IN THE MATTER OF THE PARENTAL RIGHTS AS TO A.P.M. AND E.M.M.

ARLI P.M., APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; AND A.P.M. AND E.M.M., MINORS, RESPONDENTS.

No. 64214

September 10, 2015 356 P.3d 499

Appeal from a district court order terminating parental rights. Eighth Judicial District Court, Family Court Division, Clark County; Frank P. Sullivan, Judge.

In child protection proceedings, the district court terminated parents' parental rights upon finding of neglect. Father appealed. The supreme court, GIBBONS, J., held that: (1) as a matter of first impression, father's completion of case plan for reunification did not prohibit the district court from terminating his parental rights on basis of neglect; (2) as a matter of first impression, statutory presumptions applicable to findings of parental fault and the best interest of the child when the child had resided outside of the home for 14 months during consecutive 20-month period did not require full 20 months to elapse before they applied; (3) evidence was sufficient to support finding of father's neglect; and (4) evidence was sufficient to support finding that termination of father's parental rights was in children's best interests.

Affirmed.

[Rehearing denied October 22, 2015]

DOUGLAS, J., with whom CHERRY, J., agreed, dissented. SAITTA, J., dissented in part.

David M. Schieck, Special Public Defender, and *Abira Grigsby*, Deputy Special Public Defender, Clark County, for Appellant.

Steven B. Wolfson, District Attorney, and *Janne M. Hanrahan* and *Ronald L. Cordes*, Deputy District Attorneys, Clark County, for Respondent State of Nevada Department of Family Services.

Legal Aid Center of Southern Nevada and *Mary F. McCarthy* and *Barbara E. Buckley*, Las Vegas, for Respondents A.P.M. and E.M.M.

1. INFANTS.
   A party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest and (2) parental fault exists.

2. Infants.
   Termination of parental rights is an exercise of awesome power.
3. Infants.
   The supreme court closely scrutinizes whether the district court properly terminated parental rights and will uphold a district court's order terminating parental rights when it is supported by substantial evidence.
4. Appeal and Error.
   The construction of a statute is a question of law that the supreme court reviews de novo.
5. Statutes.
   When interpreting a statute, the plain meaning of the words in a statute should generally be respected.
6. Statutes.
   When a statute is clear on its face, the supreme court will not look beyond the plain language to determine legislative intent.
7. Infants.
   Father's completion of case plan for reunification with his children, who had been placed in foster care pursuant to child protection proceeding, did not prohibit the district court from terminating his parental rights on basis of neglect, when termination was otherwise warranted by father's failure to take protective action with respect to danger posed by mother's ineffective supervision of children. NRS 128.0155, 128.105.
8. Infants.
   A completed case plan for reunification does not prohibit the district court from terminating parental rights if termination is otherwise warranted under statute governing termination of parental rights. NRS 128.0155, 128.105.
9. Infants.
   Determining a child's best interest at a termination of parental rights proceeding requires a consideration of many factors stemming from the distinct facts of each case. NRS 128.005(2)(c).
10. Infants.
    Statutory presumptions applicable to findings of parental fault and the best interest of the child when the child had resided outside of the home for 14 months during consecutive 20-month period did not require full 20 months to elapse before they applied in termination of parental rights proceeding, where 14-month threshold had been met in less than 20 months, given children's removal for over 17 consecutive months. NRS 128.109(1)(a), (2).
11. Infants.
    The district court may apply, at a termination of parental rights proceeding, the statutory presumptions applicable to findings of parental fault and the best interest of the child when the child has resided outside of the home for at least 14 months during any consecutive 20-month period without waiting for the entire 20 months to elapse, so long as the 14-month threshold has been met in less than 20 months. NRS 128.109(1)(a), (2).
12. Infants.
    Evidence at termination of parental rights proceeding was sufficient to support finding of father's neglect of children, premised on seven separate incidents in which one of three children swallowed foreign objects, such as coins, magnets, and batteries, while in mother's care, even though father was not present during any of swallowing incidents; testimony during evidentiary hearing showed that father took almost no protective action after repeated swallowing incidents, some of which sent children to hos-

pital, with most recent incident causing serious harm to one child. NRS 128.014(2), 128.105(2)(b).

13. INFANTS.

Evidence was sufficient to support finding that termination of father's parental rights, upon finding of neglect premised on seven incidents in which one of children swallowed foreign objects, such as coins, magnets, and batteries while in mother's care, was in children's best interests; even though mother had died, children had been in foster care for 17 straight months, there was evidence as to father's limited relationship with children and failure to take protective action, with evidence further establishing that children did not ingest any foreign objects after they were placed in protective custody, and children's foster parent testified that children had been living with her for several months, that they had close relationship, and that she wished to adopt them. NRS 128.105(2)(b), 128.109(2).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider two issues of first impression arising from a termination of parental rights. First, we consider whether the district court may terminate the parental rights of a parent who has completed a case plan for reunification. Second, we consider whether the district court must wait the entire 20 months before applying both the presumption of token efforts in NRS 128.109(1)(a) and the presumption that termination of parental rights is in the best interest of the child in NRS 128.109(2).

We first conclude that the district court may terminate the parental rights of a parent who has completed his or her case plan for reunification, if termination is otherwise warranted under NRS 128.105. Second, we conclude that the district court is not required to wait the entire 20 months before applying the presumptions found in NRS 128.109(1)(a) and NRS 128.109(2), as long as the child has been removed from his or her parents' home pursuant to NRS Chapter 432B for at least 14 months during any consecutive 20-month period. Having resolved these legal issues, we further conclude that the record contains substantial evidence supporting the district court's decision to terminate appellant's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Arli M. and his wife Abigail M. had three children together: J.M.,[1] A.P.M., and E.M.M. From July 2006 to November 2011, seven separate incidents occurred in which one of the three children swallowed foreign objects, such as coins, magnets, and bat-

[1]J.M. died on October 10, 2006, from undetermined causes.

teries. All of these swallowing incidents happened while Arli was at work and Abigail was at home with the children. On the latest occasion, doctors had to surgically remove a large battery that was lodged in E.M.M.'s throat. Following E.M.M.'s surgery, the doctors grew concerned that Abigail was forcing her children to swallow foreign objects. The doctors explained that three-year-old E.M.M. swallowing the large battery was the equivalent of an adult swallowing a golf ball, making it highly unlikely that he swallowed it on his own. Due to their concerns, the doctors initiated a child protective services investigation.

In November 2011, the Clark County Department of Family Services (DFS) removed A.P.M. and E.M.M. from their parents' home pursuant to NRS Chapter 432B. In July 2012, the juvenile court entered an order granting DFS legal custody of the children, and the children were placed in foster care. Arli and Abigail were issued case plans containing objectives for them to complete in order to regain custody of their children. Arli's case plan required that he take parenting classes and participate in counseling. Almost immediately, Arli successfully completed the parenting classes and was participating in the required counseling. Despite these efforts, however, the juvenile court reviewed Arli's and Abigail's progress and determined that the children should remain in foster care.

On December 6, 2012, DFS filed a petition in the district court to terminate the parental rights of Arli and Abigail pursuant to NRS Chapter 128. On April 10, 2013, the district court began a five-day evidentiary hearing on the matter. Evidence presented at the hearing showed that Arli took almost no action to ensure the safety of his children after any of the seven swallowing incidents. Throughout the proceedings, Arli testified that he did not believe that Abigail was intentionally making their children swallow foreign objects or improperly supervising them. Instead, Arli claimed that the children's injuries were simply a result of Abigail losing focus while caring for the children.

After the hearing, the district court granted the petition to terminate the parental rights of Arli and Abigail. The district court found that DFS established (1) parental fault by proving neglect,[2] and

[2]During oral argument, both parties agreed that the district court's written order terminating Arli's parental rights contained discrepancies regarding the district court's findings of parental fault on grounds other than neglect. The parties claimed that the written order contained unintentional errors that conflicted with the district court's oral findings. Acknowledging these potential discrepancies, we conclude that the written order is controlling in this case. *See Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987).

It is undisputed, however, that the district court found—both at the hearing and in its written order—parental fault based on neglect under NRS 128.105(2)(b). Because, as described below, we affirm the district court's finding of neglect, and only one parental fault ground is needed to terminate parental rights under NRS 128.105(2), any possible discrepancies in the district court's written order regarding the other parental fault grounds are inconsequential to this case.

(2) that termination of parental rights was in the best interests of the children. The district court's findings regarding parental fault and the children's best interests revolved around the danger posed by Abigail's supervision of the children and Arli's failure to take protective action.

Both parents initially appealed from the district court's order, but this court received a suggestion of death indicating that Abigail had passed away, and her appeal was dismissed. Only Arli's appeal remains. On appeal, Arli argues that (1) the district court should not have terminated his parental rights because he completed his case plan, (2) the district court erred in applying the presumptions in NRS 128.109(1)(a) and NRS 128.109(2), and (3) substantial evidence does not support the district court's findings of parental fault and that termination was in the best interests of the children.

DISCUSSION

Standard of review

[Headnotes 1-3]

"A party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exists." *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006). Termination of parental rights is "an exercise of awesome power." *In re Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000); *see also Drury v. Lang*, 105 Nev. 430, 433, 776 P.2d 843, 845 (1989) (holding that severance of the parent-child relationship is "tantamount to imposition of a civil death penalty"). This court closely scrutinizes whether the district court properly terminated the parental rights at issue. *N.J.*, 116 Nev. at 795, 8 P.3d at 129. We will uphold a district court's order terminating parental rights when it is supported by substantial evidence. *In re Parental Rights as to C.C.A.*, 128 Nev. 166, 169, 273 P.3d 852, 854 (2012).

[Headnotes 4-6]

This appeal also raises issues of statutory interpretation. "The construction of a statute is a question of law, which this court . . . reviews de novo." *Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 1293, 149 P.3d 51, 57 (2006). Generally, the plain meaning of the words in a statute should be respected. *Id.* Thus, when a statute is clear on its face, this court will not look beyond the plain language to determine legislative intent. *Id.*

Prior to reaching the merits of the parental termination decision, two legal issues must be decided: (1) whether the completion of a case plan for reunification prohibits the district court from terminating parental rights, and (2) whether the presumptions found in NRS 128.109(1)(a) and NRS 128.109(2) can be applied before a full 20 months has elapsed.

Completing a case plan for reunification does not prohibit the district court from terminating parental rights

[Headnote 7]

Arli was given a case plan under NRS 128.0155 containing written conditions and obligations imposed with the primary objective of reunifying the family. Arli argues that the district court should not have terminated his parental rights because he completed this case plan. We disagree.

[Headnotes 8, 9]

We hold that a completed case plan does not prohibit the district court from terminating parental rights if termination is otherwise warranted under NRS Chapter 128. NRS 128.105 sets forth grounds for terminating parental rights. Along with requiring a finding of parental fault, the statute also states that "[t]he primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination." NRS 128.105. Determining a child's best interest requires a consideration of many factors stemming from "the distinct facts of each case." *N.J.*, 116 Nev. at 800, 8 P.3d at 133; *see also* NRS 128.005(2)(c) ("The continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."). Nowhere in NRS Chapter 128, however, has the Legislature stated that the district court is required to find that preserving parental rights is in the best interest of the child if the parent has completed his or her assigned case plan. While a completed case plan may be persuasive evidence that termination of parental rights is not in the child's best interest, by no means does it prohibit the district court from considering additional factors and determining otherwise.[3]

Accordingly, we conclude that the district court was not prohibited from terminating Arli's parental rights even though Arli had completed his case plan.

The presumptions in NRS 128.109(1)(a) and NRS 128.109(2) do not require that a full 20 months elapse before they apply

NRS 128.109 sets forth presumptions that apply to findings of parental fault and the best interest of the child when the child has resided outside of the home for an extended period of time. The statute states in relevant part:

> 1. If a child has been placed outside of his or her home pursuant to chapter 432B of NRS, the following provisions must be applied to determine the conduct of the parent:

[3]Similarly, nothing in NRS 128.105 prohibits the district court from finding parental fault if a parent has completed his or her case plan.

> (a) If the child has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, it must be presumed that the parent or parents have demonstrated only token efforts to care for the child as set forth in paragraph (f) of subsection 2 of NRS 128.105.
>
> . . . .
>
> 2. If a child has been placed outside of his or her home pursuant to chapter 432B of NRS and has resided outside of his or her home pursuant to that placement for 14 months of any 20 consecutive months, the best interests of the child must be presumed to be served by the termination of parental rights.

NRS 128.109.

The district court applied the presumptions in NRS 128.109(1)(a) and NRS 128.109(2) because the children were removed from Arli's home pursuant to NRS Chapter 432B and had remained out of his home for roughly 17 consecutive months at the time the termination hearing had commenced.

[Headnote 10]

Arli argues that the district court erred in applying these presumptions because the children had been out of their parents' home for less than 20 months. Arli argues that even though the children had been placed elsewhere for over 14 months, the language in NRS 128.109, "14 months of any 20 consecutive months," requires that the district court wait the entire 20 months before applying the presumptions. We disagree.

