providing that a "requester who *prevails* in any proceeding shall be entitled to a reasonable attorney's fee." 951 A.2d 1017, 1031 (N.J. 2008) (emphasis added) (quoting N.J. Stat. Ann. § 47:1A-6 (West 2014)). The court adopted the "catalyst theory,"[4] holding that "requestors are entitled to attorney's fees under [the Open Public Records Act], absent a judgment . . . , when they can demonstrate: (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" *Id.* at 1032 (citing *Singer v. State*, 472 A.2d 138 (N.J. 1984)).

In adhering to the catalyst theory, the New Jersey Supreme Court noted the legislature's use of the broad term "prevails" as opposed to the legal term of art "prevailing party." *Id.* at 1032. Nevada's Legislature similarly used the broad term "prevails" in drafting NRS 239.011(2). The New Jersey Supreme Court also pointed out a policy reason for allowing an attorney fees award in a public records action absent a judgment on the merits—the potential for government abuse in that an agency otherwise could "deny access, vigorously defend against a lawsuit, and then unilaterally disclose the documents sought at the eleventh hour to avoid the entry of a court order and the resulting award of attorney's fees." *Id.* at 1031. We agree that this is a sound policy reason and supports utilizing the catalyst theory to determine whether a requester has prevailed in an NPRA

[4]The catalyst theory developed to guide courts in determining whether a plaintiff had "substantially prevailed" in an action under the Freedom of Information Act (FOIA). *See, e.g.*, *First Amendment Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1127 (9th Cir. 2017) (listing cases). Although the United States Supreme Court held in 2001 that the catalyst theory could not be used to award attorney fees and costs under two federal acts that allowed the "prevailing party" to obtain an award of attorney fees and costs, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600-10 (2001), Congress amended FOIA in 2007 and a number of circuit courts of appeal have held that the amendment restored the catalyst theory in FOIA litigation. *See First Amendment Coal.*, 878 F.3d at 1128-29 (discussing cases that address the impact of the 2007 amendment).

lawsuit. That theory also promotes the Legislature's intent behind the NPRA—public access to information. *See* NRS 239.001.

Under the catalyst theory, a requester prevails when its public records suit causes the governmental agency to substantially change its behavior in the manner sought by the requester, even when the litigation does not result in a judicial decision on the merits. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148 (Cal. 2004). But as the Ninth Circuit has explained, "[t]here may be a host of reasons why" a governmental agency might "voluntarily release[ ] information after the filing of a [public records] lawsuit," including reasons "having nothing to do with the litigation." *First Amendment Coal.*, 878 F.3d at 1128. In other words, while " 'the mere fact that [the government] ha[s] *voluntarily* released documents [should] not preclude an award of attorney's fees to the [requester],' it is equally true that 'the mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that' " the requester prevailed. *Id.* (quoting *Church of Scientology of Cal. v. U.S. Postal Serv.*, 700 F.2d 486, 491-92 (9th Cir. 1983)). Accordingly, there must be a "causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *Id.*

We therefore hold that a requester is entitled to attorney fees and costs under NRS 239.011(2) absent a district court order compelling production when the requester can demonstrate "a causal nexus between the litigation and the voluntary disclosure or change in position by the Government." *First Amendment Coal.*, 878 F.3d at 1128. To alleviate concerns that the catalyst theory will encourage requesters to litigate their requests in district court unnecessarily, the court should consider the following three factors: (1) "when the documents were released," (2) "what actually triggered the documents' release," and (3) "whether [the requester] was entitled to the documents at an earlier time." *Id.* at 1129 (quoting *Church of Scientology*, 700 F.2d at 492). Additionally, the district court should take into consideration (1) whether the litigation was frivolous, unreasonable, or groundless, and (2) whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time.[5] *See Graham*, 101 P.3d at 154-55 (discussing limitations on the catalyst theory).

Applying the catalyst theory here, the district court determined that CIR prevailed for purposes of NRS 239.011(2). We agree. CIR

[5]A requester seeking fees under NRS 239.011(2) has the burden of proving that the commencement of the litigation caused the disclosure. *Mason*, 951 A.2d at 1032. However, that burden shifts to the responding agency when the agency fails to respond at all within five business days. *Id.*; *see* NRS 239.0107. In such cases, the agency must prove that the commencement of the litigation was not the catalyst for the disclosure. *Mason*, 951 A.2d at 1032.

tried to resolve the matter short of litigation. CIR put LVMPD on notice of its grievances and gave LVMPD multiple opportunities to comply with the NPRA. At each juncture, LVMPD either failed to respond or claimed blanket confidentiality. It was not until CIR commenced litigation and the district court stated at a hearing that LVMPD did not meet its confidentiality burden that LVMPD finally changed its conduct. The record thus supports the conclusion that the litigation triggered LVMPD's release of the documents. LVMPD does not proffer any other reason aside from the litigation that it voluntarily turned over the requested documents. And it appears that CIR was entitled to at least some of the documents at an earlier time because it is unlikely the blanket confidentiality privilege LVMPD eventually asserted applied to all responsive documents in LVMPD's possession. Critically, LVMPD agreed to turn over roughly 1,400 documents when faced with an in-camera evidentiary hearing. Thus, the record supports the district court's determination that the lawsuit was the catalyst for the LVMPD's release of the requested records. Accordingly, CIR prevailed in the NPRA proceeding and is entitled to attorney fees and costs pursuant to NRS 239.011(2). As the LVMPD does not otherwise challenge the attorney fees and costs award, we affirm the judgments of the district court.[6]

Gibbons and Stiglich, JJ., concur.