WILLIAM NATHAN BAXTER, APPELLANT, *v.* DIGNITY HEALTH, DBA ST. ROSE DOMINICAN HOSPITALS; BRIAN LIPMAN, M.D.; DULCE QUIROZ, M.D.; SYED AKBARULLAH, M.D.; SHALINI BHATIA, D.O.; JESSICA GORDON, D.O.; NERIE JAMISON, DNP; AND IPC THE HOSPITALIST COMPANY, INC., RESPONDENTS.

No. 65064

September 24, 2015 357 P.3d 927

Appeal from a district court order dismissing a medical malpractice action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Patient brought medical malpractice action against hospital and emergency room physicians, alleging that they misdiagnosed his infection and that the delay in proper diagnosis and treatment left him a ventilator-dependent tetraplegic. The district court dismissed action for failure to comply with expert affidavit requirement. Patient appealed. The supreme court, PICKERING, J., held that action was not filed without an affidavit of merit even though it was not physically attached to complaint when it was filed.

Reversed and remanded.

Gary Logan, Las Vegas; *Kenneth M. Sigelman & Associates* and *Kenneth M. Sigelman*, San Diego, California, for Appellant.

Alverson, Taylor, Mortensen & Sanders and *LeAnn Sanders* and *Shirley Blazich*, Las Vegas, for Respondent Dignity Health.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody and *Robert C. McBride* and *Heather S. Hall*, Las Vegas, for Respondent Brian Lipman, M.D.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *John J. Savage*, Las Vegas, for Respondents Dulce Quiroz, M.D.; Shalini Bhatia, D.O.; Jessica Gordon, D.O.; Nerie Jamison, DNP; and IPC The Hospitalist Company, Inc.

Holland Litigation PLLC and *Matthew G. Holland*, Henderson; *Schuering Zimmerman & Doyle, LLP*, and *Thomas J. Doyle*, Sacramento, California, for Respondent Syed Akbarullah, M.D.

1. HEALTH.
The expert's affidavit of merit required to be filed with an action for medical malpractice can take the form of either a sworn affidavit or an unsworn declaration made under penalty of perjury. NRS 41A.071 (2014).

2. Health.
   Patient did not file medical malpractice action without an affidavit of merit from expert, even though expert's declaration of merit was not physically attached to complaint when it was filed; declaration was filed just five judicial hours after complaint was filed and was sworn under penalty of perjury and dated three days before patient filed complaint, complaint incorporated declaration, and both documents were served together on medical providers, who were able to challenge sufficiency of declaration in their motions to dismiss for failure to state a claim. NRS 41A.071 (2014); NRCP 8(f), 10(c), 12(b).
3. Pretrial Procedure.
   In evaluating a motion to dismiss for failure to state a claim, courts primarily focus on the allegations in the complaint. NRCP 10(c), 12(b).
4. Pretrial Procedure.
   In evaluating a motion to dismiss for failure to state a claim, a court may consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document, (2) the document is central to the plaintiff's claim, and (3) no party questions the authenticity of the document. NRCP 10(c), 12(b).
5. Health.
   Where a medical malpractice complaint incorporates by reference a preexisting affidavit of merit, which is thereafter filed and served with the complaint, and no party contests the authenticity of the affidavit or its date, the affidavit of merit may properly be treated as part of the pleadings in evaluating a motion to dismiss for failure to state a claim. NRS 41A.071 (2014); NRCP 10(c), 12(b).

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

This is an appeal from an order dismissing a medical malpractice action under NRS 41A.071. Adopted in 2002 to curb baseless malpractice litigation, NRS 41A.071 provides that a district court shall dismiss a medical malpractice action "if the action is filed without an affidavit" or declaration from a medical expert supporting the allegations of malpractice. In this case, the plaintiff consulted with a medical expert, from whom he obtained the supporting declaration required, before filing suit. For reasons unclear, the plaintiff did not attach the declaration to the complaint. Instead, he filed the complaint by itself, then filed the separately captioned declaration the next morning. The complaint incorporates the declaration by reference, and vice versa, and the two documents were served together on the defendants before the statute of limitations ran. Under the Nevada Rules of Civil Procedure, the district court should have considered the complaint and the declaration together. Instead, the district court dismissed the action because the complaint was filed without the declaration physically attached. NRS 41A.071 did not require dismissal on these facts. We therefore reverse and remand.

I.

Appellant William Baxter is a type 1 diabetic who presented to the emergency room in August 2012 with an acute infection. He alleges that the respondent hospital and doctors committed medical malpractice by misdiagnosing his infection as viral, not bacterial. Baxter further alleges that, had the correct diagnosis been timely made, his cervical spine abscess should and could have been successfully treated with antibiotics. The delay in proper diagnosis and treatment has allegedly left him a ventilator-dependent tetraplegic who will require 24-hour nursing care for the rest of his life.

Baxter obtained copies of his medical records in December 2012, which the parties seemingly agree triggered the one-year statute of limitations in NRS 41A.097(2). Baxter's counsel retained an internist and infectious disease specialist, Joseph Cadden, M.D., to review the medical records. On August 16, 2013, Dr. Cadden signed a declaration under penalty of perjury stating that he had reviewed the medical records and "the complaint that I understand will be filed together with this Declaration." The declaration is lengthy; it addresses the respondents' standards of care, their asserted breaches, and the consequent harm to Baxter. In it, Dr. Cadden also declares, "I believe that the pertinent facts that I noted when reviewing the medical records regarding William Nathan Baxter's medical care and treatment during the times pertinent to this case are summarized accurately in Paragraphs 14 through 22 of the [then draft] complaint."

Baxter's complaint was filed at 1:43 p.m. on August 19, 2013, three days after Dr. Cadden dated and signed his declaration. The complaint sets forth its allegations of malpractice, then alleges that "Plaintiff is filing, at or about the time of the filing of this Complaint, the Declaration of Joseph Cadden, M.D., pursuant to Nevada Revised Statutes § 41A.071 in support of the allegations set forth herein." For reasons unknown, the Cadden declaration was not attached to or filed at the same time as the complaint. Instead, the declaration was filed the next day, August 20, 2013, at 9:56 a.m. The summonses were issued and timely served, along with the complaint and the declaration, on respondents.

In November 2013, respondents moved to dismiss on the ground that Baxter's malpractice action was defective because filed without the expert affidavit supporting its allegations required by NRS 41A.071.[1] After briefing and argument, the district court granted the

[1]Respondent Dignity Health also argued in district court that Dr. Cadden cannot opine as to the malpractice of its nurses and other non-doctor staff because his practice area is not "substantially similar" to theirs. *See* NRS 41A.071. We do not address this argument because the district court did not reach it and respondents do not ask us to.

motion to dismiss. By then, the statute of limitations had run on Baxter's claims.

II.

[Headnote 1]

As written at the time pertinent to this appeal, NRS 41A.071 read as follows:

> If an action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action, without prejudice, *if the action is filed without an affidavit*, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.

(Emphasis added.)[2] The "affidavit" can take the form of either a "sworn affidavit or an unsworn declaration made under penalty of perjury." *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 922 (2010).

NRS 41A.071's affidavit-of-merit requirement imposes an added pleading obligation on medical malpractice plaintiffs, beyond the obligations imposed on plaintiffs generally by the Nevada Rules of Civil Procedure. This creates tension between the Legislature's substantive policy decision to deter frivolous malpractice litigation by imposing a pre-suit affidavit-of-merit requirement and the liberal pleading policies embedded in the Nevada Rules of Civil Procedure, which this court adopted pursuant to its inherent authority to adopt procedural rules designed to secure litigants their fair day in court. *See Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1028-29, 102 P.3d 600, 605-06 (2004); *see also* Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217, 243-48 (2010) (noting the split among federal courts as to whether state affidavit-of-merit statutes like NRS 41A.071 impose a procedural obligation that is unenforceable because in conflict with

[2]Although the 2015 Legislature amended NRS 41A.071, it did not change the language central to this appeal. *See* 2015 Nev. Stat., ch. 439, § 6 ("If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, *if the action is filed without an affidavit*, that: 1. Supports the allegations contained in the action; 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence; 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms." (emphasis added)). We analyze this appeal under the 2014 version of NRS 41A.071, since the 2015 amendments do not apply retroactively. *See id.* at §§ 11, 13.

the Federal Rules of Civil Procedure, or whether they set substantive state policy that federal courts should enforce under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny).

To date, this court has mediated the tension between NRS 41A.071 and the Nevada Rules of Civil Procedure according to the perceived strength of the competing policies at stake. Thus, in *Washoe Medical Center v. Second Judicial District Court*, 122 Nev. 1298, 1301, 148 P.3d 790, 792 (2006), the plaintiff filed her complaint the day before the statute of limitations ran. She did not obtain an affidavit of merit until the defendants moved to dismiss, by which time the statute of limitations had run. *Id.* The plaintiff filed an amended complaint, to which she appended the belated affidavit of merit, and argued that NRCP 15(a) entitled her to amend as of right, that the amendment related back to the original filing date, and that her claims therefore were timely. *Id.* A divided supreme court disagreed, deeming the original complaint a nullity to which NRCP 15(a) and the relation-back doctrine did not apply.[3] *Id.* at 1306, 148 P.3d at 795 (4-2-1 decision). We held that, in requiring *dismissal* of an action filed without a supporting affidavit, NRS 41A.071 trumps NRCP 15(a), which allows liberal amendment of pleadings, given the substantive policy expressed in NRS 41A.071 against a plaintiff bringing a malpractice action without a medical expert first reviewing and validating the claims. *Id.* at 1304, 148 P.3d at 794.

In *Borger*, by contrast, we invalidated an order dismissing a medical malpractice action because the expert who provided the affidavit of merit arguably did not practice in an area "substantially similar" to the defendant's, as required by NRS 41A.071. 120 Nev. at 1028, 102 P.3d at 605. The object of NRS 41A.071's affidavit-of-merit requirement, we wrote, is "to ensure that parties file malpractice cases in good faith, *i.e.*, to prevent the filing of frivolous lawsuits." *Id.* at 1026, 102 P.3d at 604. And, "because NRS 41A.071 governs the threshold requirements for initial pleadings in medical malpractice cases, not the ultimate trial of such matters, we must liberally construe this procedural rule of pleading in a manner that is consistent with our NRCP 12 jurisprudence." *Id*. at 1028, 102 P.3d at 605. *Accord Zohar v. Zbiegien*, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014) (relying on NRCP 10(c) and NRCP 12 to reverse an order of dismissal under NRS 41A.071 and emphasizing that "the NRS 41A.071 affidavit requirement is a preliminary procedural rule subject to the notice-pleading standard, and thus, it must be liberally

[3]In *Wheble v. Eighth Judicial District Court*, 128 Nev. 119, 123, 272 P.3d 134, 137 (2012), a three-judge panel of this court, citing *Washoe Medical*, held that a complaint dismissed for want of an NRS 41A.071 affidavit was so far incomplete that "the dismissed action was never 'commenced'" for purposes of NRS 11.500, which tolls the statute of limitations when an action is dismissed for want of subject matter jurisdiction.

construed in a manner that is consistent with our NRCP 12 jurisprudence") (internal quotations and alterations omitted).[4]

[Headnotes 2-4]

The question in this case is whether, under the Nevada Rules of Civil Procedure, yet consistent with the deterrent policies set by NRS 41A.071, Baxter's complaint and Dr. Cadden's declaration should be read together as sufficient to survive a motion to dismiss. In evaluating a motion to dismiss, courts primarily focus on the allegations in the complaint. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). But "the court is not limited to the four corners of the complaint." 5B Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure: Civil* § 1357, at 376 (3d ed. 2004). Under NRCP 10(c), "a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." A court "may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (internal quotation omitted); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (in evaluating a motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on [Fed. R. Civ. P.] 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference") (citing 5B Charles Alan Wright & Arthur Miller, *supra*, § 1357). While presentation of matters *outside* the pleadings will convert the motion to dismiss to a motion for summary judgment, Fed. R. Civ. P. 12(d); NRCP 12(b), such conversion is *not* triggered by a court's "consideration of matters incorporated by reference or integral to the claim," 5B Wright & Miller, *supra*, § 1357, at 376, as where the complaint "relies heavily" on a document's terms and effect, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). *See also* Kurtis A. Kemper, Annotation, *What Matters Not Contained in Pleadings May Be Considered in Ruling on a Motion to Dismiss Under Rule 12(b)(6) of the Federal Rules of Civil Procedure or Motion for Judgment on the Pleadings Under Rule 12(c) Without Conversion to Motion for Summary Judgment*, 138 A.L.R. Fed. 393 (1997) (collecting cases).