[Headnote 11]

Under the statute's plain language, the presumptions apply whenever a child has been removed from his or her parents' home pursuant to NRS Chapter 432B for at least 14 months during any consecutive 20-month period. We hold that if the 14-month threshold has been met in less than 20 months, the district court may apply the presumptions in NRS 128.109(1)(a) and NRS 128.109(2) without waiting for the entire 20 months to elapse. Indeed, waiting the additional time would serve no purpose. For example, in the present case, the district court applied the presumptions because the children had been removed pursuant to NRS Chapter 432B for over 17 consecutive months. Thus, waiting an additional 3 months—to reach a total of 20 months—before applying the presumptions would be unnecessary, because the 14-month threshold had already been satisfied. NRS 128.109(1)(a), (2). Accordingly, because Arli's children had been removed pursuant to NRS Chapter 432B for over 14 consecutive months, we conclude that the district court correctly applied the presumptions in NRS 128.109(1)(a) and NRS 128.109(2).

Substantial evidence supports termination of Arli's parental rights

With the two pressing legal issues resolved, we now turn our attention to whether the district court's findings of parental fault and that termination of parental rights was in the children's best interests were supported by substantial evidence. NRS 128.105. We conclude that substantial evidence supports these findings.

The district court correctly found parental fault based on neglect

Arli contends that substantial evidence does not support the district court's finding of neglect. Arli argues that he could not be neglectful because he was not present during any of the swallowing incidents. To support this argument, Arli cites *Chapman v. Chapman*, 96 Nev. 290, 294, 607 P.2d 1141, 1144 (1980), in which this court held that "a finding of neglect must be based upon the treatment of the child while the parent has custody" and "neglect is not established when the child is left by the parent in an environment where the child is known to be receiving proper care."[4] In response, DFS argues that Arli was neglectful because he failed to take protective action after the seven serious swallowing incidents involving all three of his children.

[Headnote 12]

We conclude that substantial evidence supports the district court's finding of neglect. NRS 128.014(2) defines a neglected child as a child "[w]hose parent . . . refuses to provide proper or necessary subsistence, education, medical or surgical care, or other care necessary for the child's health, morals or well-being." Testimony during the evidentiary hearing showed that Arli took almost no protective action after repeated swallowing incidents—some of which sent his children to the hospital, with the most recent incident causing serious harm to one child. Arli's failure to take protective action shows that he "refus[ed] to provide proper . . . care necessary for [his children's] health." NRS 128.014(2). Further, we conclude that Arli's reliance on *Chapman* is misplaced because although Arli was not present during any of the swallowing incidents, he failed to leave his children "in an environment where [they were] known to be receiving proper care." 96 Nev. at 294, 607 P.2d at 1144. Accordingly, the district court correctly found parental fault based on neglect. NRS 128.105(2)(b).

---

[4]Arli also argues that DFS attempted to compel Abigail to admit that she abused the children in order to regain custody, which violated her Fifth Amendment right against self-incrimination. Arli does not explain, however, how any alleged violations of Abigail's rights apply to his case.

The district court correctly found that termination of Arli's parental rights was in the best interests of the children

As explained above, we concluded that the district court correctly applied the NRS 128.109(2) presumption that termination of parental rights was in the best interests of the children based on the length of their removal. Arli contends, however, that he rebutted the presumption by visiting his children, completing parenting classes, and participating in counseling.

[Headnote 13]

We conclude that substantial evidence supports a finding that Arli did not rebut the presumption that termination of his parental rights was in the best interests of the children. The district court heard extensive testimony from several witnesses, including evidence as to Arli's limited relationship with his children and his failure to take any meaningful protective action after seven serious swallowing incidents, which were increasing in seriousness and harm. The evidence further established that the children did not ingest any foreign objects after they were placed in protective custody. Also, the children's foster parent testified that the children had been living with her for several months, that they had a close relationship, and that she wished to adopt them.

We conclude that the sum of this evidence supports the district court's finding that termination of Arli's parental rights was in the best interests of the children. This evidence further establishes that even with the death of Abigail, who was apparently the cause of the swallowing incidents, Arli is unable to protect his children from danger, swallowing, or otherwise.

Accordingly, because substantial evidence supports a finding of parental fault and that termination of parental rights was in the best interests of the children, we affirm the judgment of the district court.

Hardesty, C.J., and Parraguirre and Pickering, JJ., concur.

Douglas, J., with whom Cherry, J., agrees, dissenting:

This termination of parental right's case cries out for remand to the district court for a new hearing as to the best interests of the children in light of their mother's death.

The district court findings regarding parental fault and the children's best interests revolved around the danger posed by the mother, Abigail, and her supervision of the children, as well as their father Arli's failure to take protective action.

As to Arli, the facts establish he successfully completed his case plan. That is, he successfully completed parenting classes and participated in the required counseling prior to the district court's termi-

nation hearing. At the same time of the hearing, both parents participated and both parents initially appealed the district court's order. However, this court received a notice indicating that Abigail passed away and that the appeal was dismissed.

I submit that "terminating parental rights is 'an exercise of awesome power' that is 'tantamount to imposition of a civil death penalty'" and is subject to close scrutiny. *In the Matter of Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006) (footnote omitted) (quoting *In the Matter of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000) (internal quotations omitted)).

It is my belief that close scrutiny is required due to the death of Abigail and Arli's completion of his case plan. The district court's order to terminate both parents' rights was due primarily to the actions of the deceased mother. As such, this matter should be remanded to the district court for a new hearing as to the children's best interests and Arli's parental rights.

Justice requires more than a mechanical application of the presumptions as to the children's best interests and "token efforts" as related to the care of the children.

SAITTA, J., concurring in part and dissenting in part:

Although I otherwise agree with the majority, I write separately to express my concern about whether there was substantial evidence to support the district court's finding of parental fault. The majority opinion and the district court base their decisions on the fact that Arli did not take what could be considered sufficient protective action to prevent the children's mother from forcing them to swallow foreign objects while he was not present. As the majority acknowledges, Arli testified that he did not "believe" that Abigail was intentionally making their children swallow foreign objects or improperly supervising them. Although a close call, I am not convinced that this mistaken belief and subsequent failure to protect, when combined with Arli's successfully completed case plan, amount to substantial evidence that Arli has "refuse[d] to provide proper or necessary subsistence, education, medical or surgical care, or other care necessary for the child's health, morals or well-being." NRS 128.014(2). Therefore, I dissent as to the majority's holding that substantial evidence existed supporting the district court's finding of the parental fault of neglect.

JAMES S. TATE, JR., APPELLANT, *v.* THE STATE OF NEVADA BOARD OF MEDICAL EXAMINERS, RESPONDENT.

No. 65460

September 10, 2015 356 P.3d 506

Appeal from a district court order denying an injunction challenging the constitutionality of a statute prohibiting stay of Board of Medical Examiners decision. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Physician petitioned for judicial review of decision of Board of Medical Examiners suspending his license and issuing public reprimand. The district court denied physician's request for preliminary injunction. Physician appealed. The supreme court, HARDESTY, C.J., held that, as a matter of first impression, statute prohibiting district courts from entering a stay of a decision of the Board of Medical Examiners pending judicial review violates separation of powers doctrine.

Reversed and remanded.

Hafter Law and *Jacob L. Hafter*, Las Vegas, for Appellant.

Erin L. Albright, Reno, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court reviews appeals from district court decisions regarding petitions for judicial review of administrative actions under the same standard utilized by the district court.
2. APPEAL AND ERROR.
   Although the supreme court reviews factual determinations for clear error, it reviews questions of law, including statutory construction, de novo.
3. APPEAL AND ERROR.
   Whether a statute is unconstitutional is a question of law, reviewed de novo.
4. STATUTES.
   Words in a statute should be accorded their plain meaning unless doing so would be contrary to the spirit of the statute.
5. STATUTES.
   Statutes should be construed so as to avoid absurd results.
6. STATUTES.
   Absent a contrary and specific constitutional limitation, statutes are to be construed in favor of the legislative power.
7. ADMINISTRATIVE LAW AND PROCEDURE.
   Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review.
8. ADMINISTRATIVE LAW AND PROCEDURE.
   The extent of the court's jurisdiction over the acts of an administrative agency is controlled by the statute conferring that jurisdiction.

9. Constitutional Law.
   Once a statute has conferred power to a court over the acts of an administrative agency, that power may not be unduly abridged, as the judiciary is tasked with managing and finally deciding cases.
10. Administrative Law and Procedure.
    The Administrative Procedure Act (APA) governs the judicial review of those final administrative agency decisions that qualify under the terms of the APA, thus conferring power to the district courts to determine whether an aggrieved party is entitled to the relief sought on review. NRS 233B.010 *et seq*.
11. Administrative Law and Procedure.
    Typically, once a court gains jurisdiction of a case from an administrative agency, it has the power to preserve the status quo and maintain and protect the subject matter of the suit as it existed at the time the appeal was taken.
12. Constitutional Law; Health.
    The statute prohibiting district courts from entering a stay of a decision of the Board of Medical Examiners pending judicial review is a legislative encroachment on the powers of the judiciary in violation of the separation of powers doctrine. Const. art. 3, § 1; NRS 630.356(2).
13. Constitutional Law.
    A fundamental right may not be impaired without due process of law. U.S. Const. amend. 14.

Before the Court En Banc.

OPINION

By the Court, Hardesty, C.J.:

NRS 630.356(1) grants physicians the right to judicial review of Nevada State Board of Medical Examiners final decisions, while NRS 630.356(2) simultaneously prohibits district courts from entering a stay of the Board's decision pending judicial review. As a matter of first impression, we are asked to determine whether this prohibition violates the Nevada Constitution's separation of powers doctrine. Because we conclude that it does, we reverse the district court's order denying appellant injunctive relief and remand this matter for proceedings consistent with this opinion.

FACTS

Appellant James Tate, Jr., is a surgeon licensed in Nevada. In February 2010, he was scheduled to perform a surgery at Valley Hospital at around 4 p.m. When he arrived to prepare for the surgery, members of the surgical team thought Dr. Tate smelled of alcohol. The hospital halted surgery preparations and asked Dr. Tate to submit to alcohol tests, which he did, admitting that he had consumed some alcohol during his lunch break. Dr. Tate's blood alcohol level was .06 percent.

Respondent Nevada State Board of Medical Examiners found that Dr. Tate had violated NAC 630.230(1)(c) by rendering services to a patient while under the influence of alcohol and in an impaired condition. The Board suspended Dr. Tate's license for six months, issued a public reprimand, ordered him to complete an alcohol diversion program and pay $35,564.44 in investigation and prosecution costs and a $5,000 fine, and to complete continuing medical education on the subject of alcohol.

Dr. Tate petitioned for judicial review of the Board's decision. He also requested a preliminary injunction to stay the sanctions and prevent the Board from filing a report with the National Practitioner Data Bank while judicial review was pending. Medical Boards are required by 45 C.F.R. §§ 60.5(d) and 60.8(a) (2013) to report sanctions to the National Practitioner Data Bank, which disseminates information of physician misconduct to health-care entities, including hospitals. *See* Elisabeth Ryzen, M.D., *The National Practitioner Data Bank*, 13 J. Legal Med. 409, 411-20 (1992). In denying injunctive relief, the district court stated that, even though it thought the injunction was clearly warranted, NRS 630.356(2) precluded such action. Dr. Tate appeals the district court's denial of his injunction request.

DISCUSSION

The primary issue in this appeal is whether NRS 630.356(2) violates the separation of powers doctrine articulated in Article 3, Section 1 of the Nevada Constitution, which is a matter of first impression. Dr. Tate argues that the statute conflicts with the judicial powers articulated in Article 6, Section 6 of the Nevada Constitution. The Board counters that courts have no inherent authority over administrative actions and that any authority given by statute is likewise subject to statutory limitations, that this court has already determined that prohibitions against stays are not unconstitutional, and that other jurisdictions have upheld similar stays.[1]

Standard of review

[Headnotes 1-6]

We review appeals from district court decisions regarding petitions for judicial review under the same standard utilized by the district court. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245,

[1]The Board also argues that courts cannot enjoin the Board from reporting to the National Practitioner Data Bank. While we note a conflict in cases from other jurisdictions concerning the application of the Health Care Quality Improvement Act of 1986 to state court injunctions, *compare Diaz v. Provena Hosps.*, 817 N.E.2d 206, 212-13 (Ill. App. Ct. 2004), *with Doe v. Cmty. Med. Ctr., Inc.*, 221 P.3d 651, 658-59 (Mont. 2009), because the Board already reported to the National Practitioner Data Bank on April 23, 2014, this issue is moot.

248, 327 P.3d 487, 489 (2014). Although we review factual determinations for clear error, we review questions of law, including statutory construction, de novo. *Id*. Whether a statute is unconstitutional is a question of law, reviewed de novo. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). Words in a statute should be accorded their plain meaning unless doing so would be contrary to the spirit of the statute. *Berkson v. LePome*, 126 Nev. 492, 497, 245 P.3d 560, 563 (2010). Statutes should be construed so as to avoid absurd results. *State v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013). Absent a contrary and specific constitutional limitation, "statutes are to be construed in favor of the legislative power." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).

