CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ON BEHALF OF CLEVELAND RANCH, PETITIONER, *v*. THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE; AND THE HONORABLE ROBERT E. ESTES, SENIOR JUDGE, RESPONDENTS, AND JASON KING, P.E., IN HIS OFFICIAL CAPACITY AS THE NEVADA STATE ENGINEER, THE NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES; AND SOUTHERN NEVADA WATER AUTHORITY, REAL PARTIES IN INTEREST.

No. 65424

January 28, 2016 366 P.3d 1117

Original petition for an extraordinary writ challenging a district court order on judicial review determining that the State Engineer properly applied a water law statute to certain applications to appropriate water.

The supreme court, PARRAGUIRRE, C.J., held that: (1) statute allowing State Engineer to subject newly approved water applications to an incremental use process applies only to approved applications, and (2) Engineer did not retroactively apply statute.

Petition denied.

Hejmanowski & McCrea LLC and *Paul R. Hejmanowski*, Las Vegas; *Kaempfer Crowell* and *Severin A. Carlson*, Reno; *Lionel Sawyer & Collins* and *David N. Frederick* and *Lynda Sue Mabry*, Las Vegas, for Petitioner.

Adam Paul Laxalt, Attorney General, and *Micheline N. Fairbank*, Senior Deputy Attorney General, Carson City, for Real Party in Interest Jason King, P.E., in His Official Capacity as the Nevada State Engineer, Nevada Department of Conservation and Natural Resources, Division of Water Resources.

Lewis Roca Rothgerber, LLP, and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Taggart & Taggart, Ltd.*, and *Paul G. Taggart* and *Gregory H. Morrison*, Carson City; Southern Nevada Water Authority and *Gregory J. Walch* and *Dana R. Walsh*, Las Vegas, for Real Party in Interest Southern Nevada Water Authority.

1. MANDAMUS.
   The party seeking extraordinary writ relief has the burden of demonstrating that the supreme court's extraordinary intervention is warranted.

2. Mandamus.
   Whether extraordinary writ relief will issue is solely within the supreme court's discretion.
3. Mandamus.
   The supreme court may address writ petitions when they raise important issues of law in need of clarification, involving significant public policy concerns, of which the court's review would promote sound judicial economy.
4. Mandamus.
   The supreme court would address petition for extraordinary writ relief in which petitioner sought to bar State Engineer from applying statute allowing Engineer to subject newly appointed water applications to an incremental use process; whether Engineer had improperly applied statute retroactively was a clear question of law, hundreds of parties contested water authority's water permit applications, and the supreme court's intervention would promote judicial economy by determining proper application of a statute that played an important role in a matter that had spanned 25 years and multiple adjudications. NRS 533.3705(1).
5. Appeal and Error.
   The supreme court reviews questions of statutory interpretation and retroactivity de novo.
6. Statutes.
   Statutory language must be given its plain meaning if it is clear and unambiguous; a statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.
7. Water Law.
   Statute allowing State Engineer to subject newly approved water applications to an incremental use process applies only to approved applications. NRS 533.3705(1).
8. Statutes.
   A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.
9. Statutes.
   A statute does not operate retrospectively merely because it draws upon past facts or upsets expectations based in prior law.
10. Water Law.
    State Engineer did not retroactively apply statute allowing Engineer to subject newly approved water applications to an incremental use process by applying statute to applications approved five years after statute's enactment; statute unambiguously applied only upon approval of an application. NRS 533.3705(1).

Before the Court En Banc.

OPINION

By the Court, Parraguirre, C.J.:

NRS 533.3705(1), enacted in 2007, allows the State Engineer to subject newly approved water applications to an incremental use process. In material part, NRS 533.3705(1) provides that "[u]pon

approval of an application to appropriate water, the State Engineer may limit the initial use of water to a quantity that is less than the total amount approved for the application" and then authorize additional amounts for use at a later date, up to the total amount approved for the application. Here, we are asked to determine whether the State Engineer improperly applied NRS 533.3705(1) retroactively by ordering incremental pumping, and thus limiting the initial water use, for certain applications that were filed in 1989 and approved in 2012. We conclude the State Engineer did not give NRS 533.3705(1) an improper retroactive application because the statute unambiguously applies to only approved applications, and the present applications were approved almost five years after NRS 533.3705(1) took effect. Accordingly, we deny petitioner's request for an extraordinary writ barring the State Engineer from applying NRS 533.3705(1) to the disputed water permit applications.

FACTS

In 1989, real party in interest Southern Nevada Water Authority (SNWA) filed various water permit applications[1] with the State Engineer. Those applications sought to appropriate water from the Spring Valley Hydrographic Basin for municipal and domestic purposes in southern Nevada. In 2007, the State Engineer ruled on SNWA's applications, rejecting some and approving the rest subject to incremental development in the form of staged pumping and other restrictions on use, as well as a plan for continued monitoring. Parties opposing SNWA's applications sought judicial review of the State Engineer's ruling, but the district court found no material error. The opponents then sought review from this court, which reversed and remanded, requiring the State Engineer to republish SNWA's applications. *Great Basin Water Network v. Taylor*, 126 Nev. 187, 190, 234 P.3d 912, 914 (2010).

After republishing, many entities, including petitioner Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints (CPB) opposed SNWA's applications. This dispute culminated in "a record long six weeks of administrative hearing" in late 2011. Ultimately, the State Engineer issued Ruling 6164 in March 2012 denying some of SNWA's applications and granting others. Invoking NRS 533.3705(1), the State Engineer subjected SNWA's approved applications to three stages of incremental development and monitoring. That approval allowed a maximum potential water appropriation of 61,127 acre-feet-annually (afa), assuming no material problems arose during the course of the incremental development.

[1]The Las Vegas Valley Water Authority filed the applications, but SNWA later acquired the rights to those applications.

CPB, among others, petitioned the district court for review. The district court rejected CPB's argument that the State Engineer gave NRS 533.3705(1) an improper retroactive effect, concluding the statute applies only to approved applications, and SNWA's applications were not approved until 2012, nearly five years after NRS 533.3705(1) took effect. Nevertheless, the district court reversed and remanded the State Engineer's ruling on other grounds. CPB now petitions this court for an extraordinary writ barring the State Engineer from applying NRS 533.3705(1) to SNWA's applications.

DISCUSSION

[Headnotes 1-3]

CPB has the burden of demonstrating that this court's extraordinary intervention is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). "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). This court may address writ petitions when they "raise important issues of law in need of clarification, involving significant public policy concerns, of which this court's review would promote sound judicial economy." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 142-43, 127 P.3d 1088, 1096 (2006).