[Headnote 5]

NRS 41A.071 does not state that the affidavit of merit must be physically attached to the malpractice complaint—or even physical-

[4]We note that the 2015 amendments to NRS 41A.071 impose additional affidavit requirements beyond those in the version of NRS 41A.071 considered in *Zohar*.

ly filed, for that matter. It says, "If an action for medical malpractice . . . is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action." In *Zohar*, we held that, under NRCP 10(c), concerning exhibits attached to pleadings, a medical malpractice complaint and its supporting affidavit should be read together, in effect, incorporating the affidavit into the complaint. 130 Nev. at 739, 334 P.3d at 406. Similarly, where the complaint incorporates by reference a preexisting affidavit of merit, which is thereafter filed and served with the complaint, and no party contests the authenticity of the affidavit or its date, the affidavit of merit may properly be treated as part of the pleadings in evaluating a motion to dismiss.[5]

Baxter's complaint incorporates Dr. Cadden's declaration and alleges that the declaration was being filed "at or about the time of the filing of this Complaint." Dr. Cadden's declaration, filed just five judicial hours after the complaint, verifies the truth of this allegation; it is sworn under penalty of perjury and dated August 16, 2013, three days before Baxter filed the complaint. Better practice would have been to attach the declaration to the complaint and file the two documents together. But the fact remains that Baxter literally complied with NRS 41A.071 and the respondent medical providers were not negatively affected in any way by the separate submissions. The complaint incorporates the declaration and both were served together on the respondent medical providers, who were able to challenge the sufficiency of the declaration—one did, *see* note 1, *supra*—in their motions to dismiss. They thus were in "no worse position" than if Baxter had attached the affidavit to the complaint instead of filing it one day later. *See Thompson v. Long*, 411 S.E.2d 322, 324 (Ga. Ct. App. 1991) (reversing district court's order dismissing medical negligence action due to the plaintiff's failure to attach an expert affidavit to the complaint because though the plaintiff failed to plead that she qualified for an exception to the contemporaneous affidavit requirement filing and had 45 extra days to file the affidavit, the complaint placed the defendants on notice that she qualified for that exception and the plaintiff filed the proper affidavit within the extended period of time).

Under NRCP 8(f), "[a]ll pleadings shall be so construed as to do substantial justice." *See Chastain v. Clark Cnty. Sch. Dist.*, 109 Nev.

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[5]Respondents rely on *Wheble*'s reference, as part of its case history, to an earlier unpublished order which granted the medical providers' mandamus petition and directed the district court to dismiss the first action because the plaintiff had filed the complaint without the required affidavit. *See* 128 Nev. at 121, 272 P.3d at 136. This unpublished order, while law of the case in *Wheble*, *see Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014), does not constitute binding precedent, SCR 123, and, to the extent inconsistent with this opinion, is disapproved.

1172, 1178, 866 P.2d 286, 290 (1993). Treating Baxter's pleadings as comprising the complaint and the declaration the complaint incorporates comports with NRCP 8(f) and case law interpreting the federal analog to NRCP 12(b)(5), *see* 5B Charles Alan Wright & Arthur Miller, *supra*, § 1357, and does not disserve the substantive policies the Legislature established in NRS 41A.071. This action was not brought without the prior expert medical review NRS 41A.071 demands, consistent with the statute's overall purpose: to ensure that plaintiffs file non-frivolous medical malpractice actions "in good faith based upon competent expert medical opinion." *Zohar*, 130 Nev. at 739, 334 P.3d at 405 (internal citations omitted). Substantial justice is done by reading the complaint as incorporating the declaration in deciding dismissal. Because Baxter did not file his medical malpractice action without a medical expert's declaration, dismissal under NRS 41A.071 was not required and we reverse and remand for further proceedings consistent with this opinion.

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

JOANNA T., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE FRANK P. SULLIVAN, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 65796

September 24, 2015 357 P.3d 932

Original petition for a writ of mandamus or prohibition requesting an order directing the juvenile court to dismiss an abuse-and-neglect petition.

After State filed abuse-and-neglect petition against mother and grandmother, the juvenile court denied mother's motion to dismiss based on State's allegedly untimely service of summons. Mother petitioned for writ of mandamus or prohibition. The supreme court, Parraguirre, J., held that: (1) requirement to serve summons within 120 days does not apply to abuse-and-neglect petitions, and (2) the juvenile court did not exceed its jurisdiction or act arbitrarily by denying motion to dismiss.

Petition denied.

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

Steven B. Wolfson, District Attorney, and *Felicia Quinlan*, Deputy District Attorney, Clark County, for Real Party in Interest.

1. Process.
   A purpose of the requirement to serve the summons and complaint on the defendant within 120 days of the filing of the complaint is to ensure that cases do not linger in the system unpursued. NRCP 4(i).
2. Infants.
   The purpose of abuse-and-neglect proceedings is to protect children who have been abandoned or abused, or otherwise need the State's protection. NRS 432B.330.
3. Infants.
   The requirement in the Nevada Rules of Civil Procedure to serve the summons and complaint on the defendant within 120 days of the filing of the complaint is inconsistent with the procedures described in the statutes regarding protection of children from abuse and neglect and, therefore, is inapplicable. NRS 432B.010 *et seq.*; NRCP 4(i).
4. Infants.
   The juvenile court did not exceed its jurisdiction or act arbitrarily or capriciously by denying mother's motion to dismiss abuse-and-neglect petition for failure to serve summons on mother until 486 days after petition was filed, and therefore, mother was not entitled to writ of mandamus or prohibition; even though State failed to timely serve mother before original adjudicatory hearing, matter did not linger unnoticed after petition was filed, juvenile court allowed State to cure procedural error and held a new adjudicatory hearing with proper notice, and child's best interest would not have been served by her return to mother's care. NRS 34.160, 34.320, 432B.570(2).

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

This petition for a writ of mandamus or prohibition presents a novel issue regarding whether NRCP 4(i)'s requirement that a summons be served within 120 days applies in NRS Chapter 432B proceedings. Because we conclude that it does not and that dismissal of the underlying abuse-and-neglect petition is not warranted, we deny the petition.

FACTS AND PROCEDURAL HISTORY

Petitioner Joanna T.'s daughter was removed from the care of Joanna's mother, Sheila T., in December 2012 while Joanna was in jail. An abuse-and-neglect petition was filed alleging that the child was in need of protection and naming both Joanna and Sheila, but no summons was issued as to Joanna and she did not appear at the adjudicatory hearing. The abuse-and-neglect petition was orally sustained by a domestic master and both Joanna and Sheila were

provided with case plans. Sheila complied with her case plan, and the child was returned to her custody in June 2013. In the order returning the child to Sheila, Joanna was allowed supervised visitation with the child until she complied with her case plan or until further order of the court.

Then, in March 2014, Joanna filed a motion to set aside the master's oral recommendation to sustain the abuse-and-neglect petition because Joanna had never received a summons notifying her of the adjudicatory hearing. The juvenile court granted the motion, directed real party in interest the State of Nevada to issue a summons, and set a new adjudicatory hearing. A summons was thereafter served on Joanna on April 24, 2014, 486 days after the abuse-and-neglect petition was filed. Joanna moved to dismiss the petition asserting that the summons was untimely under NRCP 4(i) because it was issued more than 120 days after the abuse-and-neglect petition was filed. The juvenile court denied the motion.

Joanna then filed with this court a petition for a writ of mandamus or prohibition challenging the juvenile court's authority to adjudicate the abuse-and-neglect petition as to her. She also filed an emergency motion to stay the adjudicatory hearing, which this court denied, thereby allowing the hearing to proceed. Thereafter, the juvenile court held the hearing and considered whether the child was in need of protection under NRS 432B.530(5) at the time of the child's removal. Joanna did not appear personally at the hearing, apparently because she had forgotten about it, but her counsel was present. The juvenile court found that the child was in need of protection from Joanna because Joanna's extensive history of untreated mental health issues, substance abuse, and incarceration at the time of the child's removal adversely affected her ability to care for the child. Thus, the juvenile court sustained the abuse-and-neglect petition against Joanna. We conclude that extraordinary writ relief is not warranted, but we take this opportunity to clarify that NRCP 4(i)'s 120-day summons requirement does not apply in NRS Chapter 432B proceedings.

DISCUSSION

NRCP 4(i) requires that in a civil action the summons and complaint be served on the defendant within 120 days of the filing of the complaint. If no such service is achieved and there is no showing of good cause for the failure to serve the summons, then the court shall dismiss the complaint without prejudice. NRCP 4(i). This rule does not apply, however, in a proceeding that is governed by a specific statute containing procedures and practices that are inconsistent or in conflict with the rule. NRCP 81(a).

NRCP 4(i)'s 120-day requirement is inconsistent with the expedited nature of NRS Chapter 432B proceedings. NRS Chapter 432B

contains its own summons provision, NRS 432B.520(1), which requires the issuance of a summons after an abuse-and-neglect petition has been filed. But unlike NRCP 4(i), the statute does not specify the time frame for issuing the summons. The summons contemplated by NRS 432B.520 serves several purposes: it puts the person with custody or control of the child on notice that the petition has been filed and notifies that person of his or her right to counsel, *see* NRS 432B.520(3) (providing that a copy of the petition must be attached to the summons), and it requires that person to appear personally and bring the child before the court, NRS 432B.520(1). Accordingly, the summons must set forth the time and place for the adjudicatory hearing on the abuse-and-neglect petition. NRS 432B.520. The adjudicatory hearing on the petition must be held within 30 days of the filing of the petition, unless there is good cause to continue the hearing. NRS 432B.530(1). If we applied NRCP 4(i) in NRS Chapter 432B proceedings, then a summons could be issued up to 120 days after the filing of the abuse-and-neglect petition, well after the time that the court must hold the adjudicatory hearing. Allowing the summons to be served after the adjudicatory hearing would be contrary to NRS 432B.520 and defeat one of the key reasons for a summons: to provide a party with notice of the action. *See Orme v. Eighth Judicial Dist. Court*, 105 Nev. 712, 715, 782 P.2d 1325, 1327 (1989) ("The primary purpose underlying the rules regulating service of process is to insure that individuals are provided actual notice of suit and a reasonable opportunity to defend."); *Berry v. Equitable Gold Mining Co.*, 29 Nev. 451, 456, 91 P. 537, 538 (1907) ("The object and purpose of the summons is to bring defendants into court . . . .").

[Headnote 1]

Although another purpose of NRCP 4(i)'s 120-day requirement is to ensure that cases do not linger in the system unpursued, *see Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 513, 998 P.2d 1190, 1194 (2000) (explaining that NRCP 4(i) "was promulgated to encourage diligent prosecution of complaints once they are filed"), NRS Chapter 432B already ensures that abuse-and-neglect proceedings are diligently prosecuted. For instance, the court must hold a hearing within 72 hours of the child's removal from a home to determine whether the child should remain in protective custody, NRS 432B.470(1), and an abuse-and-neglect petition must be filed within 10 days of the protective custody hearing, NRS 432B.490(1)(b). The court then must hold an adjudicatory hearing on the abuse-and-neglect petition within 30 days, NRS 432B.530(1), and annual hearings thereafter regarding the permanent placement of the child, NRS 432B.590(1)(a). Given the expedited nature of the proceedings, NRCP 4(i)'s 120-day requirement is not necessary to ensure that the proceedings are diligently prosecuted.