The prohibition against stays in NRS 630.356(2) violates the separation of powers doctrine

[Headnotes 7-9]

It is well-established that "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review." *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Moreover, the extent of the court's jurisdiction is controlled by the statute conferring that jurisdiction. *Washoe Cnty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012). However, once a statute has conferred power, that power may not be unduly abridged, as the judiciary is tasked with managing and finally deciding cases. *See Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984) (concluding "that a court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it"); *Commonwealth v. Yameen*, 516 N.E.2d 1149, 1151 (Mass. 1987) (declining to interpret a statute to prohibit a stay of a license revocation pending judicial review).

[Headnote 10]

In Nevada, the Administrative Procedure Act (APA), codified in NRS Chapter 233B, governs the judicial review of those final administrative agency decisions that qualify under the terms of the APA, thus conferring power to the district courts to determine whether an aggrieved party is entitled to the relief sought on review. *Otto*, 128 Nev. at 431-32, 282 P.3d at 724-25; *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (stating that petitions for judicial review create "a right of review in the district court"); *see also* NRS 233B.020(1) (setting forth the legislative intent for enacting the APA); NRS 233B.130(1) (setting forth the procedural requirements for a petition for judicial review in order to invoke the district court's jurisdiction).

In an administrative proceeding before the Board of Medical Examiners, a physician has the right to seek judicial review of a final order pursuant to NRS 630.356, which states in pertinent part as follows:

> 1. Any person aggrieved by a final order of the Board is entitled to judicial review of the Board's order.
>
> 2. Every order that imposes a sanction against a licensee pursuant to subsection 4 or 5 of NRS 630.352 or any regulation of the Board is effective from the date the Secretary-Treasurer certifies the order until the date the order is modified or reversed by a final judgment of the court. *The court shall not stay the order of the Board pending a final determination by the court.*

(Emphasis added.)

The parties differ on whether a statutory prohibition against stays violates the separation of powers doctrine. Although not previously examined by this court,[2] other courts have considered this issue, and the outcomes in those jurisdictions vary widely.

For example, in *Commission on Medical Discipline v. Stillman*, a lower court reviewing an administrative agency's revocation of a physician's medical license granted a stay of the revocation pending judicial review, despite statutory language prohibiting stays. 435 A.2d 747, 751-52 (Md. 1981). The *Stillman* court held that the prohibition against stays was constitutional because a stay is not an inherent judicial power, but merely a tool courts may use in administering justice. *Id*. at 753-54. Because the physician retained the right to seek judicial review and the court retained its power to review the agency's actions, the court further held that the statutory prohibition against stays did not inhibit the administration of justice. *Id*. at 755.

In contrast, the Supreme Court of Kentucky took the opposite view in *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984). There, a licensing control board revoked a store owner's alcoholic beverage li-

---

[2]The Board cites to *Buckwalter v. Nevada Board of Medical Examiners*, 678 F.3d 737 (9th Cir. 2012); *State v. Eighth Judicial District Court (Gaming Commission)*, 111 Nev. 1023, 899 P.2d 1121 (1995); and *Kassabian v. State Board of Medical Examiners*, 68 Nev. 455, 235 P.2d 327 (1951), to argue that this court has previously decided this issue. We disagree. As neither *Kassabian* nor *Buckwalter* dealt with separation of powers, they are inapplicable here. *Gaming Commission* is too factually dissimilar to guide the outcome in the present case, as there the issue was whether the Gaming Commission could exclude a customer from a gaming establishment, 111 Nev. at 1024, 899 P.2d at 1121, whereas here the interest at stake is a physician's constitutional right to practice his profession within the legal bounds of this state. *See generally Kassabian*, 68 Nev. at 464, 235 P.2d at 331. Moreover, in *Gaming Commission*, we relied upon a long line of Nevada jurisprudence to conclude that the Nevada Constitution "does not authorize court intrusion into the administration, licensing, control, supervision and discipline of gaming." 111 Nev. at 1025, 899 P.2d at 1122. Thus, we do not have the benefit of prior jurisprudence to guide us on the issue before us.

cense, and the lower court found that the statutory scheme prevented it from issuing a stay pending judicial review. *Id*. at 63. The *Smothers* court held that a statute prohibiting any stay of a board's order pending judicial review violated the separation of powers doctrine because it was a legislative encroachment on the powers of the judiciary. *Id*. at 64. The court reasoned that where the statute allowed the licensee to appeal a board's decision, to simultaneously preclude the possibility of a stay would be "to pay lip service to the statutory provisions that establish the right for a licensee to appeal while eradicating any practical reason for taking the appeal." *Id*. at 65. The prohibition effectively puts "a licensee in the position of winning the battle but losing the war" because the sanctions could cause irreparable injury while review was ongoing. *Id*. "Succinctly put, the statute gives an appeal and then takes it away. The contradiction and conflict here are obvious. The practical effect is to render the appeal a meaningless and merely ritualistic process." *Id*. We agree with the reasoning in *Smothers*.

[Headnote 11]

The Legislature's enactment of NRS 630.356 provided physicians with the right to seek judicial review of Board decisions, thereby empowering the district courts with the ability to determine whether an aggrieved party is entitled to the relief sought on review, and if so, to shape that relief accordingly. Typically, once a court gains jurisdiction of a case, it has the power "to preserve the status quo and maintain and protect . . . the subject-matter of the suit as it existed at the time the appeal was taken." *Houston, B & T Ry. Co. v. Hornberger*, 141 S.W. 311, 312 (Tex. Civ. App. 1911). Likewise, the district court may issue an injunction to enjoin a party from taking action that would "render the judgment ineffectual." NRS 33.010(3).

To bar a district court's ability to grant injunctive relief while judicial review is pending effectively "render[s] the appeal a meaningless and merely ritualistic process," *Smothers*, 672 S.W.2d at 65, as the sanctions imposed will likely have been implemented or completed before the court could judicially review the case. Such sanctions may, among other things, irreparably penalize a physician through loss of patients, income, job opportunities, and/or damage the physician's professional reputation and standing if the court were to later overrule the Board's decision and the sanctions imposed.

[Headnote 12]

Because NRS 630.356(2)'s prohibition against stays renders meaningless the legislative grant of authority to the district courts to judicially review Board decisions and encroaches on a district court's "inherent power to do all things reasonably necessary" to administer justice, including issuing injunctions, we conclude that NRS 630.356(2) violates the separation of powers doctrine. *Smothers*, 672 S.W.2d at 64-65; *see also Ardt v. Ill. Dep't of Prof'l Regulation*, 607 N.E.2d 1226, 1232 (Ill. 1992).

Here, Dr. Tate has been sanctioned with, among other things, fees and fines, a public reprimand, and suspension of his license for a six-month period. If the district court were prohibited from staying the sanctions imposed until it can determine whether the Board's decision was in error, Dr. Tate may be irreparably penalized thus negating the purpose of his right to judicial review. Moreover, under federal law, these sanctions must be reported to the National Practitioner Data Bank within 30 days of their implementation, 45 C.F.R. §§ 60.5 and 60.8, resulting in the Board's decision and sanctions against Dr. Tate being recorded in a national database before the district court can review the Board's decision. Thus, the statutory prohibition against stays would effectively "eradicate[ ] any practical reason for taking the appeal." *Smothers*, 672 S.W.2d at 65.

[Headnote 13]

Furthermore, we are inclined to agree with Dr. Tate that public interest militates in favor of injunctive relief when the district court deems it necessary. In *Kassabian*, we noted that "'[t]he Legislature may have thought that the professions and callings to which this statute was applicable were such that the public health, safety, and welfare might be protected better if a stay were forbidden,'" 68 Nev. at 466, 235 P.2d at 332 (quoting *Flynn v. Bd. of Registration in Optometry*, 67 N.E.2d 846, 850 (Mass. 1945)), echoing the public perception that there were many dangerous doctors from whom the public needed protection. *See also* Katharine A. Van Tassel, *Blacklisted: The Constitutionality of the Federal System for Publishing Reports of "Bad" Doctors in the National Practitioner Data Bank*, 33 Cardozo L. Rev. 2031, 2041-51 (2012) (discussing the healthcare atmosphere in the 1980s and public perception of doctors). However, a prohibition against stays could potentially endanger the public: for example, if a Board refused to suspend or revoke the license of a doctor who was questionably dangerous, a reviewing court would be unable to enjoin the doctor from practicing medicine pending judicial review. Allowing stays, on the other hand, presents little danger to the public health, safety, or welfare as the impartial judge will weigh public interests, including potential danger to the public, in deciding whether to grant or deny a stay. *See* 42 Am. Jur. 2d *Injunctions* § 15 (2015) ("Deciding an injunction motion requires a delicate balancing of several factors, including . . . the interest of the public or others."); 42 Am. Jur. 2d *Injunctions* § 39 (2015) (discussing how the public interest and the rights of third parties weighs on the grant or denial of injunctive relief). Thus, we conclude that NRS 630.356(2)'s prohibition against stays is also against the public interest.[3]

[3]Dr. Tate did not argue that the stay violates due process, and over 60 years ago we held that a prohibition against stays during the pendency of judicial review of a Board decision was not a deprivation of due process. *Kassabian*, 68

CONCLUSION

Through the adoption of NRS 630.356(2), the Legislature gave physicians the right to contest and the district courts the power to review the Board's final decisions. By simultaneously extinguishing the court's ability to impose a stay where the progression of sanctions would impair or eliminate the purpose of seeking judicial review, the statute impermissibly acts as a legislative encroachment on the court's power to do what is reasonably necessary to administer justice. This, we conclude, is a violation of the separation of powers doctrine.

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

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

Nev. at 465-66, 235 P.2d at 332. However, in *Kassabian*, we also recognized that the facts of a situation as a whole drive due process considerations and implied that stays may violate due process rights where due process is not otherwise sufficiently afforded to the defending physician. *Id.* (stating that physicians were, at that time, afforded sufficient due process by virtue of the administrative procedure the Board was required to follow before it could take disciplinary action).

It is well-established that a fundamental right may not be impaired without due process of law. *Chudacoff v. Univ. Med. Ctr. of S. Nev.*, 609 F. Supp. 2d 1163, 1172-73 (D. Nev. 2009); *Maiola v. State*, 120 Nev. 671, 674-75, 99 P.3d 227, 229 (2004). Moreover, we have recognized that a physician's interest in practicing medicine is a property right that must be afforded due process. *Minton v. Bd. of Med. Exam'rs*, 110 Nev. 1060, 1082, 881 P.2d 1339, 1354 (1994), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014); *Molnar v. State ex rel. Bd. of Med. Exam'rs of the State of Nev.*, 105 Nev. 213, 216, 773 P.2d 726, 727 (1989); *Potter v. State Bd. of Med. Exam'rs*, 101 Nev. 369, 371, 705 P.2d 132, 134 (1985); *Kassabian,* 68 Nev. at 464, 235 P.2d at 331.

Several courts have addressed whether a physician has been afforded adequate process in determining whether the prohibition of a stay pending judicial review violates a physician's due process rights. *Compare Barry v. Barchi*, 443 U.S. 55, 63-66 (1979) (concluding that statute prohibiting administrative stays pending the final hearing was unconstitutionally applied where post-suspension hearing was not sufficiently timely), *with Flynn v. Bd. of Registration in Optometry*, 67 N.E.2d 846, 849-50 (Mass. 1945) (concluding that statute prohibiting stay of agency action suspending an optometrist's license did not violate due process).

Because the issue of whether NRS 630.356(2)'s prohibition against a stay pending judicial review violates a physician's due process rights is not before us in this matter, we leave that legal issue for a case that requires its determination.

MARCIA M. BERGENFIELD, AN INDIVIDUAL; AND LAWRENCE BERGENFIELD, AN INDIVIDUAL, APPELLANTS, *v*. BAC HOME LOANS SERVICING, LP, RESPONDENT.

No. 67136

September 10, 2015 354 P.3d 1282

Jurisdictional screening of an appeal from a district court order dismissing a complaint for lack of jurisdiction in a tort action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Plaintiffs brought action against defendant for fraud and consumer fraud. On two occasions, the district court granted defendant's motion to dismiss but allowed plaintiff's leave to file an amended complaint. After the second dismissal, plaintiffs appealed instead of filing an amended complaint, and the supreme court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. The supreme court, GIBBONS, J., held that an order dismissing a complaint with leave to amend is not final and appealable.

Dismissed.

Hafter Law and *Jacob L. Hafter*, Las Vegas, for Appellants.