[Headnote 4]

We will address CPB's petition because it presents a narrow legal issue concerning a matter of significant public policy, and its resolution will promote judicial economy. *See id.* First, whether the State Engineer improperly applied NRS 533.3705(1) retroactively is a clear question of law. *See Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 820, 313 P.3d 849, 853 (2013). Second, hundreds of parties contested SNWA's applications, which are intended to help secure adequate water for this state's most populous region; therefore, this is a matter of great public importance. Finally, our intervention will promote judicial economy by determining the proper application of a statute that plays an important role in a matter that has spanned 25 years and multiple adjudications. Consequently, our discretionary intervention is warranted, and we must now determine whether the State Engineer properly applied NRS 533.3705(1) to SNWA's applications.

The State Engineer did not apply NRS 533.3705(1) retroactively

[Headnotes 5, 6]

This court reviews questions of statutory interpretation and retroactivity de novo. *Sandpointe Apartments*, 129 Nev. at 820, 313 P.3d at 853. Statutory language must be given its plain meaning if it is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist.*

Court, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.*

NRS 533.3705(1) was enacted in 2007, and it provides:

> Upon approval of an application to appropriate water, the State Engineer may limit the initial use of water to a quantity that is less than the total amount approved for the application. The use of an additional amount of water that is not more than the total amount approved for the application may be authorized by the State Engineer at a later date if additional evidence demonstrates to the satisfaction of the State Engineer that the additional amount of water is available and may be appropriated in accordance with this chapter and chapter 534 of NRS. In making that determination, the State Engineer may establish a period during which additional studies may be conducted or additional evidence provided to support the application.

2007 Nev. Stat., ch. 429, § 3.5(1), at 2015 (codified at NRS 533.3705(1)).

We conclude the State Engineer did not apply NRS 533.3705(1) retroactively because (1) the statute unambiguously applies to only approved applications, and (2) SNWA's applications were approved almost five years after NRS 533.3705(1) took effect.

NRS 533.3705(1) only applies to approved applications

[Headnote 7]

CPB argues NRS 533.3705(1) impermissibly allows the State Engineer to use incremental development to draw out the permit-approval process over many years, in contravention of *Great Basin Water Network v. Taylor*, 126 Nev. 187, 234 P.3d 912 (2010), and the 1989 version of NRS 533.370, which required the State Engineer to accept or reject water appropriation applications within one year. We reject this argument because NRS 533.3705(1) plainly requires the State Engineer to approve a total appropriation before he can require incremental development of that appropriation.[2]

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[2]We decline to address CPB's additional argument that the State Engineer actually used NRS 533.3705(1) to draw out the approval process here beyond one year. The State Engineer approved the material applications here within the time frame set forth in *Great Basin Water Network*. Moreover, he expressly found sufficient evidence to allow SNWA to appropriate 61,127 afa before ordering incremental development starting at 38,000 afa. Whether the State Engineer actually had sufficient evidence that 61,127 afa was available for appropriation is a factual inquiry this court declines to undertake in the present context. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (noting that this court generally will not address factual issues when evaluating writ petitions).

By its own terms, NRS 533.3705(1) only allows incremental development of a water project "[u]pon approval of an application." "Upon approval of an application" unambiguously means "concurrent with" approval of an application or "immediately after" the approval of an application. *See Upon*, *Webster's Third New International Dictionary* (2002) (defining "upon" as "immediately following on," "very soon after," "on the occasion of," or "at the time of"). NRS 533.3705(1) plainly makes application approval and the State Engineer's decision to limit the initial use of water separate events such that application approval triggers the possibility for incremental development. Therefore, we conclude that NRS 533.3705(1) unambiguously applies to only approved applications because reasonably well-informed people cannot reach a different conclusion after reading NRS 533.3705(1)'s plain language. *See D.R. Horton, Inc.*, 123 Nev. at 476, 168 P.3d at 737.

Applying NRS 533.3705(1) here does not constitute a retroactive application

[Headnotes 8, 9]

"[A] statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 155, 179 P.3d 542, 553-54 (2008) (internal quotation marks omitted). However, "a statute does not operate retrospectively merely because it draws upon past facts or upsets expectations based in prior law." *Sandpointe Apartments*, 129 Nev. at 821, 313 P.3d at 854 (internal quotations marks and citations omitted).

[Headnote 10]

Here, the State Engineer applied NRS 533.3705(1) prospectively to applications approved in 2012. NRS 533.3705(1), which was enacted in 2007, unambiguously applies only "[u]pon approval of an application." 2007 Nev. Stat., ch. 429, § 3.5(1), at 2015. The material date here is the date of an application's approval, not filing, and these applications were approved five years after the statute took effect. As such, the State Engineer did not apply NRS 533.3705(1) retroactively here.

Accordingly, CPB is not entitled to the relief it seeks, and we deny its petition.

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

IN THE MATTER OF ESTATE OF LEROY G. BLACK, DECEASED.

WILLIAM FINK, AKA BILL FINK, APPELLANT, *v.* PHILLIP MARKOWITZ, AS EXECUTOR OF THE ESTATE OF LEROY G. BLACK, RESPONDENT.

No. 63960

February 4, 2016 367 P.3d 416

Appeal from a district court order dismissing a will contest. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Purported beneficiary filed a post-probate will contest without timely issuing a citation to the executor of decedent's estate. The district court dismissed action. Purported beneficiary appealed. The supreme court, PARRAGUIRRE, C.J., held that: (1) failure to timely issue citations within three months after a will is admitted to probate deprived court of personal jurisdiction; (2) rule allowing a district court the discretion to enlarge the time when the failure to act was the result of excusable neglect did not apply to deadline to issue citations; but (3) the district court was required to consider whether to extend deadline to issue citations under rule of practice governing motions for extension of time due to excusable neglect.

Vacated and remanded.

Goodsell & Olsen, LLP, and *Michael A. Olsen* and *Thomas R. Grover*, Las Vegas, for Appellant.

Clear Counsel Law Group and *Jonathan W. Barlow* and *Amy K. Crighton*, Henderson, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's interpretation of a statute de novo.
2. STATUTES.
   Language in a statute must be given its plain meaning if it is clear and unambiguous.
3. STATUTES.
   A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.
4. WILLS.
   A failure to timely issue citations to the executor within three months after a will is admitted to probate in connection with the filing of a will contest deprives the court of personal jurisdiction over adverse parties. NRS 137.090.
5. WILLS.
   A citation in a will contest is equivalent to a civil summons in other civil matters. NRS 137.090.
6. APPEAL AND ERROR.
   The supreme court reviews a district court's legal conclusions regarding court rules de novo.