[Headnotes 2, 3]

And finally, the remedy for failure to serve a summons within 120 days under NRCP 4(i)—automatic dismissal *without prejudice*—conflicts with the purpose of NRS Chapter 432B proceedings. The purpose of those proceedings is to protect children who have been abandoned or abused, or otherwise need the State's protection. *See* NRS 432B.330 (identifying circumstances under which a child is or may be in need of protection). Dismissal in the NRS Chapter 432B context could be highly prejudicial because the child would be returned to a potentially unsafe environment and the State would be unable to protect the child until it could once again establish reasonable cause to believe that the child is exposed to an immediate risk of injury, abuse, or neglect warranting removal from the home. NRS 432B.390(1). Thus, a dismissal under NRCP 4(i) would be contrary to the purpose of NRS Chapter 432B—protecting children. Accordingly, we conclude that NRCP 4(i)'s 120-day requirement is inconsistent with the procedures described in NRS Chapter 432B, and therefore, is inapplicable.[1]

[Headnote 4]

Having concluded that NRS Chapter 432B contemplates expedited proceedings, we now must decide whether Joanna met her burden of establishing that this court's extraordinary intervention is warranted to require the district court to dismiss the abuse-and-neglect petition because of the State's extensive delay in serving the summons on her. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (explaining that the party seeking writ relief has the burden of demonstrating that extraordinary relief is warranted). This matter did not linger unnoticed after the abuse-and-neglect petition was filed. In fact, by the time Joanna moved to dismiss this case, Sheila had completed her case plan and the child had been returned to her care. And despite having had knowledge of this matter, Joanna failed to promptly raise the summons issue until more than a year after the abuse-and-neglect petition had been filed. Thereafter, the juvenile court allowed the State to cure the procedural error by serving a summons on Joanna for a new adjudicatory hearing and subsequently held an adjudicatory hearing of which Joanna had proper notice. Nothing in NRS Chapter 432B prohibited the court from correcting the procedural deficiency and modifying its orders as it deemed was in the child's best interest. *See* NRS 432B.570(2) (allowing the court to "revoke or modify any order as it determines is in the best interest of the child").

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[1]Because NRS Chapter 432B proceedings are civil in nature, the NRCP generally apply to those proceedings unless a specific rule of procedure conflicts with a provision of NRS Chapter 432B, like NRCP 4(i) does, in which case that procedural rule does not apply. *See* NRCP 81(a).

Indeed, the record established that the child's best interest would not be served by her return to Joanna's care. Joanna had not remedied the issues that led to the child's placement in protective custody. Only a few months before the second adjudicatory hearing, Joanna admitted to having recently used methamphetamine. She had also previously admitted that after being discharged from a mental health facility, she chose not to follow her outpatient aftercare treatment plan. And during one of her visitations with the child, she attempted to use a glue stick on the child's eyes and face. Thus, despite the State's failure to issue Joanna a summons before the original adjudicatory hearing, dismissal of the abuse-and-neglect petition would not have been in the child's best interest because the child would have been returned to Joanna's care even though Joanna had failed to alleviate the risk to the child.

While we do not condone the State's failure to timely serve a summons on Joanna before the original adjudicatory hearing, the juvenile court did not exceed its jurisdiction or act arbitrarily or capriciously by denying Joanna's motion to dismiss. *See* NRS 34.160; NRS 34.320 (providing that a writ of prohibition is available to arrest the proceedings of a district court exercising its judicial functions in excess of its jurisdiction); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (explaining that 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). Instead, it appropriately provided the State with an opportunity to cure the procedural defect in the interest of protecting the child. Accordingly, we deny the petition for a writ of mandamus or prohibition.[2]

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

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[2]Additionally, we conclude that Joanna's argument that the juvenile court lacked jurisdiction to adjudicate the petition as to Joanna once the child had been returned to Sheila's care does not warrant extraordinary relief. NRS 34.160; NRS 34.320; *Pan*, 120 Nev. at 228, 88 P.3d at 844.

PATTI E. BENSON, Appellant, *v.* STATE ENGINEER OF THE STATE OF NEVADA, OFFICE OF THE STATE ENGINEER; and DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondents.

No. 65833

September 24, 2015 358 P.3d 221

Appeal from a district court order dismissing a petition for judicial review in a water law matter. Seventh Judicial District Court, Eureka County; Gary Fairman, Judge.

Permittee sought judicial review of cancellation of water rights permit by State Engineer. The district court granted State Engineer's motion to dismiss. Permittee appealed. The supreme court, Cherry, J., held that: (1) permittee was required to exhaust administrative remedies even though State Engineer was not authorized to provide permittee's preferred remedy, and (2) the district court properly ruled that it could not grant permittee equitable relief.

Affirmed.

[Rehearing denied November 5, 2015]

Schroeder Law Offices, P.C., and *Laura A. Schroeder, Therese A. Ure*, and *Matthew J. Curti*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, and *Jerry M. Snyder*, Senior Deputy Attorney General, Carson City, for Respondents.

1. Water Law.
   Statute allowing State Engineer to cancel water permit if permittee is not proceeding in good faith with reasonable diligence to perfect the appropriation requires a party aggrieved by the cancellation of a water permit to exhaust all available administrative remedies before seeking judicial review, even when the remedy that the State Engineer is authorized to provide is not the remedy that the party seeks. NRS 533.395(2).
2. Administrative Law and Procedure.
   The supreme court reviews de novo a district court's order dismissing a petition for judicial review for lack of jurisdiction due to the party's failure to exhaust statutorily required administrative remedies.
3. Administrative Law and Procedure.
   Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies.
4. Administrative Law and Procedure.
   A party may proceed directly to judicial review when the administrative proceedings would be futile.
5. Water Law.
   Futility doctrine did not apply to landowner whose water permit had been canceled by State Engineer for failure to perfect appropriation of new well, and thus, landowner was required to exhaust all available administrative remedies before seeking judicial review; even though form of relief State Engineer could have offered, which was following a public hearing,

modifying or rescinding the cancellation and issuing landowner a permit with current effective date, effectively placing her near end of line to appropriate water, was not the remedy that she would have preferred, it was a form of relief. NRS 533.395.

6. Water Law.

The district court properly ruled that it could not grant landowner equitable relief, as she had not exhausted administrative remedies with State Engineer, who had canceled landowner's water permit for failure to perfect appropriation of new well, even though remedy State Engineer was statutorily authorized to provide was not the remedy that the landowner was seeking, when landowner had only shown that the State Engineer would not approve new applications to appropriate water from a particular basin, but had not shown that she or her family had expended any funds toward improvements or completed any portion of the project, that the water was put to beneficial use, that a third party would not be harmed by her appropriation of water, or that such appropriation would benefit the county. NRS 533.005.

Before the Court En Banc.

OPINION

By the Court, Cherry, J.:

[Headnote 1]

The question presented in this appeal is whether a party aggrieved by the cancellation of her water permit must exhaust administrative remedies with the State Engineer when the State Engineer is not statutorily authorized to provide the party's preferred remedy. We hold that NRS 533.395(2) requires a party aggrieved by the cancellation of a water permit to exhaust all available administrative remedies before seeking judicial review, even when the remedy that the State Engineer is authorized to provide is not the remedy that the party seeks.

FACTS AND PROCEDURAL HISTORY

Joseph Rand purchased property in Eureka County, which he used for farming. A water permit with an appropriation date of 1960 benefited the property. Rand died on October 17, 2008, survived by his wife, Ellen. That same month, the Joseph L. and Ellen M. Rand Revocable Living Trust was created, and the trust managed the farming property. An agent, presumably acting on behalf of the trust,[1] applied for a water right permit at a new well head location with the State Engineer on December 10, 2008. According to the

[1]The application for permission to change point of diversion lists the applicant as Joseph L. Rand and Ellen M. Rand. The underlying petition for judicial review also states that the agent was acting on behalf of Joseph L. Rand and Ellen M. Rand. However, as Joseph Rand was deceased when the application was filed and the trust was managing the farming property, we presume that the agent was acting on the trust's behalf.

application, the agent intended to divert water from an underground source via a newly drilled well. The new water rights were necessary because the previous well did not produce sufficient water. The State Engineer conditionally authorized the new permit to appropriate 632 acre-feet annually for irrigation and domestic use from the Diamond Valley Hydrographic Basin. The permit required proof of completion of the new well, proof of beneficial use of the water, and a supporting map to be filed with the State Engineer within one year. The permit reflected the original appropriation date of 1960.

Due to financial constraints, the trust was unable to finish drilling the well by 2010. Consequently, Ellen, on behalf of the trust, sought an extension to complete the work and file the requisite proof with the State Engineer. The State Engineer granted the trust's request and extended the time for completion by one year. The State Engineer granted the same request again in 2011 and 2012.

Ellen died on March 31, 2013. Following her death, Patti Benson, Joseph and Ellen's daughter, inherited the farming property and water rights. On July 11, 2013, the State Engineer sent a "final notice" to the trust reminding it and the Rands that they were required to file proof of completion, proof of beneficial use, and a map. The notice stated that if they did not file the required documents or request an extension within 30 days, the permit would be canceled.

Benson recorded the quitclaim deed with the Eureka County recorder's office on July 24, 2013. The record does not reflect that Benson ever filed a report of conveyance with the State Engineer, as required by NRS 533.384. On September 11, 2013, the State Engineer canceled the water permit for failure to comply with its terms and sent notice to the Rands. The notice also advised that, within 60 days, the cancellation could be appealed by filing a written request for a review at a public hearing before the State Engineer.

Instead of requesting administrative review, Benson filed the underlying petition for judicial review in the district court. Her petition sought an order vacating the State Engineer's decision to cancel the permit. In her petition, Benson argued that the State Engineer did not allow her enough time to file a report of conveyance under NRS 533.384.[2] Because notice of the potential cancellation of the water permit was not provided to her as the owner of the water rights, Benson alleged, the State Engineer's cancellation of the permit was erroneous.[3] Further, Benson claimed that the record evi-

[2]NRS 533.384 does not specify a time frame following the conveyance in which the report must be filed with the State Engineer.

[3]However, Benson conceded during oral argument before this court that she had actual notice of the pending cancellation before expiration of the 30-day period to seek an extension of time to file proof of compliance with the permit's conditions. She also conceded during oral argument before this court that she had actual notice of the canceled permit before expiration of the 60-day period to request administrative review.

dence, which she was barred from presenting to the State Engineer in a contested hearing prior to cancellation, proved that the State Engineer's decision was clearly erroneous.

The State filed a motion to dismiss Benson's petition, arguing that NRS 533.395(4) required the district court to dismiss Benson's petition for failure to exhaust administrative remedies and seek review of the permit cancellation at a public hearing before the State Engineer. In response, Benson claimed that she properly petitioned for judicial review under NRS 533.450 and was not required to pursue administrative review as it would have been in vain and futile. Benson contended that even if she had petitioned the State Engineer for administrative review of the cancellation decision and the State Engineer issued a decision rescinding the cancellation, that decision would not provide her with an adequate remedy. Benson argued that pursuant to NRS 533.395(3), the State Engineer would be required to modify the permit's original 1960 appropriation date with an appropriation date reflecting the date of her 2013 administrative review. Benson claimed the modified appropriation date would thus affect her substantive rights in terms of priority to the water. She asserted that because she would lose her 1960 appropriation date and be required to seek judicial review regardless of the results from an administrative hearing, administrative review would have been futile.

The district court granted the State Engineer's motion to dismiss Benson's petition. In its order, the district court said that this court has not defined futile in the context of exhausting administrative remedies and that it was persuaded by caselaw from the California Court of Appeal. The district court adopted the California Court of Appeal's rule from *Doyle v. City of Chino*, which requires exhaustion of administrative procedures "unless the petitioner can positively state that the commission has declared what its ruling will be in a particular case." 172 Cal. Rptr. 844, 849 (Ct. App. 1981) (internal quotation omitted). Accordingly, the court decided that Benson had not proven that administrative review would have been futile because she did not positively state what the State Engineer's ruling would have been had she sought administrative review.