Akerman LLP and *Ariel E. Stern* and *William S. Habdas*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court's appellate jurisdiction is limited to appeals authorized by statute or court rule.
2. APPEAL AND ERROR.
   The finality of an order or judgment for appeal purposes is determined by looking to what the order or judgment actually does, not what it is called. NRAP 3A(b)(1).
3. APPEAL AND ERROR.
   A district court order dismissing a complaint with leave to amend is not final and appealable. NRAP 3A(b)(1).
4. PRETRIAL PROCEDURE.
   After issuing an order dismissing a complaint with leave to amend, in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, the district court should generally grant a party's motion for leave to amend; if the plaintiff, however, chooses to stand on its complaint as drafted, then it must file a written notice with the district court revealing its choice within 30 days from the date of written notice of entry of the court's order of dismissal, and the district court can then enter a final and appealable order of dismissal, which is one without leave to amend. NRCP 15(a); NRAP 3A(b)(1), 4(a)(1).

Before HARDESTY, C.J., SAITTA and GIBBONS, JJ.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we determine whether a plaintiff can appeal from a district court order that dismisses the complaint but allows the plaintiff leave to amend. We conclude that an order of this nature is not a final, appealable judgment. If the plaintiff does not intend to amend its complaint, then it must provide the district court with written notice of its intent to stand on its complaint as drafted, so the district court can enter a final, appealable order. Here, the plaintiff did not provide the district court said notice, thus we dismiss this appeal for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

Appellants Marcia M. Bergenfield and Lawrence Bergenfield filed a complaint against respondent BAC Home Loans Servicing, LP, asserting fraud and consumer fraud. BAC moved to dismiss the complaint. The district court granted BAC's motion to dismiss but allowed the Bergenfields leave to file an amended complaint. The Bergenfields then filed a first amended complaint, once again asserting fraud and consumer fraud. Again the district court dismissed it, allowing the Bergenfields leave to amend. However, instead of filing a second amended complaint, the Bergenfields appealed.[1] This court issued an order to show cause why this appeal should not be dismissed for lack of jurisdiction. *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) ("[W]hether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review . . . ." (internal quotations omitted)).

DISCUSSION

[Headnotes 1, 2]

This court's appellate jurisdiction is limited to appeals authorized by statute or court rule. *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). NRAP 3A(b) sets forth the judgments from which a party may appeal. If a judgment "constitutes a final judgment, then it is substantively appealable under NRAP 3A(b)(1)." *Id.* "This court determines the finality of an order or judgment by looking to what the order or judgment actually *does*, not what it is called." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994). "This court has consistently looked past labels in interpreting NRAP 3A(b)(1), and has instead taken a

[1]The Bergenfields did not seek and the district court did not certify any of the dismissed issues under NRCP 54(b).

functional view of finality, which seeks to further the rule's main objective: promoting judicial economy by avoiding the specter of piecemeal appellate review." *Id.* at 444, 874 P.2d at 733.

Here, we are tasked with determining an issue of first impression: whether an order dismissing a complaint with leave to amend is a final, appealable judgment.

In the United States Court of Appeals for the Ninth Circuit, an order dismissing a complaint with leave to amend is not final and, thus, not appealable. *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); *see also Moya v. Schollenbarger*, 465 F.3d 444, 451 (10th Cir. 2006) ("[W]hen the dismissal order expressly *grants* the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint; the dismissal is thus not a final decision."). "[A] plaintiff, who has been given leave to amend, may not file a notice of appeal simply because he does not choose to file an amended complaint." *WMX Techs.*, 104 F.3d at 1136. A plaintiff must obtain "[a] further district court determination." *Id.* A plaintiff obtains such a determination by "fil[ing] in writing a notice of intent not to file an amended complaint." *Id.* at 1135 (internal quotations omitted). "[F]iling of such notice gives the district court an opportunity to reconsider, if appropriate, but more importantly, to enter an order dismissing the action, one that is clearly appealable." *Id.* (internal quotations omitted); *see also Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004) ("In *WMX Technologies*, we specifically noted that a plaintiff may obtain an appealable final judgment by filing in writing a notice of intent not to file an amended complaint." (internal quotations omitted)).

As explained by the Ninth Circuit, we conclude that this rule, requiring the plaintiff to obtain a further district court determination, is based on sound policy considerations because it allows plaintiffs to "exercise their right to stand on a complaint [and appeal the issue of] whether the complaint is adequate as a matter of law." *Edwards*, 356 F.3d at 1065. At the same time, it "requires only a modicum of diligence by the parties and the district court, avoids uncertainty, and provides for a final look before the arduous appellate process commences." *WMX Techs.*, 104 F.3d at 1136.

[Headnotes 3, 4]

Thus, we are persuaded by the Ninth Circuit's approach and conclude that a district court order dismissing a complaint with leave to amend is not final and appealable. Generally, after issuing an order dismissing a complaint with leave to amend, "in the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant," the district court should grant a party's motion for leave to amend. *Stephens v. S. Nev. Music Co., Inc.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973) (discussing NRCP 15(a)). If the plaintiff, however, chooses to stand on its com-

plaint as drafted, then it must file a written notice with the district court revealing its choice within 30 days from the date of written notice of entry of the court's order of dismissal. The district court can then enter a final and appealable order of dismissal, i.e., one without leave to amend. *See* NRAP 3A(b)(1); *see also* NRAP 4(a)(1) (stating that generally a notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served").

In the present case, the district court order granting BAC's second motion to dismiss is not final and appealable because it allows the Bergenfields leave to amend. The Bergenfields did not notify the district court that they intended to stand on their first amended complaint. As a result, the district court never entered a final, appealable order. Accordingly, we dismiss this appeal for lack of jurisdiction.

HARDESTY, C.J., and SAITTA, J., concur.

LAND BARON INVESTMENTS, INC., A NEVADA CORPORATION; MICHAEL CHERNINE, A TRUSTEE OF THE MISHA TRUST; AND ROBERT BLACK, JR., TRUSTEE OF THE BLACKBUSH FAMILY TRUST, APPELLANTS, *v.* BONNIE SPRINGS FAMILY LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP; BONNIE SPRINGS MANAGEMENT COMPANY, A NEVADA LIMITED LIABILITY CORPORATION; ALAN LEVINSON, AN INDIVIDUAL; BONNIE LEVINSON, AN INDIVIDUAL; AND APRIL BOONE, AN INDIVIDUAL, RESPONDENTS.

No. 59687

September 17, 2015 356 P.3d 511

Appeal from a district court judgment in a tort and real property contract action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Kathleen E. Delaney, and Gloria Sturman, Judges.

Land purchaser brought action against vendor for rescission based on mutual mistake, misrepresentation and nondisclosure, and other claims, and vendor counterclaimed for abuse of process and nuisance, among others, arising out of purchaser's difficulty in obtaining access and water rights for purchased land. The district court granted summary judgment to vendor on water rights issues, denied purchaser summary judgment on mutual mistake claim and abuse of process and nuisance counterclaims and, after jury trial, awarded damages to vendor for abuse of process and nuisance. Purchaser appealed. The supreme court, HARDESTY, C.J., held that: (1) purchaser bore risk of mistake, (2) there was no evidence vendor represented facts as required for misrepresentation claim, (3) vendor was not

liable for alleged nondisclosure, (4) there was no evidence that purchaser held improper motive as required for abuse of process counterclaim, and (5) sufficient evidence supported award of damages for nuisance claim.

Affirmed in part and reversed in part.

[Rehearing denied November 24, 2015]

[En banc reconsideration denied January 22, 2016]

Cotton, Driggs, Walch, Holley, Woloson & Thompson and *John H. Cotton* and *Christopher G. Rigler*, Las Vegas, for Appellants.

Greenberg Traurig, LLP, and *Tyler R. Andrews* and *Philip M. Hymanson*, Las Vegas, for Respondents.

Darren J. Welsh, Chtd., and *Darren J. Welsh*, Las Vegas, for Amicus Curiae Prudential Americana Group, Realtors.

1. Appeal and Error.
   The grant or denial of summary judgment is reviewed de novo. NRCP 56(c).
2. Judgment.
   Summary judgment should be granted when the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact remaining in the case and where the moving party is entitled to judgment as a matter of law.
3. Appeal and Error.
   In reviewing a ruling for or against a directed verdict, the supreme court applies the same standard as the district court applies, viewing the evidence in the light most favorable to the party against whom the motion is made.
4. Contracts.
   A contract may be rescinded on the basis of mutual mistake when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain.
5. Contracts.
   Mutual mistake will not provide grounds for rescission where a party bears the risk of mistake. Restatement (Second) of Contracts §§ 152(1), 154(b), (c).
6. Contracts.
   Restatement (Second) of Contracts section, providing that a party bears the risk of a mistake if the party is aware at the time the party enters into the contract that the party has only limited knowledge with respect to the facts to which the mistake relates but treats the party's limited knowledge as sufficient, would be adopted. Restatement (Second) of Contracts § 154(b).
7. Contracts.
   If the risk of mistake is reasonably foreseeable and yet the contract fails to account for that risk, a court may infer that the party assumed that risk.
8. Contracts.
   A contracting party bears the risk of mistake if the court allocates that risk to the party on the ground that to do so is reasonable under the circumstances.

9. Vendor and Purchaser.
Land purchaser bore risk of mistake regarding certainty of procuring access and water rights to land purchased with the intent of building subdivision, which foreclosed any possibility of rescinding purchase contract based on mutual mistake, despite contention that vendor had assured it that water would not have been a problem; purchaser was sophisticated and experienced land buyer and developer, property was surrounded by mostly undeveloped land well beyond outskirts of city, and purchaser drafted contract and its amendments without conducting any due diligence.

10. Fraud.
There was no evidence that land vendor represented that there would be no impediment to purchaser gaining access for a subdivision via lanes on or near Federal Bureau of Land Management land or that vendor stated it would supply land with water, as required to support purchaser's claim for misrepresentation.

11. Fraud; Judgment.
At the threshold, to establish a claim for either intentional or negligent misrepresentation, a plaintiff must show that the defendant supplied plaintiff with false information, and summary judgment is appropriate if plaintiff has not provided evidence of this essential element.

12. Fraud.
Nondisclosure arises when a seller is aware of materially adverse facts that could not be discovered by the buyer after diligent inquiry.

13. Fraud.
When the defect is patent and obvious, and when the buyer and seller have equal opportunities of knowledge, a seller cannot be liable for nondisclosure.

14. Fraud.
Liability for nondisclosure is generally not imposed when the buyer either knew of or could have discovered the defects prior to the purchase.

15. Fraud.
Land purchaser could have discovered facts surrounding difficulty or impossibility of obtaining sufficient water and access for subdivision on land, and therefore vendor was not liable for alleged nondisclosure; purchaser had equal opportunity as vendor to discover, and did discover, facts before closing, water rights were public information accessible through government website, purchaser was in best position to know how much water was going to be needed for proposed subdivision, and purchaser was aware that it would need to obtain access approval.

16. Appeal and Error.
Questions of law are reviewed de novo.

17. Process.
To support an abuse of process claim, a claimant must show (1) an ulterior purpose by the party abusing the process other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.

18. Process.
The abuse of process claimant must provide facts, rather than conjecture, showing that the party intended to use the legal process to further an ulterior purpose.

19. Process.
For an abuse of process claim, the utilized process must be judicial, as the tort protects the integrity of the court.

20. PROCESS.
    Filing a complaint does not constitute abuse of process; the tort requires a willful act that would not be proper in the regular conduct of the proceeding, and filing a complaint does not meet this requirement.
21. PROCESS.
    Abuse of process claims do not encompass actions involving administrative agencies; the tort requires the abuse of legal process, but courts are not usually involved in the conduct of administrative agencies.
22. PROCESS.
    There was no evidence that land purchaser abused legal process, as opposed to administrative process, or held an improper motive in filing citizen's complaint with county commissioner alleging code violations on vendor's property after a dispute regarding land sale arose, as required to support vendor's abuse of process counterclaim.
23. NUISANCE.
    Nuisance arises where one party interferes with another party's use and enjoyment of land, and that interference is both substantial and unreasonable.
24. NUISANCE.
    Because damages for nuisance include personal inconvenience, discomfort, annoyance, anguish, or sickness, an occupant need not show physical harm to recover.
25. NUISANCE.
    Sufficient evidence supported an award of damages for land vendor's nuisance claim based on purchaser's complaint to county commissioner alleging multiple county code violations on vendor's property, but which resulted in no violations being found, where complaint resulted in thorough inspection of vendor's property for several hours and vendor's representatives testified that inspection interrupted business and damaged vendor's reputation, as well as testifying that vendor's representatives lost sleep, had anxiety, and were very upset from the investigations and inspection.

Before HARDESTY, C.J., PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, HARDESTY, C.J.:

This appeal arises from a failed land sale contract and raises three issues of first impression. First, we must consider whether a mutual mistake will provide a ground for rescission where one of the parties bears the risk of mistake. Second, we must determine whether an abuse of process claim may be supported by a complaint to an administrative agency instead of one involving a legal process. Finally, we consider whether a nuisance claim seeking to recover only emotional distress damages requires proof of physical harm.

In addressing the first issue, we adopt the Restatement (Second) of Contracts § 154(b) (1981), which provides that a party bears the risk when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." In this,

we reject mutual mistake as a basis for rescission. We also reject the assertions that an abuse of process claim may be supported by a complaint to an administrative agency or that a nuisance claim seeking only emotional distress damages must be supported by proof of physical harm. Accordingly, we affirm in part and reverse in part the district court's orders and judgment.