7. COURTS.
   The rules of statutory interpretation apply to the state's rules of civil procedure.
8. WILLS.
   Court rule allowing a district court the discretion to enlarge the time when the failure to act was the result of excusable neglect does not apply to statutory time limits, including the requirement to issue citations to the executor within three months after a will is admitted to probate in connection with the filing of a will contest. NRS 137.090, 155.180; NRCP 6(a), (b).
9. WILLS.
   The district court is required to consider whether to extend the three-month deadline in which to issue citations to the executor after a will is admitted to probate in connection with the filing of a will contest under the rule of practice governing motions for extension of time due to excusable neglect, and whether extending the time is appropriate is a factual inquiry that the district court must undertake. NRS 137.090; EDCR 1.10, 2.01, 2.25.

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

OPINION

By the Court, PARRAGUIRRE, C.J.:

Under NRS 137.090, an individual filing a petition to contest the validity of a will must issue citations to the estate's personal representative and the will's devisees within three months of the will being admitted to probate. In this appeal, we are asked to determine whether a failure to timely issue citations results in dismissal of the will contest and whether a petitioner can move to enlarge the time to issue citations pursuant to NRCP 6(b) or EDCR 2.25. We hold that a failure to timely issue citations deprives the court of personal jurisdiction over those to whom the citations are to be issued. Additionally, we hold that NRCP 6(b) does not apply to statutory time limits. However, we further hold that the district court erred in failing to determine whether petitioner demonstrated excusable neglect under EDCR 2.25 when requesting an enlargement of time to issue the citations. Accordingly, we vacate the district court's order and remand the matter for further proceedings.[1]

FACTS AND PROCEDURAL HISTORY

Appellant William Fink filed a post-probate will contest within days of the statute of limitations expiring but failed to timely issue a citation to Phillip Markowitz, respondent and executor of the estate, in accordance with NRS 137.090. Fink filed a petition to enlarge time for issuing citations, and the probate commissioner rec-

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

ommended the petition be granted, concluding that (1) NRCP 6(b) and EDCR 2.25 granted the court discretion to extend the time limit for issuing citations, and (2) Fink demonstrated excusable neglect as required by both rules. Upon Markowitz's objection, the district court dismissed the will contest, explaining that NRCP 6(b) does not apply to statutory time limits. The district court did not address whether EDCR 2.25 applied in this matter. Fink now appeals.

DISCUSSION

On appeal, Fink argues the district court erred by: (1) concluding his failure to timely issue citations as required under NRS 137.090 justified dismissing the will contest, (2) holding NRCP 6(b) did not apply to the statutory time limits imposed by NRS Chapter 137, and (3) failing to extend time under EDCR 2.25.

[Headnotes 1-3]

This court reviews a district court's interpretation of a statute de novo. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). Language in a statute must be given its plain meaning if it is clear and unambiguous. *Id.* "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.*

A failure to issue citations in accord with NRS 137.090 constitutes grounds for dismissal of a will contest

[Headnote 4]

Fink argues his failure to timely issue citations pursuant to NRS 137.090 does not require dismissal of his will contest. We disagree and hold that a failure to timely issue citations deprives the court of personal jurisdiction over adverse parties.

"After a will has been admitted to probate, any interested person . . . may, at any time within 3 months after the order is entered admitting the will to probate, contest the admission or the validity of the will" by filing a petition with the court. NRS 137.080. NRS 137.090 states that a citation "*must* be issued" "within the time allowed for filing the petition." (Emphasis added.)

"'Must' is mandatory, as distinguished from the permissive 'may.'" *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 239, 277 P.3d 449, 454 (2012). Therefore, the statute's clear and unambiguous language requires citations to be issued within three months after the will is admitted to probate. However, these statutes do not specify what happens in the event one fails to timely issue citations.

[Headnote 5]

A citation in a will contest is equivalent to a civil summons in other civil matters. *See In re Estate of Kordon*, 137 P.3d 16, 18 (Wash. 2006). As defective service of process deprives a court of personal

jurisdiction, *see Gassett v. Snappy Car Rental*, 111 Nev. 1416, 1419, 906 P.2d 258, 261 (1995), *superseded by rule on other grounds as stated in Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 654-56, 6 P.3d 982, 984-85 (2000), so too does a failure to issue citations in a will contest, *see In re Estate of Kordon*, 137 P.3d at 18 (holding that a "failure to issue a citation deprives the court of personal jurisdiction over the party denied process"); *see also* 95 C.J.S. *Wills* § 578 (2011) ("A court acquires personal jurisdiction over an adverse party to a will contest by issuance of a citation. A will contestant's failure to issue a citation on the decedent's personal representative deprives the court of personal jurisdiction over the personal representative."). Therefore, we hold that a failure to issue citations in accord with NRS 137.090 constitutes proper grounds for dismissal.

However, just as Nevada district courts have discretion to enlarge time for service of process upon a showing of good cause, *see Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 596, 245 P.3d 1198, 1200 (2010); *see also* NRCP 4(i), we see no reason to prohibit a district court from enlarging time to issue citations if such discretion is permitted under a procedural rule. Therefore, we now address Fink's claim that NRCP 6(b) or EDCR 2.25 should have been applied to enlarge time to issue the citations.

NRCP 6(b) does not apply to statutory time limits

Fink contends NRCP 6(b) grants district courts the discretion to enlarge time to issue citations under NRS 137.090. We disagree.

[Headnotes 6, 7]

This court reviews a district court's legal conclusions regarding court rules de novo. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). "[T]he rules of statutory interpretation apply to Nevada's Rules of Civil Procedure." *Webb ex rel. Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). Furthermore, in interpreting the language of a rule or statute, this court has repeatedly held that "the expression of one thing is the exclusion of another." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967).

[Headnote 8]

NRCP 6(b) provides, in relevant part, as follows:

> When *by these rules or by a notice given thereunder or by order of court* an act is required or allowed to be done at or within a specified time, . . . the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

(Emphasis added.) Under the rule's plain language, a court has discretion to enlarge time when an act is "required . . . to be done at or within a specified time" under "these rules or by a notice given thereunder or by order of court." NRCP 6(b). The rule does not mention acts to be done pursuant to statutes, and thus, we conclude NRCP 6(b) unambiguously does not apply to statutory time limits.[2] *See Galloway*, 83 Nev. at 26, 422 P.2d at 246; *cf. Romaine v. State Farm Mut. Auto. Ins. Co.*, 87 Nev. 257, 258-59 & n.2, 485 P.2d 102, 103 & n.2 (1971) (holding NRCP 6(a) applied to a statute of limitations period under NRS 11.190 where the rule, by its plain terms, applied to statutory time limits). Therefore, the district court did not err when it held that NRCP 6(b) did not apply to NRS 137.090's time limit.

The district court erred in failing to consider whether to extend time pursuant to EDCR 2.25

Fink also argues that the district court should have considered whether to extend time to issue citations pursuant to EDCR 2.25. We agree.