The district court further noted that Benson could have received some relief through reinstatement of her permit with a 2013 appropriation date following administrative review but acknowledged that the State Engineer is not statutorily authorized to reinstate the permit with the original appropriation date. The court also noted that by seeking judicial review before exhausting available administrative remedies, Benson undermined policy considerations, including the following: (1) having the matter heard by the State Engineer, who possesses expertise in water rights; (2) allowing development of a factual record necessary for meaningful judicial review; (3) provid-

ing an efficient process for the State Engineer to correct its own mistake; (4) encouraging adherence to administrative procedures before resort to the courts; and (5) preventing premature interruption of the administrative process. This appeal followed.

DISCUSSION

[Headnote 2]

The issue presented is whether a permittee who is aggrieved by the State Engineer's decision to cancel her water permit is required to exhaust available administrative remedies before seeking judicial review. Here, we review de novo the district court's order, which dismissed Benson's petition for judicial review for lack of jurisdiction due to Benson's failure to exhaust the statutorily required administrative remedies. *See Webb v. Shull*, 128 Nev. 85, 88, 270 P.3d 1266, 1268 (2012) (applying de novo review to questions of statutory interpretation); *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (applying de novo review to an order granting a motion to dismiss for lack of subject matter jurisdiction).

Statutory procedures applicable to the cancellation of water permits

NRS 533.410 requires the Division of Water Resources, through the State Engineer, to cancel a landowner's water permit when the landowner fails to comply with its terms. If a permit is canceled, the permit holder may, within 60 days of the cancellation, file a written request for review at a public hearing before the State Engineer. NRS 533.395(2). The State Engineer, after considering evidence at the hearing, may "affirm, modify or rescind the cancellation." *Id.* When the State Engineer modifies or rescinds a canceled permit, the original appropriation date (or "priority date," as Benson refers to it) is "vacated and replaced by the date of the filing of the written petition with the State Engineer." NRS 533.395(3). Thus, Nevada law does not authorize the State Engineer to modify or reinstate a canceled permit with its original appropriation date. *See id.*

Further, "[t]he cancellation of a permit *may not be reviewed or be the subject of any judicial proceedings* unless a written petition for review has been filed and the cancellation has been affirmed, modified or rescinded" by the State Engineer. NRS 533.395(4) (emphasis added); NRS 533.450 (providing that a person aggrieved by a State Engineer's decision may seek judicial review); *see Howell v. Ricci*, 124 Nev. 1222, 1228, 197 P.3d 1044, 1048 (2008) (explaining that when the State Engineer renders a final, written determination that affects a person's interests that relate to the administration of determined rights, that decision may be properly challenged through a petition for judicial review).

Exhaustion of administrative remedies is required before seeking judicial review of a State Engineer's decision

[Headnotes 3, 4]

"Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies." *Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002). This court has held that exhaustion is not required when administrative proceedings are "vain and futile" or when the "agency clearly lacks jurisdiction." *Engelmann v. Westergard*, 98 Nev. 348, 353, 647 P.2d 385, 389 (1982). Thus, a party may proceed directly to judicial review when the administrative proceedings would be futile. *State, Nev. Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) (affirming a district court order granting summary judgment to a taxpayer seeking declaratory relief).

In *Scotsman Manufacturing*, Scotsman moved the district court to order the State to refund sales tax payments that it made under protest and that this court determined it was not required to pay. *Id.* at 253, 849 P.2d at 318. The district court ordered the State to refund the paid taxes plus interest. *Id.* On appeal, the State argued that the district court did not have jurisdiction to order the refund because NRS 374.640(1) and NRS 374.680 required Scotsman to seek a refund from the Department of Taxation within three years of making the payments. *Id.* at 254, 849 P.2d at 319. We explained that although Nevada law has a statutory procedure that requires the exhaustion of administrative remedies before petitioning for judicial review, "[u]nder certain circumstances, . . . the district court's jurisdiction attaches notwithstanding a party's failure to exhaust its administrative remedies." *Id.* at 254-55, 849 P.2d at 319. A circumstance that excuses the exhaustion doctrine, we determined, is "where initiation of administrative proceedings would be futile." *Id.* at 255, 849 P.2d at 319. Based on the three-year statute of limitations, "[t]he statutory procedure offer[ed] Scotsman no relief at all." *Id.* at 255, 849 P.2d at 320. Thus, when the facts of a particular case prove that the agency is statutorily precluded from granting a party any relief at all, administrative proceedings are futile. *See id.*

[Headnote 5]

In the instant case, Benson argues that, pursuant to NRS 533.395(3), petitioning for review with the State Engineer would be futile because even if the cancellation of her permit was rescinded, the State Engineer would be required to reinstate the water permit with a priority date of 2013, instead of its original priority date of 1960. Because the Diamond Valley Hydrographic Basin has been depleted, the State Engineer has denied all applications to appropri-

ate groundwater for irrigation purposes since 1979. *See* State Engineer's Order No. 1226 (Mar. 26, 2013). Accordingly, Benson asserts administrative review was futile because she could only receive a permit with a 2013 priority date, which would still not allow her to appropriate any water and would thus amount to nothing more than a piece of paper.

Benson relies upon our holding in *Englemann v. Westergard*, 98 Nev. 348, 647 P.2d 385 (1982), to support her contention that she was not required to seek administrative review. But the facts of this case are distinguishable from *Englemann*, and thus its holding does not apply here. In *Englemann*, the State Engineer canceled Englemann's water permit due to his failure to comply with the permit's terms, but Englemann was unaware of the cancellation for over two years because he did not receive the State Engineer's notice that "his permits . . . were in poor standing and subject to cancellation."[4] *Id.* at 351, 647 P.2d at 387. A month after learning of the cancellation, and approximately two years and two months after his permits were canceled, Englemann filed a petition for judicial review, which the district court dismissed. *Id.* On appeal, this court concluded that the district court erred when it failed to exercise subject matter jurisdiction. *Id.* We explained:

> We have held that where an aggrieved party *had no actual knowledge* that his permits were cancelled until after the expiration of the 30-day period within which to comply with the statute, it was not the intent of the Legislature to preclude judicial review of such an order or decision.

Id. at 352, 647 P.2d at 388 (emphasis added). We concluded that Englemann was not required to exhaust the administrative remedies because his request for administrative review would have been "untimely and futile." *Id.* at 353, 647 P.2d at 389.

Unlike the petitioners in *Englemann*, Benson conceded that she received actual notice of the pending cancellation before the expiration of the 30-day period in which to request an extension to file the requisite documents with the State Engineer. She also conceded that she received actual notice of the cancellation before the expiration of the 60-day period to request review. Therefore, unlike in *Engelmann* and *Scotsman*, the limitations period did not prevent Benson from seeking administrative review. And although Benson argues that administrative review would not have offered her any relief, we disagree. We are not persuaded by Benson's claim that a water permit with an appropriation date of 2013 would afford her no remedy

[4]In compliance with NRS 533.410, the State Engineer sent its notice of cancellation to Englemann via certified mail. *Englemann*, 98 Nev. at 351, 647 P.2d at 387. The post office returned the certified letter to the State Engineer as unclaimed. *Id.* at 351-52, 647 P.2d at 387-88.

at all. Under NRS 533.395(2), following a public hearing, the State Engineer could have "modif[ied] or rescind[ed] the cancellation" and issued Benson a water permit with an effective date of 2013. NRS 533.395(2), (3). Although a water permit with a 2013 appropriation date effectively places Benson near the end of the line to appropriate water, this is a form of relief. We recognize that it is not the remedy that Benson prefers, but we do not consider administrative proceedings to be futile solely because the statute prevents the petitioner from receiving his or her ideal remedy through administrative proceedings. If a permit with a 2013 priority date did not allow her to appropriate sufficient water, seeking judicial review would have *then* been permissible. *See* NRS 533.395(4); NRS 533.450. We therefore hold that when NRS 533.395 authorizes the State Engineer to provide a party with a remedy, even when that remedy is not the remedy the party prefers, the doctrine of futility does not apply and excuse the party from complying with NRS 533.395(4)'s exhaustion requirement,[5] and the party must exhaust all available administrative remedies before seeking judicial review.

We recognize that by requiring a petitioner to prove that the administrative review process would provide "no relief at all," our holding today defines Nevada's futility more narrowly than the federal courts' definitions, which focus on the adequacy of the remedy.[6] Such a strict standard is necessary in cases under NRS Chapter 533 because of the unique nature of water rights. *See Ruddell v. Sixth Judicial Dist. Court*, 54 Nev. 363, 367, 17 P.2d 693, 694 (1933) (holding that water law cases are "special in their character"). The

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[5]NRS 533.395(4) states: "The cancellation of a permit may not be reviewed or be the subject of any judicial proceedings unless a written petition for review has been filed and the cancellation has been affirmed, modified or rescinded pursuant to subsection 2."

[6]*Compare State, Nev. Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 320 (1993) ("The statutory procedure offers Scotsman *no relief at all* given the three-year period of limitations . . . ." (emphasis added)), *with Tesoro Ref. & Mktg. Co. v. Fed. Energy Regulatory Comm'n*, 552 F.3d 868, 874 (D.C. Cir. 2009) ("The futility exception is quite restricted and limited to situations when resort to *administrative remedies would be clearly useless*." (emphasis added) (internal quotations omitted)); *Rose v. Yeaw*, 214 F.3d 206, 210-11 (1st Cir. 2000) ("A plaintiff does not have to exhaust administrative remedies if she can show that the agency's adoption of an unlawful general policy would make resort to the agency futile, *or that the administrative remedies afforded by the process are inadequate given the relief sought*." (emphasis added)); *Perrino v. S. Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1316 (11th Cir. 2000) ("Thus far, our circuit has recognized exceptions only when resort to administrative remedies would be futile *or the remedy inadequate*, or where a claimant is denied meaningful access to the administrative review scheme in place." (emphasis added) (internal quotations omitted)); *and Diaz v. United Agric. Emp. Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1485 (9th Cir. 1995) ("[B]are assertions of futility are insufficient to bring a claim within the futility exception, which is designed to avoid the need to pursue an administrative review that is *demonstrably doomed to fail*." (emphasis added)).

strict standard is also warranted because the administrative review process requires a *public* hearing. NRS 533.395(2). The scarcity of water resources in our desert climate demands public scrutiny in water rights cases. *See Dep't of Conservation & Natural Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 79, 109 P.3d 760, 761 (2005) (recognizing that the State Engineer must scrutinize the beneficial use of water rights due to "Nevada's arid geography"). Moreover, this stricter standard will provide the district court with a fully developed record and administrative decision, including factual findings by an administrative body with expertise on water appropriation. This will place the district court in a better position, acting in an appellate capacity, to determine issues such as whether a party has proved adequate grounds for having a permit restored with its original appropriation date. *See Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 840-41, 59 P.3d 474, 476 (2002) (noting that administrative agencies are generally in the best position to make factual determinations). Lastly, the stricter standard will provide the State Engineer with the opportunity to correct its mistakes and protect judicial resources. *See Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1099, 194 P.3d 1248, 1252-53 (2008) (explaining that the purpose of the exhaustion requirement is to allow agencies to correct their mistakes and conserve judicial resources).

Equitable relief

Benson additionally asserts that she was not required to seek administrative review because the State Engineer is not empowered to grant equitable relief; specifically, the State Engineer cannot reinstate her water permit with its original priority date. She relies upon this court's holding in *State Engineer v. American National Insurance Co.*, 88 Nev. 424, 498 P.2d 1329 (1972). However, this case is distinguishable from *American National*.