FACTS

Factual background

In 2004, appellants Land Baron Investments, Inc., Michael Chernine, and Robert Black, Jr. (collectively, Land Baron), contracted to purchase land for $17,190,000 from respondents Bonnie Springs Family Limited Partnership, Bonnie Springs Management Company, Alan Levinson, Bonnie Levinson, and April Boone (collectively, Bonnie Springs) for the express purpose of building a subdivision. The property lies next to the Bonnie Springs Ranch, beyond the outskirts of Las Vegas and is surrounded largely by undeveloped land.

Prior to signing the purchase agreement, Land Baron verified that Bonnie Springs had title to the property but did not inquire into water or access rights or do any other due diligence. Land Baron drafted the purchase agreement, which stated that Bonnie Springs would allow Land Baron to use some of its treated wastewater for landscaping but did not mention access or water rights or make the contract contingent upon its ability to secure access, water, or any other utility necessary for the planned subdivision. Immediately after signing the agreement and while the sale was pending, Land Baron also began listing and relisting the property for sale, first as a single piece of property and then as separate parcels. However, obtaining access and water proved to be difficult, and beginning in December 2004, the parties amended the purchase agreement five times to extend the escrow period, with Land Baron paying a nonrefundable fee of $50,000 for each extension.

The property is flanked by two gravel roads, Los Loros Lane and Gunfighter Lane, both of which overlap or border Federal Bureau of Land Management (BLM) land. Clark County informed Land Baron it would not approve either road as access into the proposed subdivision unless the road was widened and paved. After further researching the issue, Land Baron discovered that Gunfighter Lane could not be paved or widened because a right-of-way[1] would not

[1]The BLM informed Land Baron that Gunfighter Lane was known as an "R.S. 2477 right-of-way" road. An employee from Clark County Development Services indicated that R.S. 2477 roads are roads across BLM land that have been adopted and maintained by the county as public roads but that cannot be altered from their original condition in any way.

allow it and that Los Loros Lane[2] likewise could not be paved or widened because it was on National Conservation Land and use of that road could constitute a trespass.

In September 2005, Land Baron began a search for water rights for the subject property. An attempt to buy existing water rights from another owner in the area failed because the rights were not in the same water basin. Land Baron was unable to find a viable option for obtaining water rights from nearby water sources and was unable to bring in water by a pipeline from another development. Land Baron asked Bonnie Springs if it would be willing to share its commercial water rights from the Bonnie Springs Ranch, but Bonnie Springs informed Land Baron that it could not allow its commercial water to be used in the residential development. Despite these issues, Land Baron never attempted to amend the language of the agreement with Bonnie Springs to address concerns with access or water.

The parties met in August 2007 to discuss the access and water rights issues. Land Baron informed Bonnie Springs that, because the property would likely need to be sold as a single parcel rather than as individual lots in a subdivision, its value was greatly reduced. Following this meeting, Land Baron failed to make a payment to extend the escrow period through September 2007. On September 26, 2007, Bonnie Springs notified Land Baron that it was in breach and that Bonnie Springs was terminating escrow and keeping the deposits as liquidated damages. The next day, Bonnie Springs notified the title company of Land Baron's breach and requested that escrow be terminated.

Subsequent negotiations proved unsuccessful, and Land Baron filed a citizen's complaint with the Clark County Commissioner's office alleging that there were multiple county code violations on the Bonnie Springs Ranch. The complaints were based on investigations allegedly performed at Bonnie Springs Ranch by individuals it hired to search for code violations. These investigators allegedly found horses that had been electrocuted or infected with West Nile virus; turtles in the petting zoo that were infected with salmonella; licensing issues with the motel and business; code violations with the walkways, handrails, restrooms, shade structures, electrical wiring, and stairways; and other health, waste, and zoning issues. As a result, the county commissioner and multiple state and local regulatory agencies performed a large-scale inspection of the Bonnie Springs Ranch during business hours, when guests and school children were present. Officials from each county office arrived at the ranch in police vehicles that had lights flashing. No violations were found on the Bonnie Springs Ranch.

---

[2]At the time of this appeal, Land Baron's application with the BLM to widen and pave Los Loros Lane was still pending approval.

Procedural background

The same month it filed the citizen's complaint, Land Baron also filed a complaint against Bonnie Springs in district court, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional misrepresentation and nondisclosure, negligent misrepresentation, rescission based on mutual mistake, rescission based on unilateral mistake, rescission based on failure of consideration, and rescission based on fraud in the inducement. All of the claims centered on Land Baron's difficulty obtaining access and water rights for the subject property. Bonnie Springs counterclaimed for breach of contract, abuse of process, nuisance, fraudulent misrepresentation, intentional interference with contractual relations, and slander of title.

Several summary judgment motions were filed. Of note, Bonnie Springs filed a motion for summary judgment on the ground that it had no legal or contractual duty to provide or secure water rights for the property. And Land Baron filed a motion for summary judgment to confirm its right to rescind the contract based on mutual mistake.

The district court granted Bonnie Springs' motion for summary judgment on the water rights issues. It found that Bonnie Springs had no contractual duty to provide notice of water rights issues or to help secure water rights for the subject property, and that the burden was on Land Baron to secure water rights.

The district court then denied Land Baron's motion for summary judgment regarding mutual mistake. The court found that there was no mutual mistake because the parties did not know, at the time of the agreement, whether there were sufficient access and water rights to support a subdivision on the property, and it assigned the risk of that mistake to Land Baron. Finally, the district court granted Land Baron's second summary judgment motion dismissing Bonnie Springs' intentional interference with contractual relations and fraudulent misrepresentation claims because it found that there were no remaining factual issues. However, it denied the motion as to Bonnie Springs' counterclaims for breach of contract, abuse of process, nuisance, and slander of title because it found that factual issues remained.

The parties proceeded to trial on Bonnie Springs' remaining counterclaims for abuse of process and nuisance.[3] Prior to closing arguments, Land Baron made a motion for a directed verdict, arguing that Bonnie Springs had failed to satisfy the elements of each

[3]The parties also went to trial on Bonnie Springs' breach of contract and slander of title counterclaims. Bonnie Springs filed a separate trial brief seeking judicial determination in its favor on the breach of contract counterclaim, which the district court granted. The district court also granted Land Baron's motion for a directed verdict on the slander of title counterclaim, and the parties do not dispute either ruling on appeal.

claim and had failed to prove the physical harm necessary to support emotional distress damages under the nuisance claim. The district court denied the motion.[4]

The jury returned a unanimous verdict for Bonnie Springs on its nuisance and abuse of process counterclaims, awarding Bonnie Springs $1,250,000 as compensatory damages for its abuse of process counterclaim and $350,000 as compensatory damages for its nuisance counterclaim. The jury awarded Bonnie Springs an additional $1,512,500 in punitive damages on the abuse of process counterclaim and an additional $762,500 in punitive damages on the nuisance counterclaim.

Land Baron moved for a mistrial. It argued, among other things, that emotional distress damages may not be awarded on a nuisance or abuse of process claim absent proof of physical harm. The district court denied the motion, finding that a party did not need to prove physical harm in order to recover emotional distress damages for nuisance and abuse of process claims in Nevada. Judgment on the jury verdict, including an award of attorney fees and costs in favor of Bonnie Springs, was entered. After, Land Baron moved for reconsideration, which the district court denied.

Land Baron now appeals.

DISCUSSION

On appeal, the parties dispute whether the district court erred in denying Land Baron's motion for summary judgment on its rescission claim and granting Bonnie Springs' motion for summary judgment on Land Baron's misrepresentation and nondisclosure claims. Land Baron also argues that the district court improperly denied its motions for a directed verdict on Bonnie Springs' abuse of process and nuisance claims.

[Headnotes 1-3]

We review de novo the grant or denial of summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also* NRCP 56(c). Summary judgment should be granted when the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact remaining in the case, and where the moving party is entitled to judgment as a matter of law. *Id.* at 729, 255 P.3d at 1029. In reviewing a ruling for or against a directed verdict, this court applies the same standard as the trial court, viewing the evidence in the light most favorable " 'to the party against whom the motion is made.' "

[4]The motion was brought on behalf of three parties: appellants Michael Chernine, Robert Black, and Land Baron. The motion was granted as to Chernine but denied as to the other parties. The parties do not appeal the grant in favor of Chernine.

M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd., 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) (quoting *Bliss v. DePrang*, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965)).

The district court did not err in denying Land Baron's motion for summary judgment on its mutual mistake rescission claim

Land Baron argues that it was entitled to summary judgment on its rescission claim because both Land Baron and Bonnie Springs mistakenly believed there would be sufficient access and water rights for a subdivision on the property, giving rise to a mutual mistake that would render the contract voidable.

[Headnotes 4-8]

A contract may be rescinded on the basis of mutual mistake "'when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain.'" *Gramanz v. Gramanz*, 113 Nev. 1, 8, 930 P.2d 753, 758 (1997) (quoting *Gen. Motors v. Jackson*, 111 Nev. 1026, 1032, 900 P.2d 345, 349 (1995)). However, mutual mistake will not provide grounds for rescission where a party bears the risk of mistake. Restatement (Second) of Contracts §§ 152(1), 154(b), (c) (1981). If the party is aware at the time he enters into the contract "that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient," that party will bear the risk. Restatement (Second) of Contracts § 154(b) (1981). Moreover, if the risk is reasonably foreseeable and yet the contract fails to account for that risk, a court may infer that the party assumed that risk. *United States v. Winstar Corp.*, 518 U.S. 839, 905-06 (1996) (noting that in considering if a risk is foreseeable in a regulatory setting, absent a specific contract provision, the party assumes the risk); *see also Tarrant v. Monson*, 96 Nev. 844, 845-46, 619 P.2d 1210, 1211 (1980) ("One who is uncertain assumes the risk that the facts will turn out unfavorably to his interests," and where the party bargains "with conscious uncertainty," there cannot be mutual mistake). The party also bears the risk of mistake if the court allocates that risk to the party on the ground that to do so is reasonable under the circumstances. Restatement (Second) of Contracts § 154(c) (1981).

[Headnote 9]

Here, we need not determine whether Land Baron and Bonnie Springs shared a mistaken assumption about the certainty of procuring access and water rights because Land Baron bore the risk of mistake, foreclosing any possibility of rescinding the contract based on a mutual mistake. Land Baron is a sophisticated and experienced land buyer and developer, and in this instance, it contracted to purchase property that was well beyond the outskirts of Las Vegas, surrounded by land that was mostly undeveloped, flanked by dirt

roads, and only a few minutes away from Red Rock Canyon, a well-known conservation area. Land Baron also drafted the contract and its amendments. Yet, despite including a section for contingencies, Land Baron failed to include language to address the possibilities that a narrow gravel road may not provide sufficient access to a subdivision, or that water may not be available to support a neighborhood complete with large homes and horse pastures. At best, this was a significant oversight for this type of project, and it can be fairly inferred that by failing to provide for such contingencies, Land Baron assumed the risk of mistake as to these issues. *Winstar Corp.*, 518 U.S. at 906.

Land Baron argues that Bonnie Springs assured it that water, at least, would not be a problem. However, Land Baron points to no evidence (as opposed to Land Baron's assertions) that Bonnie Springs ever actually made such a statement and thus fails to show a genuine issue of material fact. Rather, the record indicates that Land Baron entered into the contract without conducting any due diligence,[5] hoping that it could procure water, access, and any other utility necessary to obtain development permits. A hope that things will work out is not the same as a reasonable belief in a set of facts, and Land Baron assumed the risk by proceeding with the contract despite having limited knowledge of the actual conditions as to water and access. Thus, rescission is not appropriate on grounds of mutual mistake.[6] The district court did not err in granting summary judgment on Land Baron's rescission claims.

[Headnote 10]

Land Baron argues that Bonnie Springs misrepresented, either intentionally or negligently, Land Baron's ability to obtain access or water rights. Specifically, it alleges that Bonnie Springs knew Los Loros Lane was on BLM land and had previously dealt with the BLM regarding land use issues on the surrounding property, and that Bonnie Springs knew Land Baron would not be able to get water rights for the subdivision and had represented to Land Baron that Bonnie Springs would provide water. It asserts that genuine issues of material fact remain and that the district court erred in dismissing these claims on summary judgment.

[Headnote 11]

At the threshold, to establish a claim for either intentional or negligent misrepresentation, Land Baron must show that Bonnie

[5]Land Baron admitted that the only step it took was to ask a friend of the corporation whether Bonnie Springs actually held title to the property.

[6]Because we conclude that Land Baron was not entitled to rescind the contract on the basis of mutual mistake, we do not address Bonnie Springs' arguments that Land Baron is precluded from seeking rescission because (1) the doctrine of unclean hands precludes equitable relief, and (2) Land Baron failed to seek rescission within a reasonable time.