EDCR 2.25 governs the form of a motion to extend time and states "[a] request for extension made after the expiration of the specified period shall not be granted unless the moving party . . . demonstrates that the failure to act was the result of excusable neglect." EDCR 2.25(a). Further, EDCR 2.25 expressly applies to will contests. EDCR 2.01 ("The rules in Part II govern the practice and procedure of . . . all contested proceedings under Titles 12 and 13 of NRS.").

[Headnote 9]

Unlike NRCP 6(b), EDCR 2.25 does not contain any implicit limitation on the rule's application. Furthermore, Eighth District Court Rules "must be liberally construed . . . to promote and facilitate the administration of justice." EDCR 1.10. This court has also long recognized "the basic underlying policy to have each case decided upon its merits." *Hotel Last Frontier Corp. v. Frontier Props., Inc.*,

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[2]Although NRS 155.180 states "the Nevada Rules of Civil Procedure . . . apply in matters of probate, *when appropriate,*" we hold it would be inappropriate to apply NRCP 6(b) to statutory time limits where subsection (b) omits any reference to statutes, in marked contrast to subsection (a). *Cf.* NRCP 6(a) ("In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, *or by any applicable statute*, the day of the act . . . shall not be included." (emphasis added)). Furthermore, we conclude such a construction best harmonizes NRS 155.180 with NRCP 6(a) and (b). *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) (stating this court seeks to harmonize rules and statutes). However, we note that NRS 155.180 may still apply NRCP 6(b) to probate matters where the action in question is made pursuant to *rule*, rather than *statute*.

79 Nev. 150, 155, 380 P.2d 293, 295 (1963). In light of these principles, we conclude the district court erred by failing to consider whether to extend the time to issue the citations pursuant to EDCR 2.25. Whether extending time is appropriate based on excusable neglect is a factual inquiry that the district court must undertake. *See Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 668, 188 P.3d 1136, 1146 (2008).

CONCLUSION

We conclude that failing to issue citations in a will contest deprives the court of personal jurisdiction over the parties denied process. Furthermore, we hold that the district court properly concluded NRCP 6(b) does not apply to statutory time limits. However, the district court erred in failing to consider whether to enlarge the time to issue the citations pursuant to EDCR 2.25. Accordingly, we vacate the order of the district court and remand for further proceedings.

Douglas and Cherry, JJ., concur.

MB AMERICA, INC., a Nevada Corporation, Appellant, *v.* ALASKA PACIFIC LEASING COMPANY, an Alaska Business Corporation, Respondent.

No. 66860

MB AMERICA, INC., a Nevada Corporation, Appellant, *v.* ALASKA PACIFIC LEASING COMPANY, an Alaska Business Corporation, Respondent.

No. 67329

February 4, 2016 367 P.3d 1286

Consolidated appeals from district court orders granting a motion for summary judgment and awarding attorney fees in a contractual dispute action. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Supplier filed complaint against distributor, seeking declaratory relief that agreement between the parties was valid and that supplier did not breach the agreement and specific performance of mediation provision in agreement. Distributor filed motion for summary judgment. The district court granted the motion and awarded distributor attorney fees. Supplier appealed the granting of the motion and the award of attorney fees. After consolidating the appeals, the supreme court, Saitta, J., held that: (1) as a matter of first impression, prelitigation mediation provision in contract between distributor and supplier constituted an enforceable condition precedent to litigation;

(2) supplier did not comply with mediation provision; (3) distributor did not waive enforcement of mediation provision; (4) supplier's request was not ripe for review; (5) stay of action was not warranted; and (6) distributor was entitled to award of attorney fees.

Affirmed.

Robison Belaustegui Sharp & Low and *Michael E. Sullivan*, Reno, for Appellant.

Laxalt & Nomura, Ltd., and *Marilee Breternitz* and *Holly S. Parker*, Reno, for Respondent.

1. Appeal and Error.
   The supreme court reviews a district court's order granting summary judgment de novo.
2. Judgment.
   Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.
3. Alternative Dispute Resolution.
   Prelitigation mediation provision in contract between distributor and supplier constituted an enforceable condition precedent to litigation.
4. Alternative Dispute Resolution.
   Supplier did not comply with prelitigation mediation provision in contract between distributor and supplier before filing action in district court, when contract stated that mediation would be governed by rules of arbitration association, and supplier did not take required actions under those rules to initiate mediation.
5. Alternative Dispute Resolution.
   Distributor did not waive enforcement of prelitigation mediation provision contained in contract between distributor and supplier, absent evidence that distributor categorically rejected a request for mediation.
6. Alternative Dispute Resolution; Declaratory Judgment.
   Supplier's request for finding that its agreement with distributor was valid and binding on the parties and that supplier had not breached the agreement was not ripe for review, as required to seek declaratory relief, when supplier failed to comply with prelitigation mediation provision in agreement. NRS 30.030, 30.040.
7. Alternative Dispute Resolution.
   Stay of supplier's action against distributor, and an order for the supplier and distributor to mediate, was not warranted after supplier failed to comply with prelitigation mediation provision in contract, under statute addressing stays of action upon entry of arbitration orders; mediation was not arbitration, and thus, arbitration remedies did not apply. NRS 38.221(6), (7).
8. Costs.
   Distributor who received summary judgment in its favor and dismissal of supplier's complaint which sought declaratory judgment that supplier had not breached agreement, was the prevailing party and, therefore, entitled to award of attorney fees under general attorney fee statute. NRS 18.010(1).
9. Appeal and Error.
   An award of attorney fees is reviewed for an abuse of discretion.

10. Appeal and Error.
An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.

11. Costs.
A party prevails under general attorney fees statute if it succeeds on any significant issue in litigation that achieves some of the benefit it sought in bringing suit. NRS 18.010(1).

12. Costs.
To be a prevailing party under general attorney fees statute, a party need not succeed on every issue, but the action must proceed to judgment. NRS 18.010(1).

13. Costs.
An order dismissing a complaint is sufficient to find a prevailing party under general attorney fees statute. NRS 18.010(1).

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Saitta, J.:

This opinion addresses the issue of whether a prelitigation mediation provision in the parties' contract constitutes an enforceable condition precedent to litigation. We hold that it does and that because MB America, Inc. (MBA) did not initiate mediation as required under its agreement with Alaska Pacific Leasing Company, the district court correctly granted Alaska Pacific's motion for summary judgment. Furthermore, because Alaska Pacific was the prevailing party under NRS 18.010, we hold that the district court did not abuse its discretion by awarding Alaska Pacific attorney fees.

FACTUAL AND PROCEDURAL HISTORY

MBA is a Nevada corporation headquartered in Reno, Nevada, selling rock-crushing machines, primarily for commercial purposes. Alaska Pacific is an Alaska business based out of Anchorage, Alaska. MBA and Alaska Pacific entered into an agreement (the Agreement), whereby Alaska Pacific agreed to become a dealer for MBA's line of products.