[Headnote 6]

In *American National*, the State Engineer canceled a water permit because the permittee failed to file proof of application of the water to beneficial use by the set deadline. *Id.* at 425, 498 P.2d at 1330. The permittee had filed every other required proof, completed the well and the pump, and put the water to beneficial use. *Id.* The district court found the following: (1) the permittee spent $35,000 to improve the land, (2) the State Engineer did not intend to approve new permits in the foreseeable future, (3) no one would be damaged by the permittee's appropriation of the water, and (4) the permittee's appropriation would provide increased tax revenues for Humboldt County. *Id.* at 425-26, 498 P.2d at 1330. Moreover, the State Engineer did not dispute that equity rested with the permittee. *Id.* Consequently, the district court granted equitable relief and reinstated the

permit. *Id.* at 426, 498 P.2d at 1330. This court affirmed the lower court's decision, concluding that NRS Chapter 533 did not prohibit the district court from granting equitable relief when warranted. *Id.* In the instant case, Benson has only shown that the State Engineer will not approve new applications to appropriate water from the particular basin. Benson has not shown that she or her family have expended any funds toward improvements or completed any portion of the project, that the water was put to beneficial use, that a third party would not be harmed by her appropriation of water, or that such appropriation would benefit Eureka County.

The instant case is also distinguishable from *American National* because the Legislature amended NRS Chapter 533 since we decided that case. At the time of our decision in *American National*, NRS 533.395 did not require a permittee to request administrative review of a canceled permit before seeking judicial review. *See* 1981 Nev. Stat., ch. 44, § 3, at 114 (amending NRS 533.395 to allow the holder of a canceled permit to petition the State Engineer to review a canceled permit at a public hearing and precluding judicial review of a canceled permit if the permittee did not first petition for the State Engineer's review). When American National filed its petition for judicial review, the relevant statute read:

> If, in the judgment of the state engineer, the holder of any permit to appropriate the public water is not proceeding in good faith and with reasonable diligence to perfect said appropriation, the state engineer may require at any time the submission of such proof and evidence as may be necessary to show a compliance with the law, and the state engineer shall, after duly considering said matter, if, in his judgment, the said holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the said appropriation, cancel the said permit, and advise the holder of said permit of said cancellation.

1913 Nev. Stat., ch. 140, § 68, at 213 (enacting Nevada's water law statutes). At that time, American National did not have a remedy at law to address the deprivation of its water right. *See id.* Because Nevada law did not provide a remedy for American National, as the State Engineer was without discretion to review a permit cancellation, equitable relief through judicial review was appropriate. *See Am. Nat'l Ins. Co.*, 88 Nev. at 426, 498 P.2d at 1330. The difference between the statutes in force before 1981, when we decided *American National*, and in 2013, when Benson filed for judicial review of her canceled water permit, makes *American National* inapplicable to this case because administrative review pursuant to NRS 533.395(2) could have offered Benson relief. *See Smith v. Smith*, 68 Nev. 10, 22, 226 P.2d 279, 285 (1951) (concluding that the district court did

not have jurisdiction in equity "where statutes in force required [the party] to seek his relief in another way").

Benson has not proven that the law does not provide her with an adequate legal remedy. NRS 533.395(3) allowed the State Engineer to rescind its cancellation of the permit and reissue a permit with a 2013 appropriation date. Benson opines that she would not be able to appropriate any water with such a permit because the well is overburdened and the State Engineer will not accept new permits to appropriate water from this source. However, Benson's unsupported suspicions that the remedy would have been inadequate are insufficient to excuse her noncompliance with NRS 533.395(2) and (4). District courts should not entertain a petition for equitable relief based upon a party's unproven supposition that the remedy at law is inadequate. Accordingly, the district court properly ruled that it could not grant Benson equitable relief.[7] *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.")

CONCLUSION

We conclude that NRS 533.395 requires a party who is aggrieved by the cancellation of a water permit to exhaust all available administrative remedies pertaining to the State Engineer's decision on a water permit before filing a petition for judicial review with the district court. Benson should have therefore filed a written request for the State Engineer to review its decision to cancel the trust's water permit at a public hearing before she sought judicial remedies. Accordingly, we affirm the decision of the district court.

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

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[7]In its order granting the State Engineer's motion to dismiss Benson's claims, the district court explained that it could not provide any equitable relief to Benson unless her water permit remained valid. The court did not cite to any authority to support its conclusion, and this court is not aware of any such requirement. Nonetheless, equitable relief was improper due to the existence of a statutory remedy. *See* NRS 533.395(2).

WATSON ROUNDS, P.C., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND HIMELFARB & ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND BRUCE HIMELFARB, AN INDIVIDUAL, REAL PARTIES IN INTEREST.

No. 65632

September 24, 2015 358 P.3d 228

Original petition for a writ of mandamus challenging a district court order awarding attorney fees jointly and severally, as a sanction, against petitioner law firm.

Law firm petitioned for a writ of mandamus challenging the district court's award of attorney fees against it in the amount of $551,216.83, jointly and severally, as a sanction for filing a frivolous lawsuit. The supreme court, PARRAGUIRRE, J., held that: (1) law firm had no adequate legal remedy, as required to seek writ relief; (2) rule requiring attorney certification of pleadings and statute providing for attorney's personal liability for filing frivolous lawsuits were independent methods for trial courts to award fees for misconduct; and (3) the district court's findings were insufficient to support award.

Petition granted.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Petitioner.

Kolesar & Leatham, Chtd., and *Matthew T. Dushoff* and *Daniel S. Cereghino*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS.
   Whether extraordinary writ relief will issue is solely within the supreme court's discretion. NRS 34.170, 34.330.
2. MANDAMUS.
   The right to appeal in the future, after a final judgment is ultimately entered, will generally constitute an adequate and speedy legal remedy precluding writ relief. NRS 34.170, 34.330.
3. MANDAMUS.
   Extraordinary writs are a proper avenue for attorneys to seek review of sanctions. NRS 7.085, 34.170, 34.330; NRCP 11.
4. MANDAMUS.
   Law firm that petitioned for writ of mandamus challenging the district court's order awarding attorney fees against it in the amount of $551,216.83, jointly and severally, as a sanction for filing a frivolous lawsuit, had no adequate legal remedy, as required to seek extraordinary writ relief, where firm was not a party to underlying case and could not appeal order. NRS 7.085, 34.170, 34.330; NRCP 11.

5. Appeal and Error.
   The supreme court reviews sanctions awarding attorney fees for an abuse of discretion. NRS 7.085; NRCP 11.
6. Appeal and Error.
   The supreme court reviews interpretations of statutes and the Nevada Rules of Civil Procedure de novo. NRCP 1 *et seq.*
7. Costs.
   Rule requiring attorney certification of pleadings, which includes safe harbor provisions preventing attorneys from being sanctioned until they have the opportunity to cure the sanctionable conduct or appear at an order to show cause hearing, and statute providing for attorney's personal liability for filing frivolous lawsuits, are independent methods for district courts to award attorney fees for misconduct; statute is not superseded by rule and does not incorporate its safe harbor provisions. NRS 7.085; NRCP 11.
8. Courts; Statutes.
   Whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes.
9. Costs.
   The district court's findings in its order awarding attorney fees against law firm in the amount of $551,216.83, jointly and severally, as a sanction for filing a frivolous lawsuit were insufficient to support award; order improperly relied on jury's question about awarding law firm's client attorney fees for opposing party's breach of the implied covenant of good faith and fair dealing, and the district court did not explain defects in law firm's pretrial motions, how the evidence presented at trial was deficient, why the district court believed law firm could not have made any required inquiries before filing complaint, or why it believed law firm could not have reasonably believed its client's claims were well-grounded in fact or law. NRS 7.085.
10. Costs.
    Statute providing for attorney's personal liability for filing frivolous lawsuits does not empower juries to sanction attorneys. NRS 7.085.
11. Damages.
    Even though juries can award attorney fees as a consequential damage for the breach of an obligation, such an award is only permissible if a request for attorney fees was pleaded in accord with rule governing pleading special matters. NRCP 9(g).

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

NRS 7.085 allows a district court to make an attorney personally liable for the attorney fees and costs an opponent incurs when the attorney "[f]ile[s], maintain[s] or defend[s] a civil action . . . [that] is not well-grounded in fact or is not warranted by existing law or by [a good-faith] argument for changing the existing law." Here we are asked to determine whether (1) Nevada Rule of Civil Procedure (NRCP) 11 supersedes NRS 7.085, and (2) the district court abused its discretion in sanctioning the law firm under NRS 7.085. We con-

clude NRCP 11 does not supersede NRS 7.085 because each represents a distinct, independent mechanism for sanctioning attorney misconduct. However, we also conclude the district court abused its discretion in sanctioning the petitioner under NRS 7.085 without making adequate findings. Accordingly, we grant petitioner's request for a writ of mandamus and direct the district court to vacate the portion of its order making petitioner liable for attorney fees and costs.

FACTS

FortuNet, Inc., is a gaming company that leases bingo equipment to casinos. In 2011, FortuNet filed the initial version of its complaint in an action against former FortuNet employees and an entity they created; the claims centered on allegations that the employees breached various duties to FortuNet and improperly used FortuNet's intellectual property. FortuNet later retained petitioner Watson Rounds, P.C. (Watson) as its new counsel, and Watson prepared a second amended complaint adding real parties in interest Bruce Himelfarb[1] and Himelfarb & Associates, LLC (collectively Himelfarb) as defendants. All claims against Himelfarb derived from an alleged kickback scheme and the alleged theft of FortuNet's intellectual property.

Each of FortuNet's claims against Himelfarb survived summary judgment. The parties proceeded to trial, but before the jury entered a verdict, the district court dismissed several of FortuNet's claims against Himelfarb for lack of evidence under NRCP 50(a). FortuNet also voluntarily dismissed several other claims against Himelfarb. The remaining claims against Himelfarb made it to the jury, which had the option of finding that Himelfarb was involved in the kickback scheme, the theft of FortuNet's intellectual property, both, or neither. The jury rejected FortuNet's claims against Himelfarb, found for Himelfarb on its counterclaims, and specifically asked the district court if it could include Himelfarb's attorney fees when calculating the damages Himelfarb suffered from FortuNet's breach of the implied covenant of good faith and fair dealing. The district court instructed the jury that it could not add attorney fees because such fees, if any, would be assessed posttrial.

The district court eventually determined that FortuNet would be liable for Himelfarb's attorney fees and costs in the amount of $551,216.83. Additionally, the district court determined Watson was jointly and severally liable with FortuNet for those fees and costs pursuant to NRS 7.085. The district court explained that Watson's liability was proper because, "despite not being well-grounded in fact and not warranted by existing law or a good faith argument for

[1]Bruce Himelfarb is the president of Himelfarb & Associates, LLC.

a change in existing law, [Watson] filed and maintained FortuNet's claims against [Himelfarb] and defended FortuNet against [Himelfarb's] counterclaims as contemplated by NRS 7.085."

The district court sanctioned Watson under NRS 7.085 based on (1) "its review of the various pre-trial motions," (2) "the evidence presented at trial," (3) "NRCP 50(a) rulings," (4) "FortuNet's voluntary dismissal with prejudice of certain claims," (5) "the jury's unanimous verdict in favor of [Himelfarb]," and (6) "the jury's expressed desire to award [Himelfarb its] entire attorney's fees incurred relating to this case." The district court also cited the fact that "the deposition and trial testimony of FortuNet's [CEO] and principal witness . . . [stated] that counsel was responsible for '99.99%' of the factual and legal content of FortuNet's pleadings." Finally, the district court found that Watson "could not have made the required inquiries prior to filing" the second amended complaint against Himelfarb, "could not have reassessed the evidentiary support for FortuNet's claims against [Himelfarb]" before filing, and "could not have had a reasonable belief that the claims against [Himelfarb] were well-grounded in either fact or law."

Watson now seeks a writ of mandamus vacating the portion of the district court's order making Watson jointly and severally liable for Himelfarb's attorney fees.

DISCUSSION

Watson contends that (1) this court should exercise its discretion to consider Watson's petition, (2) NRCP 11 supersedes NRS 7.085 such that the award against Watson is improper, and (3) the district court abused its discretion in making Watson liable for Himelfarb's attorney fees under NRS 7.085 without making adequate findings.