Springs supplied Land Baron with false information. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 449, 956 P.2d 1382, 1386-87 (1998). Summary judgment is appropriate on either of these claims if Land Baron has not provided evidence of this essential element. *Id.* at 447, 956 P.2d at 1386. Here, Land Baron has provided no evidence that Bonnie Springs ever represented that there would be no impediment to gaining access for a subdivision via either Los Loros or Gunfighter Lanes, or that Bonnie Springs had stated that it would supply the property with water. Because the record does not indicate that Bonnie Springs ever misrepresented any facts regarding access or water to Land Baron, summary judgment was appropriate on the misrepresentation claims.

The district court did not err in granting Bonnie Springs' motion for summary judgment on Land Baron's nondisclosure claim

[Headnotes 12-14]

Land Baron next argues that Bonnie Springs knew, and did not disclose, that the property could not be supplied with adequate water and that both Los Loros and Gunfighter Lanes were on BLM land, giving rise to a claim for nondisclosure. Nondisclosure arises where a seller is aware of materially adverse facts that "could not be discovered by the buyer" after diligent inquiry. *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). "[W]hen the defect is patent and obvious, and when the buyer and seller have equal opportunities of knowledge," a seller cannot be liable for nondisclosure. *Collins v. Burns*, 103 Nev. 394, 397, 741 P.2d 819, 821 (1987). Liability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase. *Mitchell v. Skubiak*, 618 N.E.2d 1013, 1017 (Ill. App. Ct. 1993).

[Headnote 15]

The record makes clear that Land Baron could have, and did, discover the facts surrounding the difficulty or impossibility of obtaining sufficient water and access for a subdivision on the property. Those defects arose from government regulations, were public knowledge, and were available to anyone upon inquiry. Thus, even if Bonnie Springs had known about these facts and not disclosed them, there would still be no viable nondisclosure claim because the facts were discoverable and Land Baron had an "equal opportunit[y]" to discover, and did discover, those facts before closing. *Collins*, 103 Nev. at 397, 741 P.2d at 821. We also note that the record shows that Bonnie Springs was not aware, prior to signing the contract, that Land Baron would be unable to obtain water rights or that neither Los Loros Lane nor Gunfighter Lane would provide

suitable access.[7] Moreover, water rights are public information that can be accessed through the Nevada District of Water Resources' (NDWR) website, and Black testified that Land Baron, through its engineering firm, was in the best position to know how much water was going to be needed for the proposed subdivision and whether it would be possible to procure that amount of water. Also, Land Baron was aware that it would need to obtain access approval across BLM land, as is evidenced by its August 2006 request for permission from Clark County to request a right-of-way across BLM land.[8]

Thus, we conclude that Bonnie Springs cannot be liable for nondisclosure regarding water rights or access.[9] Accordingly, we conclude that summary judgment was appropriate as a matter of law on Land Baron's nondisclosure claim.

The district court's denial of Land Baron's motion for a directed verdict on Bonnie Springs' abuse of process and nuisance counterclaims

[Headnote 16]

We next turn to whether the damages award was proper on Bonnie Springs' abuse of process and nuisance counterclaims, and whether Bonnie Springs was required to provide evidence of physical harm in order to recover emotional distress damages. We review questions of law de novo. *See Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010).

Abuse of process

[Headnotes 17-19]

To support an abuse of process claim, a claimant must show " '(1) an ulterior purpose by the [party abusing the process] other

---

[7]Alan Levinson and April Boone both testified that they were not aware of these issues prior to signing the agreement, and that they had never attempted to widen or pave the roads themselves. Although there is evidence that at some point an official advised Bonnie Springs that the county would not approve a transfer of water rights from Bonnie Springs to the property for purposes of supplying water to a subdivision, that testimony does not show that Bonnie Springs knew, in advance of the contract, that Land Baron would be unable to procure *any* water rights for the property.

[8]We reject Land Baron's argument that a prior dispute between Bonnie Springs and the BLM regarding a parking lot on the Bonnie Springs Ranch indicated that Bonnie Springs was aware of potential access issues because that dispute did not concern widening or paving either Los Loros Lane or Gunfighter Lane.

[9]Because the record reveals that Bonnie Springs was not aware of the water rights and access issues, we do not address amicus curiae party Prudential Americana Group's argument that allowing Bonnie Springs not to disclose these issues will detrimentally harm purchasers of real estate by reinstating strict application of the rule of caveat emptor in Nevada.

than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.'" *LaMantia v. Redisi*, 118 Nev. 27, 31, 38 P.3d 877, 880 (2002); *Posadas v. City of Reno*, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993) (quoting *Kovacs v. Acosta*, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990)); *see also Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 843, 963 P.2d 465, 478 (1998). Thus, the claimant must provide facts, rather than conjecture, showing that the party intended to use the legal process to further an ulterior purpose. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880 (holding that where the party presented only conjecture and no evidence that the opposing party actually intended to improperly use the legal process for a purpose other than to resolve the legal dispute, there was no abuse of process). The utilized process must be judicial, as the tort protects the integrity of the court. *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 644 (Ct. App. 2001); *Stolz v. Wong Commc'ns Ltd. P'ship*, 31 Cal. Rptr. 2d 229, 236 (Ct. App. 1994). Furthermore, the tort requires a "willful act," and the majority of courts have held that merely filing a complaint and proceeding to properly litigate the case does not meet this requirement. *See, e.g.*, *Pomeroy v. Rizzo*, 182 P.3d 1125, 1128 (Alaska 2008); *Ramona Unified Sch. Dist. v. Tsiknas*, 37 Cal. Rptr. 3d 381, 389 (Ct. App. 2005); *Weststar Mortg. Corp. v. Jackson*, 61 P.3d 823, 831 (N.M. 2002); *Muro-Light v. Farley*, 944 N.Y.S.2d 571, 572 (App. Div. 2012); *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 82 P.3d 1199, 1217 (Wash. Ct. App. 2004).

[Headnotes 20, 21]

We agree with the majority rule that filing a complaint does not constitute abuse of process. The tort requires a "willful act" that would not be "proper in the regular conduct of the proceeding," *Kovacs*, 106 Nev. at 59, 787 P.2d at 369, and filing a complaint does not meet this requirement. Moreover, we agree with other jurisdictions' holdings that abuse of process claims do not encompass actions involving administrative agencies. *See, e.g.*, *ComputerXpress*, 113 Cal. Rptr. 2d at 644. The tort requires the abuse of "legal process," *Kovacs*, 106 Nev. at 59, 787 P.2d at 369, but courts are not usually involved in the conduct of administrative agencies. *Crowe v. Horizon Homes, Inc.*, 116 S.W.3d 618, 623 (Mo. Ct. App. 2003) (in contrast to administrative process, legal process is founded upon court authority).

[Headnote 22]

Here, Bonnie Springs failed to establish the elements of abuse of process. Bonnie Springs alleges that Land Baron abused process by filing a civil complaint and by filing a citizen's complaint with the county commissioner for the ulterior purpose of coercion. However, filing a citizen's complaint does not demonstrate abuse of *legal*

process, and Bonnie Springs has alleged no facts that show Land Baron improperly abused the legal process in filing its complaint or litigating the case. Nor did it present any evidence at trial of an improper motive, other than its own allegations that Land Baron filed its complaint for an ulterior purpose. Therefore, we conclude that the district court erred in denying Land Baron's motion for a directed verdict on the abuse of process counterclaim.[10]

Nuisance

[Headnote 23]

Nuisance arises where one party interferes with another party's use and enjoyment of land, and that interference is both substantial and unreasonable. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 106, 294 P.3d 427, 432 (2013). In its answer to the complaint, Bonnie Springs based its nuisance counterclaim on the complaint filed with the county commissioner and the resulting inspection, alleging that this inspection caused "needless expense and loss of income" and that recoverable costs were incurred when Bonnie Springs paid attorney fees to defend itself in the ensuing litigation. During trial, however, Bonnie Springs' representatives admitted that it had suffered no known economic harm as a result of the inspection, and although it believed the inspection had damaged its reputation, it presented no evidence to that extent. Instead, they urged the jury to award damages for the emotional pain and suffering inflicted by the nuisance.[11]

Courts differ on whether a plaintiff must prove physical harm to recover for emotional distress arising under a nuisance claim. *Compare Bailey v. Shriberg*, 576 N.E.2d 1377, 1380 (Mass. App. Ct. 1991) (concluding that evidence of physical injury is necessary in an emotional distress claim based on nuisance), *with Herzog v. Grosso*, 259 P.2d 429, 433 (Cal. 1953) (determining that occupants could recover for mere annoyance and discomfort, such as lack of sleep, for a cause of action for nuisance). However,

> [i]t seems to be the prevailing view in most jurisdictions that, in a nuisance action, an owner or occupant of real estate is entitled to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in

[10]We likewise conclude that the district court abused its discretion by denying Land Baron's motion for reconsideration on this issue. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (noting that a motion for reconsideration is reviewed for an abuse of discretion when appealed with the underlying judgment).

[11]On appeal, Land Baron does not argue that the district court inappropriately included the Bonnie Springs' entities in the counter-plaintiff category and, thus, does not argue whether such entities are incapable of emotion. *See HM Hotel Properties v. Peerless Indem. Ins. Co.*, 874 F. Supp. 2d 850, 854 (D. Ariz. 2012). Accordingly, we do not address this distinction.

> addition to, damages for depreciation in value of property or its use.

Tracy A. Bateman, Annotation, *Nuisance as Entitling Owner or Occupant of Real Estate to Recover Damages for Personal Inconvenience, Discomfort, Annoyance, Anguish, or Sickness, Distinct from, or in Addition to, Damages for Depreciation in Value of Property or Its Use*, 25 A.L.R. 5th 568 (1994). *See, e.g.*, *Kornoff v. Kingsburg Cotton Oil Co.*, 288 P.2d 507, 512 (Cal. 1955) (reiterating that "[o]nce a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue") (internal quotations omitted); *Webster v. Boone*, 992 P.2d 1183, 1185-86 (Colo. App. 1999) (holding that damages for nuisance claim can include discomfort and annoyance); *Reichenbach v. Kraska Enters., LLC*, 938 A.2d 1238, 1245 (Conn. App. Ct. 2008) (holding that trier of fact can consider discomfort and annoyance in nuisance damages claim). Further, Restatement (Second) of Torts § 929(1)(c) (1979) provides that the damages for nuisance include "discomfort and annoyance" to the occupants.

[Headnote 24]

This court has not previously addressed emotional distress damages arising under a nuisance claim. We conclude that California, Colorado, Connecticut, and the Restatement offer the better-reasoned approach for recovering damages based on a nuisance claim. Because damages for nuisance include personal inconvenience, discomfort, annoyance, anguish, or sickness, an occupant need not show physical harm to recover.

[Headnote 25]

Bonnie Springs bases its nuisance counterclaim on Land Baron's complaint to the county commissioner and the resulting inspection of Bonnie Springs Ranch. The record shows that the inspection lasted several hours, during which the group of inspecting agents separately moved through the property conducting a thorough search, which included pulling apart beds in the motel and searching dark areas with a black light. Bonnie Springs' representatives testified that the inspection caused an interruption in business and that it believed the ranch's reputation had suffered as a result, even though the county failed to find evidence of any of the violations alleged by Land Baron. Bonnie Springs' representatives also testified that they lost sleep, had anxiety, and were very upset from the investigations and inspection.

While we do not opine as to whether the facts are sufficient to support a nuisance claim, the facts here support the damages arising under such a claim. Accordingly, we conclude that the district court

did not err by denying Land Baron's motion for a directed verdict on the nuisance counterclaim, as Bonnie Springs presented evidence sufficient to merit a damages award.

CONCLUSION

Because insufficient facts exist to support the abuse of process counterclaim, the district court erred in refusing to enter a directed verdict on this counterclaim. Therefore, the judgment on the jury's award of compensatory and punitive damages[12] for the abuse of process claim must be reversed. Conversely, we affirm the damages award and corresponding punitive damages award under the nuisance counterclaim.[13] Based on our decision, we thus affirm the district court's award of attorney fees and costs.[14]

Accordingly, for the reasons set forth above, we affirm in part and reverse in part the district court's orders and judgment.

PARRAGUIRRE and CHERRY, JJ., concur.

---

[12]Punitive damages generally may not be awarded when there is no basis for compensatory damages. *See Tucker v. Marcus*, 418 N.W.2d 818 (Wis. 1988). *See also* Richard C. Tinney, J.D., Annotation, *Sufficiency of Showing Actual Damages to Support Award of Punitive Damages—Modern Cases*, 40 A.L.R. 4th 11, § 2[a] (1985) ("The general rule that punitive damages may not be awarded unless the party seeking them has sustained actual damage is accepted universally . . . ."); J.D. Lee & Barry A. Lindahl, 2 *Modern Tort Law: Liability and Litigation* § 21:49 (2d ed. 2002) ("As a general rule a plaintiff is required to establish actual damages before he or she may be entitled to recover punitive damages."); John J. Kircher & Christine M. Wiseman, 1 *Punitive Damages: Law and Practice* 2d § 5:21, 401 (2015) ("Abundant authority exists to support the proposition that a finding must be entered entitling the plaintiff to actual damages before that plaintiff will be allowed to recover punitive damages.").