After termination of the Agreement, a dispute arose regarding more than $100,000 in equipment purchases made by Alaska Pacific, while acting as a dealer under the terms of the Agreement. MBA filed a complaint in the district court seeking (1) declaratory relief that the Agreement was valid and binding on the parties and that MBA had not breached the Agreement, and (2) specific performance of the mediation provision of the Agreement. Subsequently, Alaska Pacific filed a motion for summary judgment, alleging that MBA

had prematurely filed its complaint because it had not complied with the mediation provision in the Agreement. The district court granted Alaska Pacific's motion. Subsequently, the district court awarded Alaska Pacific attorney fees as a prevailing party.

DISCUSSION

MBA argues that the district court erred in granting summary judgment in favor of Alaska Pacific on MBA's complaint for declaratory relief and specific performance because: (1) genuine issues of material fact remain as to whether Alaska Pacific refused to participate in mediation as required by the Agreement and whether Alaska Pacific's prior refusal to mediate rendered any further attempt by MBA to mediate the dispute futile, (2) the district court ignored the purpose and scope of declaratory relief claims in Nevada, (3) the district court erred by dismissing the complaint instead of staying the proceedings and ordering the parties to mediate, and (4) the district court abused its discretion by awarding attorney fees to Alaska Pacific.

The district court did not err in granting summary judgment in favor of Alaska Pacific

[Headnotes 1, 2]

"This court reviews a district court's order granting summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

The prelitigation provision in the parties' contract is a condition precedent to litigation

Although this court has not addressed the issue of whether prelitigation mediation provisions in a contract can constitute a condition precedent to litigation, other jurisdictions have and held that they can. In *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, the United States Court of Appeals for the Seventh Circuit enforced a prelitigation mediation provision by way of summary judgment, stating that the mediation provision was a condition precedent to litigation. 811 F.2d 326, 336 (7th Cir. 1987). The court reasoned that the mediation clause was straightforward in stating that it was a condition precedent to any litigation. *Id.* at 335-36. This required strict compliance with the provision. *Id.* at 336. Although the court entertained the argument that the defendant's conduct constituted a waiver of the

mediation right, the court determined that a nonwaiver provision in the parties' agreement precluded such an argument. *Id.* at 336-37.

Similarly, in *Tattoo Art, Inc. v. TAT International, LLC*, the court noted that "[a] number of courts have found that when parties to a lawsuit have elected not to be subject to a court's jurisdiction until some condition precedent is satisfied, such as mediation, the appropriate remedy is to dismiss the action." 711 F. Supp. 2d 645, 651 (E.D. Va. 2010). The court began with the proposition that "failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal." *Id.* (internal quotations omitted). In analyzing whether a condition precedent existed, the court stated that the agreement entered into by the parties "unambiguously provide[d] that the parties must, at minimum, request mediation of any dispute arising from the [a]greement prior to initiating litigation." *Id.* The *Tattoo Art* court further stated that, "[a]s with any other contract, this [c]ourt cannot simply ignore the clear intent of the parties." *Id.* at 652. As such, the court held "that [p]laintiff [had] failed to satisfy the condition precedent necessary to trigger the right to initiate litigation" and, absent defendant's waiver of rights to mediation, dismissal was proper. *Id.*

[Headnote 3]

In this opinion, we adopt the positions taken in *DeValk* and *Tattoo Art* and hold that the mediation provision in the parties' contract is an enforceable condition precedent to litigation.

MBA did not comply with the prelitigation mediation provision in the Agreement

[Headnote 4]

Here, as the provision at issue unambiguously addresses mediation as a condition precedent to litigation, the terms are given their "usual and ordinary signification." *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 174, 87 P.3d 1054, 1058 (2004) (internal quotations omitted). Paragraph 13 of the Agreement, titled "Disputes and Mediation," states:

> The parties agree that any disputes or questions arising hereunder, including the construction or application of [the] Agreement shall be submitted to mediation between [MBA] and [Alaska Pacific] with the rules of the American Arbitration Association, of which any hearing or meeting should be conducted in Reno, NV. Any mediation settlement by the parties shall be documented in writing. If such mediation settlement modifies the language of this Agreement, the modification shall be put in writing, signed by both parties and added to the Agreement as an attachment.

> If mediation between the parties does not result in a mutual satisfying settlement within 180 days after submission to mediation, then each party will have the right to enforce the obligations of this Agreement in the court of law of Reno, Nevada with all reasonable attorney fees, court costs and expenses incurred by the prevailing party in such litigation to be paid by the other party.

The commercial mediation procedures under paragraph M-2 of the American Arbitration Association's (AAA) "Commercial Arbitration Rules and Mediation Procedures," titled "Initiation of Mediation," states:

> Any party or parties to a dispute may initiate mediation under the AAA's auspices *by making a request for mediation to any of the AAA's regional offices or case management centers* via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at www.adr.org.
>
> *The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable*:
>
> (i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
>
> (ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
>
> (iii) A brief statement of the nature of the dispute and the relief requested.
>
> (iv) Any specific qualifications the mediator should possess.

(Emphases added.)

Paragraph 13 of the Agreement and paragraph M-2 of the commercial mediation procedures, when read together, indicate that MBA had a duty to follow the AAA rules regarding mediation procedures and that those rules require MBA to submit a request for mediation to "any of the AAA's regional offices or case management centers" in order to initiate mediation. MBA is also required to notify Alaska Pacific of any formal request.

It is undisputed that MBA did not take the required actions to initiate mediation. Thus, MBA failed to comply with a prelitigation mediation provision in the Agreement before filing its action in the district court. Nevertheless, MBA argues that it was not required to comply with the prelitigation mediation provision.

MBA's failure to comply with the prelitigation mediation provisions in the Agreement preclude initiation of litigation

[Headnote 5]

MBA contends that it was not required to first exhaust mediation with the AAA, given Alaska Pacific's prior rejections of MBA's informal mediation requests. MBA disagrees with the district court's characterization of a mediation provision as an "administrative remedy," but contends that even if it were, "it is well established that 'the exhaustion doctrine only applies to *available* administrative remedies.'" MBA relies on *Malecon Tobacco, LLC v. State, Department of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 476 (2002), as support for the proposition that "exhaustion is not required when a resort to administrative remedies would be futile." MBA states that it did not file a formal request with the AAA because it would have been futile to do so, and therefore, it did not have to exhaust the mediation remedy prior to filing its complaint.