This court will exercise its discretion to consider Watson's petition

[Headnotes 1, 2]

"Whether extraordinary writ relief will issue is solely within this court's discretion." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). "Generally, an extraordinary writ may only be issued in cases 'where there is not a plain, speedy and adequate remedy' at law." *Id.* (quoting NRS 34.170 and NRS 34.330). "The right . . . to appeal in the future, after a final judgment is ultimately entered, will generally constitute an adequate and speedy legal remedy precluding writ relief." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007).

[Headnotes 3, 4]

Sanctioned attorneys do not have standing to appeal because they are not parties in the underlying action; therefore, extraordinary

writs are a proper avenue for attorneys to seek review of sanctions. *See Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011); *see also Albany v. Arcata Assocs., Inc.*, 106 Nev. 688, 690, 799 P.2d 566, 567-68 (1990). Here, Watson was not a party to the underlying case, and it cannot appeal the district court's order making it jointly and severally liable for more than $500,000 in attorney fees and costs. Therefore, Watson lacks a plain, speedy, and adequate legal remedy and is entitled to seek extraordinary writ relief. As such, this court must now assess whether Watson is entitled to the writ relief it seeks.

NRCP 11 does not supersede NRS 7.085

[Headnotes 5, 6]

This court reviews sanctions awarding attorney fees for an abuse of discretion. *Emerson*, 127 Nev. at 679, 263 P.3d at 229; *see also Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995). However, we review interpretations of statutes and the NRCP de novo. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004); *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

[Headnote 7]

Watson argues that NRCP 11 supersedes NRS 7.085 because NRS 7.085 is a procedural statute last amended in 2003 and NRCP 11 is a procedural rule that was materially amended in 2004. According to Watson, NRCP 11's 2004 amendment added safe harbor rules that supersede NRS 7.085, such that the statute (1) is now totally superseded by NRCP 11, or (2) at least incorporates NRCP 11's safe harbor provisions. NRCP 11's safe harbor provisions prevent attorneys from being sanctioned until they have the opportunity to cure the sanctionable conduct or appear at an order to show cause hearing. NRCP 11(c). We reject Watson's argument.

Watson relies on *State v. Connery*, 99 Nev. 342, 661 P.2d 1298 (1983), to support its position that procedural rules supersede conflicting procedural statutes when the rule is enacted after the statute. In *Connery*, the issue was whether the time for appeal was governed by (1) a statute requiring appeal within 30 days of a district court's oral pronouncement of an order, or (2) a later-enacted appellate rule requiring appeal within 30 days of the district court's entry of a written order. *Id.* at 344, 661 P.2d at 1299. This court held that the subsequently enacted procedural rule superseded the statute. *Id.* at 345-46, 661 P.2d at 1300.

However, *Connery* does not compel the result Watson seeks because it is materially distinguishable from the present matter. In *Connery*, the rule and statute plainly and irreconcilably conflicted because they provided different dates from which to calculate a strict

30-day appeal window. In this case, however, Watson has not articulated any reason why this court cannot give effect to both NRCP 11 and NRS 7.085, and there is nothing to suggest that the rule and statute cannot be read in harmony. *See Bowyer v. Taack*, 107 Nev. 625, 627-28, 817 P.2d 1176, 1178 (1991) ("[A]pparent conflicts between a court rule and a statutory provision should be harmonized and both should be given effect if possible."), *superseded by statute and rule on other grounds as recognized by McCrary v. Bianco*, 122 Nev. 102, 131 P.3d 573 (2006). Moreover, persuasive authority and Nevada's rules for statutory interpretation strongly support treating NRCP 11 and NRS 7.085 as independent sanctioning mechanisms.

Nevada adopted the 1993 version of Federal Rule of Civil Procedure (FRCP) 11 "in its entirety." NRCP 11, Drafter's Note 2004 Amendment. As the Advisory Committee Notes on the 1993 amendments to FRCP 11 make clear, FRCP 11 does not supersede or supplant 28 U.S.C. § 1927 (2014), which makes attorneys personally liable for the unreasonable and vexatious multiplication of proceedings.[2] FRCP 11, Advisory Committee Notes, 1993 Amendment, Subdivision (d).

> Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927.

Id. While federal courts have declined, as a matter of discretion, to allow § 1927 to be used as a means of sidestepping FRCP 11's safe harbor provisions where the misconduct involved is clearly covered by FRCP 11, *see New England Surfaces v. E.I. DuPont de Nemours & Co.*, 558 F. Supp. 2d 116, 124 n.12 (D. Me. 2008) (citing cases), they recognize that FRCP 11 and § 1927 apply to different types of misconduct and provide independent mechanisms for sanctioning attorney misconduct. *See, e.g.*, *Hutchinson v. Pfeil*, 208 F.3d 1180, 1183-86 (10th Cir. 2000); *Nw. Bypass Grp. v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 2d 137, 142-43 (D. N.H. 2008) ("Although there is no First Circuit authority directly on point, [the 2d, 4th, 6th, 10th, and 11th Circuits] have ruled that the safe harbor provisions in Rule 11 do not apply to § 1927 claims."). The relationship between

[2]28 U.S.C. § 1927 (2014) states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

the Nevada statute and rule is analogous to that between § 1927 and FRCP 11. Thus, federal authority strongly indicates that NRCP 11 does not supersede NRS 7.085.

[Headnote 8]

Nevada's statutory interpretation rules also support treating NRCP 11 and NRS 7.085 as separate sanctioning mechanisms. This court has "previously indicated that the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure." *Webb, ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009) (citing *Moseley*, 124 Nev. at 662 n.20, 188 P.3d at 1142 n.20). Further, "whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999); *see also Bowyer*, 107 Nev. at 627-28, 817 P.2d at 1178. The simplest way to reconcile NRCP 11 and NRS 7.085 is to do what federal courts have done with FRCP 11 and § 1927; treat the rule and statute as independent methods for district courts to award attorney fees for misconduct. Therefore, we conclude NRCP 11 does not supersede NRS 7.085.

The district court failed to make adequate findings supporting sanctions against Watson

[Headnote 9]

Watson contends the district court abused its discretion in concluding that it violated NRS 7.085 because the court's findings are insufficient to support that conclusion. We agree.

NRS 7.085 allows the district court to make an attorney personally liable for the attorney fees and costs an opponent incurs when the attorney "[f]ile[s], maintain[s] or defend[s] a civil action . . . [that] is not well-grounded in fact or is not warranted by existing law or by [a good faith] argument for changing the existing law." We have previously held, in the context of an attorney fees award, that a district court abuses its discretion by making such an award without including in its order "'sufficient reasoning and findings in support of its ultimate determination.'" *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d 730, 736 (2008) (quoting *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005)).

According to the district court's order, its award against Watson is based on (1) the jury's express desire to award Himelfarb attorney fees; (2) a review of pretrial motions; (3) the evidence presented at trial; (4) the court's NRCP 50(a) rulings; (5) FortuNet's voluntary dismissal of certain claims; (6) the jury's unanimous verdict in Himelfarb's favor; (7) a statement by FortuNet's CEO that Watson was 99.99% responsible for the contents of pleadings; and (8) its determination that Watson could not have (a) made the required inqui-

ries before filing the second amended complaint, (b) reassessed the evidence underlying FortuNet's claims, and (c) reasonably believed FortuNet's claims were well-grounded in fact or law. This reasoning does not support the imposition of sanctions against Watson.

[Headnotes 10, 11]

First, the district court's order improperly relies on the jury's question to the district court about awarding Himelfarb attorney fees for FortuNet's breach of the implied covenant of good faith and fair dealing. NRS 7.085 does not empower juries to sanction attorneys. Even though juries can award attorney fees as a consequential damage for the breach of an obligation, such an award is only permissible if a request for attorney fees was pleaded in accord with NRCP 9(g). *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956-57, 35 P.3d 964, 969 (2001), *receded from by Hogan v. Felton*, 123 Nev. 577, 586, 170 P.3d 982, 988 (2007). The record does not demonstrate that Himelfarb pleaded such a request in accord with NRCP 9(g). More importantly, there is no authority indicating that Watson could be liable for consequential damages caused by its *client's* breach. As such, the jury's impulse to award Himelfarb some attorney fees has no logical bearing on whether Watson can be sanctioned under NRS 7.085.

Additionally, the district court's order contains several unsupported conclusions, making meaningful review of the sanctions impossible. In regard to Watson's purported violation of NRS 7.085, the district court does not explain (1) what defects in Watson's pretrial motions show it should be sanctioned; (2) how the evidence presented at trial was deficient; or (3) why it believes Watson could not have made any required inquiries before filing the second amended complaint, reassessed the evidence underlying FortuNet's claims, or reasonably believed that FortuNet's claims were well-grounded in fact or law. Although these conclusions may be supported by the facts in this case, this court cannot properly review the issue because the district court did not provide sufficient factual detail and reasoning to explain its decision.

Moreover, it is not clear the NRCP 50(a) rulings and FortuNet's voluntary dismissal of some claims support an award for attorney fees. Indeed, there are many cases in which attorneys are not made personally liable for fees even though some claims are dismissed before trial. *See, e.g.*, *Semenza*, 111 Nev. at 1096, 901 P.2d at 688 (noting that voluntarily dismissing claims before trial does not necessarily indicate frivolity). Again, the district court does not explain how the pre-verdict dismissals here indicate that Watson brought or maintained groundless claims. Further, despite several claims being eliminated by NRCP 50(a) and voluntary dismissal, all those claims survived summary judgment, demonstrating the district court be-

lieved there might have been sufficient evidence to support them. Additionally, the core factual issues—whether Himelfarb was involved in the kickback scheme or the theft of FortuNet's intellectual property—still went to a jury.

Finally, the only piece of evidence the district court identifies does not explain why the award against Watson is justified. FortuNet's CEO stated that Watson was 99.99% responsible for the decision to add Himelfarb to the second amended complaint. The district court cites this statement as evidence that Watson filed or maintained claims not well-grounded in fact or law. However, this evidence says nothing about whether the claims were well-grounded. Instead, it assigns blame to Watson for any groundlessness that may have existed, without supporting an actual finding of groundlessness. Therefore, we conclude that the district court abused its discretion in sanctioning Watson because its findings are insufficient to justify making Watson liable for attorney fees and costs under NRS 7.085.

CONCLUSION

This court will exercise its discretion to hear Watson's writ petition because, as a nonparty in the underlying action, it has no right to appeal. This court rejects Watson's argument that NRCP 11 supersedes NRS 7.085 and concludes that NRCP 11 and NRS 7.085 are distinct and independent methods for sanctioning attorney misconduct. Nevertheless, this court concludes Watson is entitled to writ relief because the district court's order does not sufficiently explain why Watson should be liable for attorney fees under NRS 7.085. Although sufficient facts may exist to sanction Watson under NRS 7.085, the district court failed to articulate those facts in its order.

Accordingly, our intervention is warranted, and we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate the portion of its September 19, 2013, order holding Watson Rounds, P.C., jointly and severally liable for Himelfarb's attorney fees and costs. Nothing in this opinion prevents Himelfarb from renewing its motion for NRS 7.085 sanctions against Watson. However, if the district court again sanctions Watson, its order must set forth reasoning and factual findings to support its decision.

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

STEPHEN TAM, M.D., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE, RESPONDENTS, AND SHERRY CORNELL, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CHARLES THOMAS CORNELL, JR.; KARLA CRAWFORD, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CHARLES THOMAS CORNELL, JR.; PATRICK N. CHAPIN, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CHARLES THOMAS CORNELL, JR.; AND ALFREDO HIBBART, PA, REAL PARTIES IN INTEREST.

No. 66346

October 1, 2015 358 P.3d 234

Original petition for writ of mandamus challenging a district court order ruling a statute unconstitutional in a medical malpractice action.