[13]After review, we conclude that Land Baron's remaining arguments are without merit.

[14]We disagree that sanctions should issue for Bonnie Springs' "trial by ambush." Trial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack. *See, e.g.*, *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989); *Johnson v. Berg*, 848 S.W.2d 345, 349 (Tex. App. 1993). Here, Land Baron points to instances where Bonnie Springs briefly raised arguments and evidence that Land Baron was already aware of and objected to during the trial. The trial judge either overruled these objections or sustained them and took steps necessary to mitigate any damage. Such is not the type of action or level of seriousness that constitutes trial by ambush.

IN RE: MANHATTAN WEST MECHANIC'S LIEN LITIGATION.

APCO CONSTRUCTION, A NEVADA CORPORATION; ACCURACY GLASS & MIRROR COMPANY, INC.; BRUIN PAINTING CORPORATION; BUCHELE, INC.; CACTUS ROSE CONSTRUCTION; FAST GLASS, INC.; HD SUPPLY WATERWORKS, LP; HEINAMAN CONTRACT GLAZING; HELIX ELECTRIC OF NEVADA, LLC; INTERSTATE PLUMBING & AIR CONDITIONING; SWPPP COMPLIANCE SOLUTIONS, LLC; AND WRG DESIGN, INC., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE, RESPONDENTS, AND SCOTT FINANCIAL CORPORATION, A NORTH DAKOTA CORPORATION; AHERN RENTALS, INC.; ARCH ALUMINUM AND GLASS CO.; ATLAS CONSTRUCTION SUPPLY, INC.; BRADLEY J. SCOTT; CABINETEC, INC.; CAMCO PACIFIC CONSTRUCTION CO., INC.; CELLCRETE FIREPROOFING OF NEVADA, INC.; CLUB VISTA FINANCIAL SERVICES, LLC; CONCRETE VISIONS, INC.; CREATIVE HOME THEATRE, LLC; CUSTOM SELECT BILLING, INC.; DAVE PETERSON FRAMING, INC.; E&E FIRE PROTECTION, LLC; EZA, P.C.; FERGUSON FIRE AND FABRICATION, INC.; GEMSTONE DEVELOPMENT WEST, INC.; GRANITE CONSTRUCTION COMPANY; HARSCO CORPORATION; HYDROPRESSURE CLEANING; INQUIPCO; INSULPRO PROJECTS, INC.; JEFF HEIT PLUMBING CO., LLC; JOHN DEERE LANDSCAPE, INC.; LAS VEGAS PIPELINE, LLC; NEVADA PREFAB ENGINEERS; NOORDA SHEET METAL COMPANY; NORTHSTAR CONCRETE, INC.; PAPÉ MATERIAL HANDLING; PATENT CONSTRUCTION SYSTEMS; PRESSURE GROUT COMPANY; PROFESSIONAL DOOR AND MILL WORKS, LLC; READY MIX, INC.; RENAISSANCE POOLS & SPAS, INC.; REPUBLIC CRANE SERVICE, LLC; STEEL ENGINEERS, INC.; SUNSTATE COMPANIES, INC.; SUPPLY NETWORK, INC.; THARALDSON MOTELS II, INC.; TRI CITY DRYWALL, INC.; UINTAH INVESTMENTS, LLC; AND ZITTING BROTHERS CONSTRUCTION, INC., REAL PARTIES IN INTEREST.

No. 61131

September 24, 2015 359 P.3d 125

Original petition for writ of mandamus and prohibition challenging a district court order granting summary judgment in a mechanic's lien action.

Contractor, with second-priority mechanics' liens, brought action against real estate developer and developer's lender, which had entered into agreement to subordinate lender's first-priority deeds of trust to lender's third-priority deed of trust. The district court granted summary judgment to lender, concluding that contractor's liens remained in second-priority position. Contractor petitioned for writ of mandamus. The supreme court, HARDESTY, C.J., held that: (1) subordination agreement resulted in partial, rather than complete, subordination; and (2) partial subordination was not statutorily precluded.

Petition denied.

[Rehearing denied November 24, 2015]

[En banc reconsideration denied February 19, 2016]

CHERRY, J., dissented.

Howard & Howard Attorneys PLLC and *Wade B. Gochnour* and *Gwen Rutar Mullins*, Las Vegas, for Petitioner APCO Construction.

Sterling Law, LLC, and *Beau Sterling*, Las Vegas; *Peel Brimley LLP* and *Richard L. Peel* and *Michael T. Gebhart*, Henderson, for Petitioners Accuracy Glass & Mirror Company, Inc.; Bruin Painting Corporation; Buchele, Inc.; Cactus Rose Construction; Fast Glass, Inc.; HD Supply Waterworks, LP; Heinaman Contract Glazing; Helix Electric of Nevada, LLC; Interstate Plumbing & Air Conditioning; SWPPP Compliance Solutions, LLC; and WRG Design, Inc.

Lionel Sawyer & Collins and *A. William Maupin*, Las Vegas; *Meier & Fine, LLC*, and *Glenn F. Meier* and *Rachel E. Donn*, Las Vegas; *Hutchison & Steffen, LLC*, and *Michael K. Wall*, Las Vegas, for Real Party in Interest Scott Financial Corporation.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones* and *Matthew S. Carter*, Las Vegas, for Real Parties in Interest Bradley J. Scott and Scott Financial Corporation.

Snell & Wilmer, LLP, and *Robin E. Perkins*, Las Vegas, for Real Party in Interest Ahern Rentals, Inc.

Holley, Driggs, Walch, Puzey & Thompson and *Jeffrey R. Albregts*, Las Vegas, for Real Party in Interest Arch Aluminum and Glass Co.

Tony Ditty, Escondido, California, for Real Party in Interest Atlas Construction Supply, Inc.

Premier Legal Group and *R. Christopher Reade*, Las Vegas, for Real Party in Interest Cellcrete Fireproofing of Nevada, Inc.

Grant Morris Dodds PLLC and *Steven L. Morris*, Henderson, for Real Party in Interest Camco Pacific Construction Co., Inc.

Greenberg Traurig, LLP, and *Mark E. Ferrario, Tami Cowden*, and *Moorea Katz*, Las Vegas, for Real Parties in Interest Club Vista Financial Services, LLC; and Tharaldson Motels II, Inc.

Koch & Scow, LLC, and *David R. Koch*, Henderson, for Real Parties in Interest Creative Home Theatre, LLC; and Renaissance Pools & Spas, Inc.

T. James Truman & Associates and *T. James Truman*, Las Vegas, for Real Parties in Interest Dave Peterson Framing, Inc.; E&E Fire Protection, LLC; Noorda Sheet Metal Company; Pressure Grout Company; and Professional Door and Mill Works, LLC.

Williams & Associates and *Donald H. Williams*, Las Vegas, for Real Parties in Interest Eza, P.C.; Harsco Corporation; and Patent Construction Systems.

Fennemore Craig Jones Vargas and *David W. Dachelet*, Las Vegas, for Real Party in Interest Ferguson Fire and Fabrication, Inc.

Watt, Tieder, Hoffar & Fitzgerald, LLP, and *David R. Johnson*, Las Vegas, for Real Party in Interest Granite Construction Company.

Dickinson Wright PLLC and *Eric Dobberstein*, Las Vegas, for Real Party in Interest Insulpro Projects, Inc.

Keith E. Gregory & Associates and *Keith E. Gregory*, Las Vegas, for Real Party in Interest Jeff Heit Plumbing Co., LLC.

Varricchio Law Firm and *Philip T. Varricchio*, Las Vegas, for Real Parties in Interest John Deere Landscape, Inc.; and Supply Network, Inc.

Smith & Shapiro, LLC, and *James E. Shapiro*, Henderson, for Real Party in Interest Las Vegas Pipeline, LLC.

Jolley Urga Wirth Woodbury & Little and *Martin A. Little*, Las Vegas, for Real Parties in Interest Nevada Prefab Engineers; Papé Material Handling; and Steel Engineers, Inc.

Pezzillo Lloyd and *Jennifer R. Lloyd*, Las Vegas, for Real Parties in Interest Northstar Concrete, Inc.; and Tri City Drywall, Inc.

Brian K. Berman, Las Vegas, for Real Party in Interest Ready Mix, Inc.

Law Office of Hayes & Welsh and *Garry L. Hayes*, Henderson, for Real Party in Interest Sunstate Companies, Inc.

Procopio, Cory, Hargreaves & Savitch, LLP, and *Andrew J. Kessler*, San Diego, California, for Real Party in Interest Uintah Investments, LLC.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and *Reuben H. Cawley*, Las Vegas, for Real Party in Interest Zitting Brothers Construction, Inc.

Cabinetec, Inc.; *Concrete Visions, Inc.*; *Custom Select Billing, Inc.*; *Gemstone Development West, Inc.*; *Hydropressure Cleaning*; *Inquipco*; and *Republic Crane Service, LLC*, in Pro Se.

1. JUDGMENT.
   The district court was permitted to reconsider grant of summary judgment to plaintiff in lien priority dispute, when order determining lien priority adjudicated the rights of only a few of the parties. NRCP 54(b).
2. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. LIENS.
   Contractual subordination allows creditors of a common debtor to contractually rearrange the priority of their enduring liens or debt positions.
4. LIENS.
   In a complete subordination, the agreement subordinating the senior lien to a junior lien effectively also subordinates the senior lien to intervening liens.
5. LIENS.
   Partial subordination gives a junior lien priority over a senior lien to the extent that it does not affect the priority of the intervening lien; thus, the junior lien only has priority over the intervening lien in the amount of the senior lien.
6. APPEAL AND ERROR.
   An order granting summary judgment is reviewed de novo, viewing all evidence in a light most favorable to the nonmoving party.
7. APPEAL AND ERROR.
   When the facts in a case are not in dispute, contract interpretation is a question of law, which is reviewed de novo.
8. MECHANICS' LIENS; MORTGAGES.
   Agreement between lender and real estate developer subordinating first-priority deeds of trust to third-priority deed of trust resulted in partial,

rather than complete, subordination, and therefore contractor's mechanics' liens remained in second-priority position; lender would not have intended to completely subordinate first-priority deeds to allow contractor's liens to take first-priority position, lender's intent was to be allowed to freely contract order of payment as between itself, and subordination agreement neither stated it intended to create complete subordination nor mentioned mechanics' liens.

9. Appeal and Error.
Questions of statutory construction are reviewed de novo.

10. Statutes.
The supreme court does not fill in alleged legislative omissions based on conjecture as to what the Legislature would or should have done.

11. Mechanics' Liens.
Statute that protects the right to payment for those who have worked to improve property does not prohibit negotiations between lienholders with priority over mechanics' liens and those with lesser priority in situations where the mechanics' liens will be left in exactly the same position as if the subordination agreement had never occurred; the statute does not preclude partial subordination. NRS 108.225.

Before Hardesty, C.J., Douglas and Cherry, JJ.

OPINION

By the Court, Hardesty, C.J.:

In this writ proceeding, we must determine whether a subordination agreement that subordinates a lien for original land financing to a new construction deed of trust affects the priority of a mechanic's lien for work performed after the date of the original loan but before the date of the construction deed of trust. Because contractual partial subordination differs from complete subordination, we agree that a contractual partial subordination by creditors of a common debtor do not subordinate a first-priority lien to a mechanic's lien. Further, nothing in NRS 108.225 changes the priority of a mechanic's lien to a partially subordinated lien recorded before the mechanic's lien became effective. Thus, the priority of the mechanic's lien remains junior to the amount secured by the original senior lien.

PROCEDURAL AND FACTUAL HISTORY

Gemstone Apache, LLC (Apache), intended to develop a mixed-use property (Manhattan West) in Las Vegas. Real party in interest Scott Financial Corporation (SFC) made multiple loans to Apache for this purpose. The first three loans, which were recorded in July 2006, totaled $38 million (the Mezzanine Deeds of Trust) and financed the purchase of the property. In April 2007, petitioner APCO Construction (APCO),[1] the contractor hired by Apache, began con-

[1]There are multiple petitioners appearing in this matter, and petitioners have filed a joint petition with this court. We collectively refer to petitioners as APCO.

struction on Manhattan West, setting the priority date for mechanic's lien services. In May and October of 2007, the Mezzanine Deeds of Trust were amended to secure additional funds for the project.[2]

In early 2008, Gemstone Development West, LLC (GDW), purchased Manhattan West from Apache, assuming Apache's loan obligations. To obtain financing for construction, GDW borrowed an additional $110,000,000 from SFC (the Construction Deed of Trust), recording the deed of trust on February 7, 2008. As part of the overall transaction, SFC and GDW entered into a subordination agreement subordinating the Mezzanine Deeds of Trust to the Construction Deed of Trust. SFC indicated that its intent for the subordination agreement was for SFC to determine "in what order SFC's debts would be satisfied." The subordination agreement did not state whether the subordination was complete or partial, nor did it address the priority of any potential mechanics' liens.