We agree with MBA that the district court erred in characterizing mediation as an administrative remedy. The district court cited no authority to support that characterization, and indeed, this court has distinguished between mediation and administrative adjudication. *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 891 n.2, 266 P.3d 602, 605 n.2 (2011) ("[T]he purpose of mediation . . . is not to adjudicate or issue findings, instead it is a process meant to define, evaluate, make recommendations on issues, and try to settle issues." (citing *Guzman v. Laguna Dev. Corp.*, 219 P.3d 12, 16 (N.M. Ct. App. 2009))).

Although the district court incorrectly based its findings on a mistaken assumption that a mediation provision is an administrative remedy, it nevertheless reached the correct result. As the prelitigation mediation provision constituted a condition precedent to litigation, and MBA initiated litigation without complying with the prelitigation mediation provision in the Agreement, the district court's order granting summary judgment was proper. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598-99, 245 P.3d 1198, 1202 (2010) (holding that a district court's order will be affirmed "if the district court reached the correct result, even if for the wrong reason").

To the extent that MBA argues that Alaska Pacific's alleged conduct was a waiver of Alaska Pacific's right to mediation as a condition precedent to litigation, *see DeValk*, 811 F.2d at 336-37, this argument also fails. MBA provides several examples of what it claims are Alaska Pacific's rejections of MBA's efforts to pursue mediation prior to MBA's initiation of litigation. First, MBA proffers a letter dated February 27, 2014, in which MBA claims it informed Alaska Pacific that any disputes arising under the Agreement needed to be

sent to mediation in Reno, Nevada. The relevant portion of the letter states:

> Lastly, under paragraphs 12 and 13 of the Agreement, any disputes or questions arising under the application of the Agreement shall be submitted to mediation pursuant to the rules of the [AAA] and the hearing shall be conducted in Reno, Nevada pursuant to Nevada law. *Hopefully this will not be necessary*.

(Emphasis added.) However, nothing in this letter indicates that MBA requested mediation. In fact, MBA's statement that "[h]opefully this will not be necessary" actually works *against* MBA's assertion because it implies that this letter does not constitute a request for mediation.

MBA next relies on a letter that it received from Alaska Pacific in reply to MBA's February 27, 2014, letter threatening litigation. In relevant part, the letter states:

> Please note that Paragraph 13 ("Disputes and Mediation") of the Agreement does not apply in this matter as we do not contest [MBA's] right to cancel the agreement, but rather take issue with the fact that [MBA] acted in bad faith by accepting our payment for units which we were not obligated to purchase and then cancelling the Agreement less than eleven (11) months later.

Although this letter may demonstrate a belief by Alaska Pacific that mediation did not apply, it does not demonstrate a *rejection* by Alaska Pacific of a mediation request by MBA.

MBA also relies on a declaration by Miriano Ravazzolo, Chief Executive Officer of MBA, and an affidavit of Michael E. Sullivan, attorney of record for MBA, for its contention that Alaska Pacific rejected MBA's requests for mediation. Ravazzolo's declaration states that "[c]ounsel for [MBA] requested mediation in his February 27, 2014 letter to [Alaska Pacific's] Vice President David Faulk. Unfortunately, [Alaska Pacific] rejected that invitation for mediation . . . ." As discussed above, contrary to Ravazzolo's declaration, the letter does not request mediation. Therefore, there was no mediation request for Alaska Pacific to reject, and Ravazzolo's statement does not support MBA's argument that a formal request for mediation was futile.

Sullivan's affidavit states that he "attempted in good faith to obtain the consent of [Alaska Pacific] to participate in mediation." He then states:

> Additionally, after this letter was sent out I spoke with representatives in Alaska for [Alaska Pacific] and advised them

> that [MBA] would participate in mediation but it would need to be in Reno, Nevada. Unfortunately, [Alaska Pacific] and Mr. Faulk ignored those requests and instead sent threatening letters indicating that [Alaska Pacific] would be filing suit in Alaska.

Sullivan's affidavit finally states that

> [a]t no time since the filing of this lawsuit has [Alaska Pacific] ever agreed to participate in mediation in Reno, Nevada even though the undersigned has requested both local Reno counsel . . . and [Alaska Pacific's] counsel to participate in mediation in Reno.

However, when taken in the light most favorable to MBA—that is, when the allegations in the affidavits are taken at face value—this does not constitute evidence that Alaska Pacific refused to engage in mediation. Although Sullivan states that Alaska Pacific never agreed to participate in mediation, he does not state that Alaska Pacific categorically rejected a request for mediation. Therefore, Alaska Pacific's conduct cannot be seen as a waiver of its right to mediation.

The complaint for declaratory relief was not ripe for judicial review

[Headnote 6]

MBA also contends that the district court erred in granting Alaska Pacific's motion for summary judgment by ignoring the purpose and scope of declaratory relief claims in Nevada. It contends that it appropriately sought judicial assistance to declare the obligations of the parties to conduct mediation in Reno, Nevada, pursuant to NRS 30.030 and NRS 30.040.

In *Kress v. Corey*, this court stated that the Uniform Declaratory Judgment Act opened the door "to the adjudication of innumerable complaints and controversies not theretofore capable of judicial relief, and courts may now function to vindicate challenged rights, clarify and stabilize unsettled legal relations and remove legal clouds which create insecurity and fear." 65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948) (citation omitted) (internal quotations omitted).

Kress also included the four elements that must be met before declaratory relief may be granted:

> (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Id. at 26, 189 P.2d at 364 (internal quotations omitted); *see also Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (holding that the four elements described in *Kress* constituted the requirements for a justiciable controversy in a declaratory relief action).

Here, as discussed above, the issues are not ripe for judicial review because MBA failed to comply with the mediation terms of the agreement. Paragraph 13 of the Agreement states:

> The parties agree that *any disputes or questions arising hereunder*, including the construction or application of [the] Agreement *shall be submitted to mediation* between [MBA] and [Alaska Pacific] with the rules of the American Arbitration Association, of which any hearing or meeting should be conducted in Reno, NV.

(Emphases added.) There is no dispute that the Agreement provides the formal requirements for mediation. The language of the Agreement clearly establishes that disputes "shall be submitted to mediation." MBA failed to comply with the terms of the Agreement by neglecting formally to submit the dispute to mediation.

Thus, the issue was not ripe for judicial review and the district court properly dismissed MBA's complaint for declaratory relief. Even assuming that the complaint for declaratory relief was ripe for judicial review, the issue is now moot because following the filing of the present appeal, the parties participated in a mediation/settlement conference process.