Administrator of patient's estate brought action against physician and others for professional negligence and medical malpractice. The district court found that statutory cap on noneconomic damages was unconstitutional and that a separate cap applied to each plaintiff for each defendant. Physician filed petition for writ of mandamus. The supreme court, HARDESTY, C.J., held that: (1) statutory cap on damages did not interfere with plaintiff's constitutional right to jury trial, (2) cap did not violate equal protection, (3) cap applied per incident, and (4) cap applied to claims of medical malpractice.

Petition granted.

Lewis Brisbois Bisgaard & Smith, LLP, and *S. Brent Vogel* and *Erin E. Jordan*, Las Vegas, for Petitioner.

Law Office of Bradley L. Booke and *Bradley L. Booke*, Las Vegas; *Shandor S. Badaruddin*, Missoula, Montana, for Real Parties in Interest Sherry Cornell, Karla Crawford, and Patrick N. Chapin.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody and *Robert C. McBride*, Las Vegas, for Real Party in Interest Alfredo Hibbart.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.
2. MANDAMUS.
   Writ relief is generally not available when an adequate and speedy legal remedy exists.

3. Mandamus.
   The supreme court would exercise its discretion to entertain physician's petition for writ of mandamus in professional negligence action in which the district court had found cap on noneconomic damages for health-care provider's professional negligence to be unconstitutional; resolving writ petition could affect course of litigation and thus promote sound judicial economy and administration, and petition raised an important legal issue in need of clarification involving public policy. NRS 41A.035 (2004).
4. Appeal and Error.
   The supreme court reviews de novo determinations of whether a statute is constitutional.
5. Constitutional Law.
   Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional; in order to meet that burden, the challenger must make a clear showing of invalidity.
6. Jury.
   The Nevada Constitution guarantees the right to have factual issues determined by a jury. Const. art. 1, § 3.
7. Jury.
   In order for a statute to violate the right to trial by jury, a statute must make the right practically unavailable. Const. art. 1, § 3.
8. Jury.
   The statutory cap on an award of noneconomic damages against a health-care provider for professional negligence does not implicate a plaintiff's constitutional right to a jury trial. Const. art. 1, § 3; NRS 41A.035 (2004).
9. Appeal and Error.
   Although the supreme court would not normally address an issue that the district court declined to consider and develop the factual record, the supreme court can consider constitutional issues for the first time on appeal.
10. Constitutional Law.
    To survive an equal protection challenge, a statute need only be rationally related to a legitimate governmental purpose. U.S. Const. amend. 14; NRS 41A.035 (2004).
11. Constitutional Law.
    While the legislative history is helpful to understanding the purpose of enacting the statute, a court is not limited to the reasons expressed by the legislature; rather, if any rational basis exists, or can be hypothesized, then the statute does not violate equal protection. U.S. Const. amend. 14.
12. Health.
    The right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right.
13. Constitutional Law; Health.
    The statutory cap on an award of noneconomic damages against a health-care provider for professional negligence does not violate equal protection; the imposition of an aggregate cap on noneconomic damages in medical malpractice actions is rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available to the state's citizens. U.S. Const. amend. 14; NRS 41A.035 (2004).
14. Appeal and Error.
    The supreme court reviews de novo questions of statutory construction.

15. STATUTES.
    The supreme court does not look beyond the language of a statute if it is clear on its face.
16. STATUTES.
    When a statute is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application.
17. STATUTES.
    In construing an ambiguous statute, the supreme court must give the statute the interpretation that reason and public policy would indicate the legislature intended.
18. HEALTH.
    The statutory cap on noneconomic damages against a health-care provider for professional negligence applies per incident, regardless of how many plaintiffs, defendants, or claims are involved. NRS 41A.035 (2004).
19. HEALTH.
    The statutory cap on noneconomic damages against a health-care provider for professional negligence applies to claims of medical malpractice. NRS 41A.035 (2004).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

NRS 41A.035 (2004) limits the recovery of a plaintiff's noneconomic damages in a health-care provider's professional negligence action to $350,000. In this petition, we resolve three issues related to this statute: whether the statute violates a plaintiff's right to trial by jury, whether the cap applies separately to each cause of action, and whether the statute applies to medical malpractice actions. We conclude that the district court erred in finding the statute unconstitutional on the basis that it violates a plaintiff's constitutional right to trial by jury. We further conclude that the district court erred when it found the statutory cap applies per plaintiff and per defendant. And finally, we conclude that the district court erred when it found the statute only applies to professional negligence and not to medical malpractice. Accordingly, we grant the petition.

FACTS

After the death of Charles Thomas Cornell, Jr., real party in interest Sherry Cornell,[1] individually and as administrator of Charles' estate, filed a complaint alleging, among other causes of actions, professional negligence and medical malpractice. The complaint named numerous defendants, including petitioner Stephen Tam, M.D.

[1]Although Charles Cornell, Jr., died in 2010, all references to the plaintiffs/real parties in interest, whether suing on Charles Cornell's behalf or in their individual capacity, are hereinafter referred to collectively as "Cornell."

Charles had several chronic medical conditions. However, Cornell alleged that Charles died after receiving care from the defendants, who discharged him without medications or prescriptions for essential medications, including insulin, to treat his diabetes. Consequently, the complaint alleged that Charles died because he did not have access to insulin.

The district court dismissed several of the defendants and numerous claims from the action, and the remaining claims for trial fell "within the definition of medical malpractice as set forth in NRS 41A.009." Relevant to this opinion is that Dr. Tam filed an omnibus motion in limine requesting in part that the plaintiffs' noneconomic damages be limited to $350,000 as a whole pursuant to NRS 41A.035 (2004).

The district court denied this motion finding that NRS 41A.035 was unconstitutional, as it violated a plaintiff's constitutional right to trial by jury. The district court also found that the cap in NRS 41A.035 does not apply to the case as a whole but that a separate cap applies to each plaintiff for each of the defendants.[2] In addition, the district court found that the cap in NRS 41A.035 did not apply to medical malpractice claims.[3] This petition for writ relief followed.

Writ relief is appropriate

[Headnotes 1, 2]

Dr. Tam petitions this court for a writ of mandamus compelling the district court to vacate its order denying his motion in limine. " 'A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.' " *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)); NRS 34.160. Generally, "[w]rit relief is not available . . . when an adequate and speedy legal remedy exists." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene 'under circumstances of urgency or strong necessity, or when an important issue of law

[2]The Legislature has since amended NRS 41A.035 to clarify that the recovery for noneconomic damages is limited to $350,000, "regardless of the number of plaintiffs, defendants or theories upon which liability may be based." *See* 2015 Nev. Stat., ch. 439, § 3, at 2526. All further references to NRS 41A.035 in this opinion are based on the 2004 version of the statute.

[3]As part of his motion in limine, Dr. Tam also requested that he be allowed to introduce collateral source evidence pursuant to NRS 42.021. The district court denied this request, deeming NRS 42.021 unconstitutional. Dr. Tam separately petitioned this court for a writ of mandamus on this denial. *Tam v. Eighth Judicial District Court (Cornell)*, Docket No. 66065. We resolve Docket No. 66065 separately from the petition now before the court.

needs clarification and sound judicial economy and administration favor the granting of the petition.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (footnote omitted) (quoting *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)).

[Headnote 3]

In this case, although an appeal from a final judgment appears to be an adequate and speedy remedy for the individual parties, resolving this writ petition could affect the course of the litigation and thus promote sound judicial economy and administration. Moreover, this petition raises an important legal issue in need of clarification involving public policy, which could resolve or mitigate related or future litigation. Accordingly, we exercise our discretion to entertain Dr. Tam's petition for writ of mandamus.

The district court erred in finding NRS 41A.035 unconstitutional, as the statute does not violate the right of trial by jury

NRS 41A.035 provides that "[i]n an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000." The district court concluded that the statute violates the right of trial by jury because it takes a question of fact—the determination of damages—away from the jury.

[Headnotes 4, 5]

"[T]his court reviews de novo determinations of whether a statute is constitutional." *Hernandez v. Bennett-Haron*, 128 Nev. 580, 586, 287 P.3d 305, 310 (2012). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (citation omitted).

[Headnote 6]

In Nevada, "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const. art. 1, § 3. This provision guarantees "the right to have factual issues determined by a jury." *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 711, 542 P.2d 198, 207 (1975).

[Headnote 7]

In order for a statute to violate the right to trial by jury, a statute must make the right practically unavailable. *Barrett v. Baird*, 111 Nev. 1496, 1502, 908 P.2d 689, 694 (1995) ("[T]he correct standard for evaluating whether a statute unconstitutionally restricts the right to a jury trial is that the right must not be burdened by the imposition

of onerous conditions, restrictions or regulations which would make the right practically unavailable." (internal quotations omitted)), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008).

While jurisdictions disagree on whether caps on statutory damages violate the right to trial by jury,[4] we have previously held that a statutory limit on damages *does not* infringe upon a plaintiff's constitutional right. *Arnesano v. State, Dep't of Transp.*, 113 Nev. 815, 819, 942 P.2d 139, 142 (1997), *abrogated on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). In *Arnesano*, the plaintiffs contended that a $50,000 cap on damages under NRS 41.035 (limiting damages in a tort action against the government) violated their right to a jury trial. *Id.* at 819-20, 942 P.2d at 142. After explaining that it is the jury's role to determine the extent of a plaintiff's injury, this court concluded that " 'it is not the role of the jury to determine the legal consequences of its factual findings. . . . That is a matter for the [L]egislature.' " *Id.* at 820, 942 P.2d at 142 (quoting *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (first alteration in original) (upholding a statutory cap on medical malpractice liability)).

California has also addressed this exact issue in upholding the constitutionality of its statutory cap on noneconomic damages in an action involving a health-care provider's professional negligence. *See Yates v. Pollock*, 239 Cal. Rptr. 383, 385 (Ct. App. 1987) (concluding that such an argument is merely "an indirect attack upon the Legislature's power to place a cap on damages"). The *Yates* court reasoned that while the statute could possibly result in a lower judgment than the jury's award, "the Legislature retains broad control over the measure . . . of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . [it] may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." *Id.* at 385-86 (internal quotations omitted) (third alteration in original).

[Headnote 8]

Consistent with our prior holding in *Arensano* and persuasive caselaw from California, we conclude that NRS 41A.035's cap does not interfere with the jury's factual findings because it takes effect only after the jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial.

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[4]*Compare Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) ("[O]nce the jury has made its findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law."), *with Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 473 (Or. 1999) ("Although it is true that [the statutory cap] does not prohibit a jury from assessing noneconomic damages, to the extent that the jury's award exceeds the statutory cap, the statute prevents the jury's award from having its full and intended effect.").

NRS 41A.035 does not violate equal protection rights

[Headnote 9]

Cornell also argues that the district court correctly found the statute unconstitutional but for the wrong reasons. Cornell argues that NRS 41A.035 violates the Equal Protection Clause and claims there is no rational basis for the statute. The district court did not address the equal protection argument in its order. Although this court would not normally address an issue that the district court declined to consider and develop the factual record, this court can consider constitutional issues for the first time on appeal. *See Jacobs v. Adelson*, 130 Nev. 408, 417-18, 325 P.3d 1282, 1288 (2014); *Barrett*, 111 Nev. at 1500, 908 P.2d at 693 (holding that this court may consider constitutional issues for the first time on appeal).

[Headnotes 10-12]

To survive an equal protection challenge, NRS 41A.035 need only be rationally related to a legitimate governmental purpose.[5] *See generally Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559 (2009). "[T]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right." *Barrett*, 111 Nev. at 1507, 908 P.2d at 697.

The argument presented to voters in support of passing NRS 41A.035 was to "stabilize Nevada's health care crisis and provide protection for both doctors and patients." *Nevada Ballot Questions 2004*, Question No. 3, Argument in Support of Question No. 3 at 16, *available at* https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf 2004 (last visited July 10, 2015). Based on this express goal, NRS 41A.035's aggregate cap on noneconomic damages is rationally related to the legitimate governmental interest of ensuring that adequate and affordable health care is available to Nevada's citizens. By providing a hard cap limiting potential noneconomic damages arising from an incident of malpractice, the statute would seem to provide greater predictability and reduce costs for health-care insurers and, consequently, providers and patients.