The relationship between APCO and GDW deteriorated. APCO stopped work on Manhattan West and filed suit against GDW, SFC, and others. SFC and APCO both moved for summary judgment on the issue of lien priority. SFC argued that the subordination agreement partially subordinated the Mezzanine Deeds of Trust to the Construction Deed of Trust, giving the Construction Deed of Trust senior priority for $38 million and leaving APCO's mechanics' liens unaffected. APCO argued that the subordination agreement completely subordinated the Mezzanine Deeds of Trust to the Construction Deed of Trust, prioritizing the Mezzanine Deeds of Trust after APCO's mechanics' liens and the Construction Deed of Trust. It further argued that NRS 108.225 precluded the Construction Deed of Trust from taking priority over APCO's mechanics' liens.

[Headnote 1]

The district court initially granted summary judgment in favor of APCO, but, after SFC filed a motion for reconsideration, the district court granted summary judgment in favor of SFC.[3] The district court determined that the subordination agreement only partially subordinated the Mezzanine Deeds of Trust to the Construction Deed of Trust and left the mechanics' liens in the second-priority position.

---

[2]Although APCO frames these amendments as a refinance, the parties present no argument regarding whether these amendments served to refinance the Mezzanine Deeds of Trust or what effect a refinance would have on lien priority, and thus, we do not consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

[3]APCO argues that the district court erred in reconsidering the motion. APCO's argument is without merit because NRCP 54(b) permits the district court to revise a judgment that adjudicates the rights of less than all the parties until it enters judgment adjudicating the rights of all the parties. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009). Here, the district court's order determining lien priority adjudicated the rights of only a few of the parties.

APCO petitioned for a writ of mandamus[4] to compel the district court to vacate its order and recognize APCO's mechanics' liens as holding a first priority.

DISCUSSION

[Headnote 2]

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (internal citation omitted); *see* NRS 34.160. We exercise our discretion to entertain this writ petition because an important issue of law requires clarification—whether a mechanic's lien takes priority over a contractually subordinated debt by creditors of a common debtor either because (1) the subordination agreement constitutes a complete subordination, or (2) NRS 108.225 (Nevada's mechanic's lien statute) precludes the partial subordination of an existing lien.

[Headnote 3]

Contractual subordination allows creditors of a common debtor to contractually rearrange the priority of their enduring liens or debt positions. *See* Robin Russell, *Distinction Between Contractual and Equitable Subordination*, 2 Tex. Prac. Guide: Fin. Transactions § 10:10 (Robin Russell & J. Scott Sheehan eds., 2014); *see also* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 591-92 (2003) (describing subordination). Central to this case is the distinction between complete and partial contractual subordination, which differ on their rearrangements of the priorities of lienholders.

[Headnotes 4, 5]

In a complete subordination, the agreement subordinating the senior lien to a junior lien effectively also subordinates the senior lien to intervening liens.[5] *See* George A. Nation, III, *Circuity of Liens*

---

[4]In the alternative, APCO petitions for a writ of prohibition, arguing that the district court did not have authority to rehear the case. We conclude, however, that a writ of prohibition is improper here because the district court had jurisdiction to hear and determine the motion to reconsider pursuant to NRCP 54(b). *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (stating that this court will not issue a writ of prohibition "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration").

[5]Complete subordination occurs when the effect of a subordination agreement subordinates the first-priority lien to the third-priority lien but also has the effect of subordinating the first-priority lien to the second-priority lien. For example, there are three liens on a property with the following priority: lien A for $10,000, lien B for $5,000, and lien C for $20,000. Complete subordination would mean

Arising From Subordination Agreements: Comforting Unanimity No More, 83 B.U. L. Rev. 591, 593 (2003). Here, for example, the Mezzanine Deeds of Trust would simply become junior to the Construction Deed of Trust, which would remain junior to the mechanics' liens, thus moving the mechanics' liens to first priority. In contrast, partial subordination gives a junior lien priority over a senior lien to the extent that it does not affect the priority of the intervening lien; thus, the junior lien only has priority over the intervening lien in the amount of the senior lien.[6] *Id*. at 593-94; *Caterpillar Fin. Servs. Corp. v. Peoples Nat'l Bank, N.A.*, 710 F.3d 691, 693-94 (7th Cir. 2013). In other words, in partial subordination, the priority of liens is contractually rearranged without affecting the position of any intervening lien. *Caterpillar*, 710 F.3d at 693-94. Here, the Construction Deed of Trust would partially subordinate the Mezzanine Deeds of Trust, giving the Construction Deed of Trust $38 million in first priority, leaving the mechanics' liens in second priority, and placing the remainder of the Construction Deed of Trust in third priority over the Mezzanine Deeds of Trust.

At issue is whether the subordination agreement effected a complete subordination and whether Nevada caselaw and statutes preclude partial subordination.

The subordination agreement effected a partial subordination

[Headnotes 6, 7]

APCO argues that the district court erred when, in granting summary judgment in favor of SFC, it determined that the subordination agreement was intended to create a partial subordination, not a complete subordination. We review an order granting summary judgment de novo, viewing all evidence "in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). We have held that "[s]ummary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any,

---

that the subordination agreement between the holders of lien A and lien C resulted in the following priority: lien B for $5,000, lien C for $20,000, and then lien A for $10,000. *See* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 593 (2003).

[6]Partial subordination occurs when the effect of a subordination agreement subordinates a first-priority lien to a third-priority lien without affecting the priority of the second lien. For example, using the factual scenario from footnote 5, partial subordination occurs when the holders of lien A and lien C agree to subordinate lien A to lien C. After the agreement, the lien priority would be lien C for $10,000, lien B for $5,000, the remaining amount of lien C ($10,000), and then lien A for $10,000. *See* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 593-94 (2003).

that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id.* at 731, 121 P.3d at 1031. Additionally, "[w]hen the facts in a case are not in dispute, contract interpretation is a question of law, which this court reviews de novo." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008).

Different courts have reached different conclusions about whether a general subordination agreement effects complete or partial subordination. *See Caterpillar*, 710 F.3d at 693-94; *In re Price Waterhouse Ltd.*, 46 P.3d 408, 410 (Ariz. 2002); *see also* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 592-93 (2003). The minority view concludes that a general subordination agreement results in complete subordination. *See, e.g.*, *AmSouth Bank, N.A. v. J & D Fin. Corp.*, 679 So. 2d 695, 698 (Ala. 1996). Relying on *Black's Law Dictionary*'s definition of "subordination agreement," this view contends that "[b]y definition, 'subordination' contemplates a reduction in priority. Nothing in the definition contemplates *raising* a lower priority lienholder up to the position of the subordinating party." *Id.* Thus, this view holds that lienholders can only step into the shoes of another lienholder when the agreement explicitly indicates that there is a transfer of priority rights. *Id.*

In contrast, the United States Court of Appeals for the Seventh Circuit adopted the majority approach and held in favor of partial subordination when the subordination agreement was silent on the issue. *Caterpillar*, 710 F.3d at 693-94. This approach holds that nonparties are unaffected by the subordination agreement and "simply swaps the priorities of the parties to the subordination agreement." *Id*. It reasoned that the party agreeing to subordinate its higher-priority lien surely wants the subsequent loan to occur so that the debtor would be strengthened, but that complete subordination would "drop the subordinating creditor to the bottom of the priority ladder," thus benefiting "a nonparty to the subordination agreement." *Id*. Therefore, as a practical matter, the court "c[ould]n't think why [the subordinating party] would have insisted on complete subordination." *Id.* at 694.

[Headnote 8]

We agree with the reasoning in *Caterpillar*. In the instant case, complete subordination would move APCO's mechanics' liens (nonparties to the subordination agreement) into the first-priority position and leave SFC's liens junior to all mechanics' liens. Partial subordination, however, would leave $38,000,000 of the Construction Deed of Trust in first priority and the mechanics' liens in the same position they were in prior to the subordination agreement. We cannot determine any reason SFC would have intended to completely subordinate the Mezzanine Deeds of Trust, only for APCO's me-

chanics' liens to then take the first-priority position. Moreover, this aligns with SFC's claimed intent for the subordination agreement—that it should be "allowed to freely contract the order of payment as between" itself. The subordination agreement neither stated it intended to create complete subordination nor mentioned the mechanic's lien. Absent this clear intent, we conclude that a common-sense approach weighs in favor of partial subordination.

NRS 108.225 does not preclude partial subordination

[Headnote 9]

APCO argues that, while parties may contractually subordinate the priorities of their liens, NRS 108.225 does not permit partial subordination, only complete subordination; specifically, APCO asserts that NRS 108.225 prevents SFC from partially subordinating the Mezzanine Deeds of Trust in favor of the Construction Deed of Trust. That statute, which protects the right to payment for those who have worked to improve property, states, in pertinent part, that mechanics' and materialmen's liens are senior to "[a]ny lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement." NRS 108.225(1)(a); *see In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 575, 289 P.3d 1199, 1211 (2012); *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 538, 245 P.3d 1149, 1156 (2010). SFC argues that NRS 108.225 does not preclude other lienholders from contracting for a partial subordination with respect to their lien priorities. This court reviews questions of statutory construction de novo. *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013).

[Headnotes 10, 11]

The statute gives priority to mechanics' liens over liens that attach after the commencement of the work of improvement. It does not, however, address subordination agreements between other lienholders.[7] This court does not "fill in alleged legislative omissions based

[7]To be sure, contractual partial subordination differs from equitable subrogation, which we addressed in *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 572-77, 289 P.3d 1199, 1209-12 (2012) (concluding that NRS 108.225 precludes the application of equitable doctrines that would advance the priority of a junior lienholder above the priority of a mechanic's lien). We note that *Fontainebleau*'s distinguishing factor is that the mechanic's lien claimants there were *parties* to the subordination agreement and attempted to subordinate their priority positions despite NRS 108.225's constraints. *Id.* at 570-71, 289 P.3d at 1208. Unlike *Fontainebleau*, APCO is not a party to the subordination agreement and the subordination agreement has not changed APCO's priority *position*. Here, the contractual partial subordination arises as a result of a subordination agreement, not equity principles. *See, e.g.*, *Bratcher v. Buckner*, 109 Cal. Rptr. 2d 534, 539-40 (Ct. App. 2001) (court relied on subordination agreement, not equitable principles, "to enforce the objective intent of the parties").

on conjecture as to what the [L]egislature would or should have done." *Falcke v. Cnty. of Douglas*, 116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (internal quotations omitted). Therefore, we conclude that NRS 108.225 does not prohibit negotiations between lienholders with priority over mechanics' liens and those with lesser priority in situations where the mechanics' liens will be left in exactly the same position as if the subordination agreement had never occurred. In other words, the statute does not preclude partial subordination.

Here, when APCO began work on Manhattan West, it did so with notice of SFC's Mezzanine Deeds of Trust and knowledge that its mechanics' liens would be in second priority to those liens. Crucially, nothing about the subordination agreement alters the amount of debt that APCO was junior to, and thus, the subordination agreement does not violate NRS 108.225. To read the statute in a way that would grant APCO first priority even though the subordination agreement did not prejudice APCO's lien position—or change APCO's status whatsoever—would be an over-reading of the statute.

CONCLUSION

The district court did not improperly determine that the subordination contract effected a partial subordination. Further, NRS 108.225 does not preclude parties from contracting for a partial subordination.

Accordingly, we deny APCO's petition for a writ of mandamus and prohibition.

DOUGLAS, J., concurs.

CHERRY, J., dissenting:

I would not entertain this writ at this stage of the proceedings. A short order stating that intervention is unnecessary at this time would suffice.

I am troubled by the fact that this court previously denied APCO's request for a stay, which would have allowed the district court to conclude this case with a final disposition that could then be appealed to this court.

In reviewing the district court's order granting Scott Financial Corporations' motion for summary judgment filed on May 7, 2012, some three years ago, the order states:

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that SFC's loan of $110,000,000.00 is in first position priority regarding the other claimants in the principal amount of $38,000,000.00. Thereafter, the mechanic lien claimants are in second position and the remainder of SFC's $110,000,000.00 principal amount loan, namely $72,000,000.00 in principal is in third position, and the Original Mezzanine Deeds of Trust

along with the post-April 2007 Mezzanine Deeds of Trust are in junior priority position to the aforementioned encumbrances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED a further stay of this litigation is granted pending a petition to the Nevada Supreme Court provided such is timely filed and for which no bond is required.

In cases such as this one, where the right to appeal a final disposition is still viable, the best practice would have been to not only deny APCO's motion for a stay, but also to immediately deny APCO's writ as soon as possible without the necessity of extensive appellate proceedings.

For the above reasons, I would agree the writ should be denied, but I worry that in considering the writ, we are sending the wrong message to the Nevada Bar concerning pretrial extraordinary writs.[1]

[1]This is not to say that the published opinion by the majority is not an excellent appellate disposition because it is a well-written opinion affirming the district court in all respects.