The district court did not err by refusing to stay the proceedings

[Headnote 7]

MBA also contends that the district court erred by not staying the proceedings and ordering the parties to mediate. MBA relies on NRS 38.221(6)-(7) and the unpublished order in *AJS Construction, Inc. v. Pankopf*, Docket No. 60729 (Order of Summary Reversal and Remand, September 25, 2013),[1] for this proposition. Because the authorities cited by MBA address arbitration, as opposed to mediation, they are inapposite here. Indeed, the United States Court of Appeals for the Eleventh Circuit has stated that "the law of arbitration is in nearly every respect an illogical foundation for enforcement of mediation agreements." *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1240 (11th Cir. 2008) (internal quotations omitted). The court also held that "because the mediation

[1]MBA's reliance on this unpublished order is misplaced. Although amendments to the Nevada Rules of Appellate Procedure allow for citation to unpublished orders, the amendments apply only to orders entered on or after January 1, 2016. As the *AJS Construction* order was entered prior to January 1, 2016, it is not persuasive.

process does not purport to adjudicate or resolve a case in any way, it is not 'arbitration,'" and thus arbitration remedies, such as "mandatory stays and motions to compel, are not appropriately invoked to compel mediation." *Id.*

Accordingly, the district court did not err by refusing to stay the proceedings.

The district court properly awarded attorney fees to Alaska Pacific as a prevailing party

[Headnote 8]

MBA argues that the district court abused its discretion in granting Alaska Pacific's motion for attorney fees as Alaska Pacific was not a "prevailing party because it did not succeed on any significant issue of the case."

[Headnotes 9, 10]

An award of attorney fees is reviewed for an abuse of discretion. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006) (reviewing an award of attorney fees for an abuse of discretion). An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law. *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660-61 (2004) (holding that relying on factual findings that are "clearly erroneous or not supported by substantial evidence" can be an abuse of discretion (internal quotations omitted)); *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (holding that a decision made "in clear disregard of the guiding legal principles [can be] an abuse of discretion").

Alaska Pacific was the prevailing party

[Headnotes 11-13]

The district court awarded attorney fees to Alaska Pacific based on NRS 18.010(1), which provides that the "compensation of an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law." "A party . . . prevail[s] under NRS 18.010 if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 6, 10, 106 P.3d 1198, 1200 (2005) (internal quotations omitted). "To be a prevailing party, a party need not succeed on every issue," *LVMPD v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015), but the action must proceed to judgment, *Works v. Kuhn*, 103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987) ("[A] party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not 'proceeded to judgment.'"), *disap-*

proved of on other grounds by Sandy Valley Associates v. Sky Ranch Estates Owners Ass'n, 117 Nev. 948, 955 n.7, 35 P.3d 964, 969 n.7 (2001). An order dismissing a complaint is sufficient to find a prevailing party. *See Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1094, 1096, 901 P.2d 684, 687, 688 (1995).

Here, the district court did not abuse its discretion by granting attorney fees to Alaska Pacific, as a summary judgment in favor of Alaska Pacific and dismissal of MBA's complaint were sufficient to find Alaska Pacific a prevailing party, and as such, entitled to an award of attorney fees under NRS 18.010. *See Semenza*, 111 Nev. at 1094, 1096, 901 P.2d at 687-88.

CONCLUSION

The district court did not err in granting summary judgment in favor of Alaska Pacific because MBA did not comply with a prelitigation condition precedent for mediation contained in the Agreement. Furthermore, the district court did not abuse its discretion in awarding attorney fees to Alaska Pacific because it was the prevailing party. Accordingly, we affirm the district court order granting summary judgment and its award of attorney fees.

GIBBONS and PICKERING, JJ., concur.

THE STATE OF NEVADA DEPARTMENT OF TRANSPORTATION, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE, RESPONDENTS, AND JORGENSON & KOKA, LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP; PWREO EASTERN AND ST. ROSE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND CITY OF HENDERSON, A MUNICIPAL CORPORATION, REAL PARTIES IN INTEREST.

No. 67465

February 25, 2016 368 P.3d 385

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

Urgent care facility brought action against Nevada Department of Transportation (NDOT), building owner, and City for negligence based on flooding that occurred on premises, and owner filed cross-claim against NDOT and City for negligence, indemnity, contribution, and declaratory relief. The district court denied NDOT's

motion to dismiss. NDOT petitioned for writ of mandamus. The supreme court, HARDESTY, J., held that NDOT is not a design professional under statute providing requirements for suits against professionals.

Petition denied.

Adam Paul Laxalt, Attorney General, and *Roger K. Miles*, Deputy Attorney General, Carson City, for Petitioner.

Josh M. Reid, City Attorney, and *Nancy D. Savage*, Assistant City Attorney, Henderson, for Real Party in Interest City of Henderson.

Lee, Hernandez, Landrum & Garofalo and *David S. Lee* and *Charlene N. Renwick*, Las Vegas, for Real Parties in Interest PWREO Eastern and St. Rose, LLC.

Reisman Sorokac and *Robert R. Warns, III*, Las Vegas, for Real Party in Interest Jorgenson & Koka, LLP.

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. NRS 34.160.
2. MANDAMUS.
   A writ of mandamus is generally not available when an adequate and speedy legal remedy exists. NRS 34.160.
3. PROHIBITION.
   Nevada Department of Transportation was not entitled to writ of prohibition after the district court denied its motions to dismiss negligence claim and cross-claim regarding flood damage, where the district court had jurisdiction to rule on motions to dismiss. NRS 34.320.
4. MANDAMUS.
   The supreme court would consider petition for writ of mandamus brought by Nevada Department of Transportation (NDOT) regarding its motions to dismiss negligence claim and cross-claim based on lack of expert affidavit by flooding victims, even though NDOT appeared to have plain, speedy, and adequate remedy to denial of motions in form of appeal from any judgment rendered against it, when applicability of expert affidavit statute to NDOT raised important legal issue in need of clarification and interests of sound judicial economy and administration favored resolving writ petition. NRS 11.258, 34.160.
5. APPEAL AND ERROR.
   The district court's legal conclusions are reviewed de novo.
6. STATES.
   Nevada Department of Transportation (NDOT) is not a design professional, as envisioned by the statute regarding actions involving nonresidential construction against design professionals, and therefore, the statute's requirements for expert affidavit are inapplicable to NDOT. NRS 11.258, 11.2565(1)(a), (2)(b).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this original writ proceeding, we are asked to consider whether a complaint alleging professional negligence in an action filed against petitioner State of Nevada Department of Transportation (NDOT) must be accompanied by an attorney affidavit and an expert report pursuant to NRS 11.258. Because we conclude that NDOT is not a design professional as envisioned by the Legislature in NRS 11.2565(1)(a), we further conclude that the requirements of NRS 11.258 are inapplicable to NDOT since the action would not statutorily qualify as "an action involving nonresidential construction." NRS 11.258(1). Accordingly, we deny this petition.