Similarly, the California Supreme Court determined that California's statutory cap on noneconomic damages does not violate equal protection. *See Fein v. Permanente Med. Grp.*, 695 P.2d 665, 680 (Cal. 1985). Specifically, the *Fein* court explained that an aggregate cap on medical malpractice damages was rationally related to the

[5]While the legislative history is helpful to understanding the purpose of enacting the statute, this court is not limited to the reasons expressed by the Legislature; rather, if any rational basis exists, or can be hypothesized, then the statute is constitutional. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 520, 217 P.3d 546, 559 (2009).

legitimate governmental purpose of combating "the rising cost of medical malpractice insurance [that] was posing serious problems for the health care system in California." *Id.*; *see also Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985) (same).

[Headnote 13]

Thus, we conclude that NRS 41A.035 does not violate equal protection because the imposition of an aggregate cap on noneconomic damages in medical malpractice actions is rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available to Nevada's citizens.

The district court erred when it found the cap in NRS 41A.035 applies per plaintiff, per defendant

Cornell argues that the district court properly found that the plain language and legislative history of NRS 41A.035 support the argument that its cap applies separately to each plaintiff for each defendant, as each plaintiff has an independent action. Cornell compares this statute with the wrongful death statute where heirs' actions may be joined, and each action is separate and distinct.[6] We disagree.

NRS 41A.035 provides that "[i]n an action for injury or death against a provider of health care based upon professional negligence, the injured plaintiff may recover noneconomic damages, but the amount of noneconomic damages awarded in such an action must not exceed $350,000." Cornell argues that the term "action" refers to each separate claim and applies separately to each defendant. Conversely, Dr. Tam argues that the plain meaning of "action" refers to the case as a whole. Because both interpretations are reasonable, the statute is ambiguous, and we look to the legislative history to aid in interpreting the statute.

[Headnotes 14-17]

We review de novo questions of statutory construction. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004). We do not look beyond the language of a statute if it is clear on its face. *Id.* at 579-80, 97 P.3d at 1135. "However, when a statute is susceptible to more than one natural or

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[6]Incorrectly, Cornell also cites to *County of Clark ex rel. University Medical Center v. Upchurch*, 114 Nev. 749, 961 P.2d 754 (1998), as evidence that NRS 41A.035 applies per plaintiff, per defendant, and per cause of action. In *Upchurch*, we determined that a $50,000 governmental immunity waiver and damage cap pursuant to NRS 41.035(1) was ambiguous as to whether the cap was per political subdivision or aggregate "regardless of the number of defendant political subdivisions." 114 Nev. at 754, 961 P.2d at 758. However, after examining legislative history and related caselaw, we ultimately held that "NRS 41.035 allows one statutory limitation for each cause of action, *regardless of the number of actors*." *Id.* at 754-60, 961 P.2d at 758-61 (emphasis added).

honest interpretation, it is ambiguous, and the plain meaning rule has no application." *Id.* (internal citations omitted). "In construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended." *Id.* (internal citations omitted).

In repealing NRS 41A.031(3)(a), which limited "the noneconomic damages awarded *to each plaintiff from each defendant*," the 2004 amendments to NRS Chapter 41A adopted instead NRS 41A.035, which limits "the amount of noneconomic damages awarded *in such an action*." (Emphases added.) Such an alteration suggests that noneconomic damages are restricted to a per-incident basis. *See McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986) ("It is ordinarily presumed that the [L]egislature, by deleting an express portion of a law, intended a substantial change in the law.").

Particularly helpful is legislative history prior to the 2004 Ballot Question Number 3 that resulted in the addition of NRS 41A.035, which indicated that the aggregate cap was per incident, with no exceptions. *See* Hearing on S.B. 97 Before the Senate Judiciary Comm., 72d Leg. (Nev., March 24, 2003) (testimony of Jack Meyer, The Doctors Company, at 25). The legislative history also discusses a comparison between Nevada's statute and California's analogous statute, noting that the cap in NRS 41A.035 is similarly "per incident, not per claimant, and not per doctor." *Id.* at 10. Additionally, the official explanation to Question No. 3 stated that the previous statute provided that "a person seeking damages in a medical malpractice action is limited to recovering $350,000 in noneconomic damages *from each defendant* . . . . The proposal, if passed, would . . . limit the recovery of noneconomic damages to $350,000 *per action*." *Nevada Ballot Questions 2004*, Question No. 3, Explanation at 14 (emphases added) *available at* https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf 2004 (last visited July 29, 2015).

The intent behind the statute is further evinced by the Legislature's discussion of recent amendments to NRS 41A.035, indicating that the purpose of the 2004 amendments was to clarify that the cap for noneconomic damages is intended to apply per action. *See* Hearing on S.B. 292 Before the Senate Judiciary Comm., 78th Leg. (Nev., March 26, 2015) (statement of John Cotton, Keep Our Doctors in Nevada, at 14).

[Headnote 18]

Based on the foregoing, we conclude that the noneconomic damages cap in NRS 41A.035 applies per incident, regardless of how many plaintiffs, defendants, or claims are involved. Thus, the district court erred in denying the portion of Dr. Tam's motion in limine

requesting that the plaintiffs' noneconomic damages be limited to $350,000 as a whole pursuant to NRS 41A.035.

The district court erred when it found NRS 41A.035 only applies to claims of professional negligence and not to medical malpractice

The district court found that NRS 41A.035 only applies to "professional negligence" claims and not to "medical malpractice" claims. Citing this court's opinion in *Egan v. Chambers*, 129 Nev. 239, 299 P.3d 364 (2013), the district court explained that the terms were essentially mutually exclusive. Dr. Tam argues that professional negligence is broader and includes medical malpractice. Dr. Tam additionally argues that NRS 41A.035 applies because under the statutory definitions, he is a physician, and physicians are covered under professional negligence. Cornell argues that her claims are based on medical malpractice, which is distinct from professional negligence, and following *Egan*'s logic, the statute does not apply.[7]

NRS 41A.035 applies "[i]n an action for injury or death against a provider of health care based upon professional negligence." Under the then-existing statutes, "[p]rofessional negligence" was defined as a "negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death." NRS 41A.015. A "[p]rovider of health care" included a "physician licensed under chapter 630 or 633 of NRS." NRS 41A.017 (2011). NRS 41A.013 defined "[p]hysician [as] a person licensed pursuant to chapter 630 or 633 of NRS," and NRS 630.014 defines "[p]hysician [as] a person who has complied with all the requirements of [NRS Chapter 630] for the practice of medicine." It is clear that Dr. Tam is a physician as defined by NRS 630.014.

What is unclear from our reading of the statutes is the relationship between professional negligence and medical malpractice.[8] NRS 41A.009 (1989) defined "[m]edical malpractice [as] the failure of a physician, hospital or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances." Although not identical, the definitions for both professional negligence and medical malpractice are sim-

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[7]Curiously, Cornell labeled her claim against Dr. Tam as "professional negligence," however, the district court did not address this distinction as the court determined that NRS 41A.035 was unconstitutional.

[8]The Legislature has since clarified this confusion by striking the term "medical malpractice" in NRS Chapter 41A and replacing those references with the term "professional negligence." *See* 2015 Nev. Stat., ch. 439, §§ 1.5, 2, 5, 6, 7, 10, at 2526-2528. The Legislature has also repealed NRS 41A.009 and 41A.013, and provided a new definition for professional negligence under NRS 41A.015, incorporating provisions of the previously used definition of medical malpractice. *Id.* at § 12, at 2529.

ilar and ultimately include negligence by a physician.[9] Moreover, while the definition of medical malpractice is narrower in scope, the definition of professional negligence encompasses almost all of the medical malpractice definition.[10]

This ambiguity is expounded when taking into account the legislative history of these statutes. In 2004, Nevada voters were presented with and approved Question No. 3, the Keep Our Doctors in Nevada initiative, which added NRS 41A.035 to the state's statutes. The initiative was explained to the voters as follows, using professional negligence and medical malpractice interchangeably:

> If passed, the proposal would limit the fees an attorney could charge a person seeking damages against a negligent provider of health care in a *medical malpractice* action. *Professional negligence* means a negligent act, or omission to act, by a provider of health care that is the proximate cause of a personal injury or wrongful death. . . .
>
> The law currently provides that a person seeking damages in a *medical malpractice* action is limited to recovering $350,000 in noneconomic damages from each defendant. . . .
>
> Currently, damages that an injured person is allowed to recover in a *medical malpractice* action may be reduced by benefits the person received from a third party. . . .

Nevada Ballot Questions 2004, Question No. 3, Explanation at 14 (emphases added), *available at* https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf (last visited July 29, 2015). Similarly, the legislative history prior to the voter initiative indicates that the statute would apply to medical malpractice actions, and the discussion surrounding the proposed legislation further conflated the terms:

> Nevada's initiative petition defines *professional negligence* as being the "act or omission to act by a provider of health care in

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[9]This court made a similar observation in *Fierle v. Perez*, 125 Nev. 728, 737, 219 P.3d 906, 912 (2009), *overruled on other grounds by Egan v. Chambers*, 129 Nev. 239, 240-41, 299 P.3d 364, 365 (2013):

> Initially, we note that the definition for professional negligence that was added in 2004 (NRS 41A.015) essentially duplicates the definition for medical malpractice contained in NRS 41A.009. As such, it is not clear whether the references to medical malpractice in NRS Chapter 41A encompass the almost identically defined professional negligence.

[10]"Medical malpractice" includes the broader term "hospital," while "[p]rovider of health care" uses the term "licensed hospital." *See* NRS 41A.009 (1989), NRS 41A.015. Thus, with the exception of an unlicensed hospital, provider of health care is broader than medical malpractice, such that it encompasses medical malpractice.

> the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death." In other words, in a *medical malpractice* case the alleged negligent act must have actually contributed to the injury or the death of a patient. This is logical, it seems appropriate, and it works well in other states.

Hearing on S.B. 97 Before the Senate Judiciary Comm., 72d Leg. (Nev., March 5, 2003) (testimony of Dr. Robert W. Shreck, President, Nevada Medical Association) (emphases added).

Here, the district court relied on *Egan* for the proposition that medical malpractice and professional negligence are essentially mutually exclusive. In *Egan*, we held that NRS 41A.071, which requires an affidavit of merit in medical malpractice claims, applied only to medical malpractice actions, thus partly overruling a previous decision that applied the statute to professional negligence actions as well. 129 Nev. at 240-41, 299 P.3d at 365. NRS 41A.071 did not mention "professional negligence," only "medical malpractice and dental malpractice," so this court turned to the statutory definitions of medical malpractice. *Id*. at 243, 299 P.3d at 367. Because medical malpractice only encompasses claims against physicians licensed pursuant to NRS Chapters 630 and 633, and podiatrists were licensed under NRS Chapter 635, this court determined that a negligence action against a podiatrist, while professional negligence, was outside the purview of medical malpractice. *Id*.

[Headnote 19]

To the contrary, NRS 41A.035 applies to *professional negligence* claims, which by definition of NRS 41A.015 applies to "a provider of health care," and includes physicians licensed pursuant to NRS Chapters 630 and 633. NRS 41A.017. Thus, construing the statutes in harmony and consistent with what reason and public policy suggest the Legislature intended, we conclude that medical malpractice is incorporated into professional negligence, making NRS 41A.035 applicable to medical malpractice actions. Accordingly, we further conclude that the district court erred when it found that NRS 41A.035 only applies to professional negligence claims and not to medical malpractice claims.

CONCLUSION

Based on our analysis, we conclude that the district court erred in finding NRS 41A.035 unconstitutional. We further conclude that the district court erred when it found NRS 41A.035's cap for noneconomic damages applies per plaintiff and per defendant. Finally, we conclude that the district court erred when it found that NRS 41A.035 did not apply to claims for medical malpractice. We there-

fore grant Dr. Tam's petition and instruct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order and to conduct further proceedings consistent with this opinion.

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