FACTS AND PROCEDURAL HISTORY

Real party in interest Jorgenson & Koka, LLP (J&K) filed suit against NDOT and real parties in interest PWREO Eastern and St. Rose, LLC (collectively, PWREO) and the City of Henderson. PWREO owned a commercial shopping center in Henderson, Nevada, and leased a portion of the shopping center to J&K for an urgent care facility. In its amended complaint, J&K alleged that water entered its premises on two separate occasions and that NDOT failed to prevent the flooding. J&K asserted a claim of negligence against NDOT for failing to properly design, construct, maintain, and/or repair a state highway located adjacent to J&K's premises. PWREO filed a cross-claim against NDOT and the City, asserting claims of negligence, equitable indemnity, implied indemnity, contribution, and declaratory relief.

NDOT filed motions to dismiss the amended complaint and the cross-claim for failure to comply with NRS 11.256-.259. The district court denied the motions after finding that NDOT is not "primarily engaged in the practice of professional engineering" and, as such, all claims brought against NDOT are not subject to the mandatory filing requirements of NRS 11.256-.259. This petition for writ relief followed.

DISCUSSION

Writ relief is appropriate

[Headnotes 1-3]

"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 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)).[1]

[Headnote 4]

Although NDOT appears to have a plain, speedy, and adequate remedy in the form of an appeal from any judgment rendered against it, we exercise our discretion to consider this petition because the applicability of NRS 11.258 to NDOT raises an important legal issue in need of clarification. Furthermore, the interests of sound judicial economy and administration favor resolving this writ petition.

NRS 11.258 does not apply to NDOT

[Headnote 5]

NRS 11.258(1) provides that

> in an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney:
>
> (a) Has reviewed the facts of the case;
>
> (b) Has consulted with an expert;
>
> (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and

[1]Alternatively, NDOT seeks a writ of prohibition. A writ of prohibition is applicable when a district court acts "without or in excess of [its] jurisdiction." NRS 34.320; *see also Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). A writ of prohibition is inappropriate here because the district court had jurisdiction to rule on the motions to dismiss. *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (explaining that we will not issue a writ of prohibition "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration").

> (d) Has concluded on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact.

Pursuant to NRS 11.258(3), the attorney's affidavit must also be accompanied by an expert report. NRS 11.2565(1) defines an "[a]ction involving nonresidential construction" as one that:

> (a) Is commenced against a design professional; and
> (b) Involves the design, construction, manufacture, repair or landscaping of a nonresidential building or structure, of an alteration of or addition to an existing nonresidential building or structure, or of an appurtenance, including, without limitation, the design, construction, manufacture, repair or landscaping of a new nonresidential building or structure, of an alteration of or addition to an existing nonresidential building or structure, or of an appurtenance.

The district court concluded that the claims against NDOT are not actions concerning nonresidential construction pursuant to NRS 11.2565(1), thus an affidavit and expert report were not necessary. "We review the district court's legal conclusions de novo." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

NDOT is not a design professional

NDOT argues that it is a design professional because its employees hold professional engineering licenses and it primarily engages in professional engineering. We disagree. NRS 11.2565(2)(b) defines "[d]esign professional" as "a person who holds a professional license or certificate issued pursuant to chapter 623 [Architecture, Interior Design and Residential Design], 623A [Landscape Architects] or 625 [Professional Engineers and Land Surveyors] of NRS *or* a person primarily engaged in the practice of professional engineering, land surveying, architecture or landscape architecture." (Emphasis added.)

Not all NDOT employees are statutorily required to be licensed professional engineers. *See* NRS 408.106 (setting forth the makeup and qualifications of the NDOT board of directors but not requiring members to solely be licensed professional engineers); NRS 408.163 (setting forth the qualifications for the NDOT director but not requiring the director to be a licensed professional engineer); NRS 408.178(1)-(2) (setting forth the qualifications for NDOT deputy directors and the chief engineer and requiring the chief engineer to "be a licensed professional engineer"). Moreover, it cannot be said that NDOT is "primarily engaged in the practice of professional

engineering." NRS 11.2565(2)(b). NRS 625.050(1) defines "professional engineering" as

> (a) Any professional service which involves the application of engineering principles and data, such as surveying, consultation, investigation, evaluation, planning and design, or responsible supervision of construction or operation in connection with any public or private utility, structure, building, machine, equipment, process, work or project, wherein the public welfare or the safeguarding of life, health or property is concerned or involved.
>
> (b) Such other services as are necessary to the planning, progress and completion of any engineering project or to the performance of any engineering service.

NDOT engages in several of these activities. *See, e.g.*, NRS 408.200(1), (3) (stating that NDOT director's duties include investigating the best approach for highway construction and maintenance throughout the state and consulting with county officials regarding streets and highways in their counties); NRS 408.233(2)(c) (providing that NDOT planning division's duties include "evaluat[ing] the [department's] policies, plans, proposals, systems, programs and projects"); NRS 408.234(2)(i), (k) (stating that NDOT planning division shall "[i]nvestigate possible sources of money" for promotion of and participation in programs for bicycle transportation on state roadways). However, NDOT's board of directors is the "custodian of the state highways and roads," NRS 408.100(5), and its director's duties include "construction, reconstruction, improvement, maintenance and repair of all highways" in Nevada, NRS 408.195. Thus, while some NDOT employees may be engaged in areas of professional engineering, we cannot conclude that NDOT is "primarily engaged in the practice of professional engineering" as contemplated by NRS 11.2565(2)(b).[2]

Finally, NRS 11.2565(2)(b) defines "[d]esign professional" as "*a person* who holds a professional license or certificate . . . or *a person* primarily engaged in the practice of professional engineering." (Emphases added.) "Person" is defined as "a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. The term does not include a government, governmental agency or political subdivision of a government." NRS 0.039. As a government entity, NDOT does not fall within this definition.

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[2]Alternatively, NDOT argues that it primarily engages in architecture, landscape architecture, and land surveying. However, identical to our analysis above, these activities are also only a portion of the activities in which NDOT engages. Thus, this argument lacks merit.

[Headnote 6]

Accordingly, for the reasons set forth above, we conclude that NDOT is not a design professional as envisioned by the Legislature in NRS 11.2565(1)(a).[3] As such, the requirements of NRS 11.258 are inapplicable to NDOT since the action would not statutorily qualify as "an action involving nonresidential construction." NRS 11.258(1). Because NRS 11.258 is inapplicable to NDOT, we conclude that the district court did not err in denying NDOT's motion to dismiss, and we thus deny this petition.[4]

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

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[3]Because both subsections of NRS 11.2565(1) must be met in order for a claim to be classified as an "[a]ction involving nonresidential construction" and we have determined that NDOT does not qualify as a design professional under subsection (a), we need not consider whether subsection (b) has been satisfied.

[4]NDOT also argues that NRS 11.259 mandates dismissal with prejudice. Because we conclude that the district court did not err in denying NDOT's motions to dismiss, we do not address this argument.