JOSE AZUCENA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 74071

September 5, 2019 448 P.3d 534

Appeal from a judgment of conviction, pursuant to a jury verdict, of twelve counts of lewdness with a child under the age of 14; seven counts of child abuse, neglect or endangerment; five counts of indecent exposure; four counts of attempted lewdness with a child under the age of 14; and one count each of first-degree kidnapping and sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Reversed and remanded.

Darin Imlay, Public Defender, *P. David Westbrook* and *Deborah L. Westbrook*, Chief Deputy Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Krista D. Barrie*, Chief Deputy District Attorney, and *Christopher S. Hamner*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Hardesty, J.:

During voir dire in this criminal case, the trial judge threw a book against the wall, cursed, and berated, yelled at, and threatened a prospective juror for expressing her belief that she could not be impartial. We conclude that such behavior and statements constitute judicial misconduct and may have discouraged other prospective jurors from answering candidly about their own biases. Because we cannot be convinced that an impartial jury was selected under these circumstances where the judge did nothing to alleviate the intimidating atmosphere that he created, we reverse and remand for a new trial.

FACTS

Appellant Jose Azucena was charged with multiple sex offenses against children and other related offenses. His case proceeded to a jury trial. During the second day of voir dire, a prospective juror stated that she did not think she could be unbiased toward Azucena because of her exposure to child abuse in her work as a nurse. The following colloquy took place between the trial judge and the prospective juror:

THE COURT: So you didn't say that yesterday. All right.

PROSPECTIVE JUROR NO. 177: Well, I said I had other issues.

THE COURT: No, listen, what—what we're not going to have in this jury is people coming in overnight and thinking up shit and try to make shit up now so they can get out of the jury. That's not going to happen. All right. All right. Because if I find that someone said something yesterday under oath and changes it because they're trying to fabricate something to get out of serving on this jury, there's going to be repercussions. All right.

PROSPECTIVE JUROR NO. 177: I did say—

THE COURT: Now, what's going on here?

PROSPECTIVE JUROR NO. 177: I did say.

THE COURT: Tell me what's going on.

PROSPECTIVE JUROR NO. 177: I said I had other issues yesterday. And you said you'd get back to me.

THE COURT: All right. So—so why you got issues? Why can't you—you're—you're saying that you can't be fair and impartial to both sides. You're going to completely throw out our entire justice system because you don't want to be fair and impartial.

[DEFENSE COUNSEL]: Your Honor, may we approach?

THE COURT: Is that what you're saying?

[DEFENSE COUNSEL]: Your Honor?

THE COURT: No, you can't approach. You're not going to be fair and impartial?

PROSPECTIVE JUROR NO. 177: Like I said, with my nursing history and I've been involved with child abuse and I've been involved with incest with young girls that deliver, 13-years-old, it makes me rather, you know, biased.

THE COURT: Ma'am, you're—you're off this jury. You're off this jury.

PROSPECTIVE JUROR NO. 177: Okay.

THE COURT: You're removed.

PROSPECTIVE JUROR NO. 177: Okay.

THE COURT: Go home. All right. I don't like your attitude.

Video of the proceedings shows the judge throwing a book against the wall when yelling at the prospective juror, "You're going to completely throw out our entire justice system because you don't want to be fair and impartial." After excusing the prospective juror,

the district court continued voir dire of the remaining venire. The next prospective juror to be questioned admitted that she had been sexually abused as a child but stated that she would not be biased. No other juror subsequently disclosed any bias or expressed any concerns about being impartial.

Later, during a break and outside the presence of the venire, Azucena moved to dismiss the entire venire out of concern that the judge's behavior and language in admonishing the prospective juror had "a chilling effect on the" rest of the voir dire, such that the remaining jurors would not be comfortable in expressing any bias they might have out of fear of the judge's reaction. The trial judge denied the request as "ludicrous," explaining that the prospective juror had changed her story and that the judge needed to make it known to the venire that they could not lie to get out of jury service. The district court then proceeded with voir dire. Trial began the next day and the jury eventually returned guilty verdicts on most of the counts with which Azucena was charged. Azucena appealed.

DISCUSSION

Azucena argues that the district court's misconduct during voir dire and denial of his request for a new venire violated his right to a fair trial by an impartial jury. He contends that the judge's behavior and statements to the prospective juror had a "chilling effect" on voir dire and tainted the entire venire. We agree.

Standard of review

We have previously "held that judicial misconduct falls within the category of error which must normally be preserved for appellate review," *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995); *see also Oade v. State*, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998), but we have not addressed the standard for reviewing preserved claims of judicial misconduct. Here, Azucena preserved the issue by moving to dismiss the venire during voir dire based on the judge's conduct and its impact on the impartiality of the jury. This sufficiently notified the district court of Azucena's concerns and afforded the judge the opportunity to inquire into and cure the prejudicial effect of any misconduct.

Because we have not previously set forth the standard for reviewing a preserved claim of judicial misconduct during voir dire, we do so now. The district court has broad discretion in conducting voir dire, and this court generally will not overturn its decision regarding impartiality of the jury absent an abuse of discretion. *Cf. Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("[*V*]*oir dire* is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." (internal quotation marks omitted)); *United States v. Rowe*, 106 F.3d 1226, 1230 (5th Cir. 1997) (review-

ing a motion to dismiss a jury panel for an abuse of discretion); *United States v. Bear Runner*, 502 F.2d 908, 911 (8th Cir. 1974) ("[I]t is fundamental that the trial court has broad discretion in deciding what questions to ask [during voir dire] and that its rulings will not be reversed absent an abuse of discretion."). However, where the challenge is based on alleged misconduct by the trial judge, which requires an evaluation of the judge's own conduct, we believe a less deferential standard of review is warranted. *See State v. Gaither*, 156 P.3d 602, 610 (Kan. 2007) (reviewing "a claim of judicial misconduct using an unlimited standard"). We therefore will determine de novo whether judicial misconduct occurred. *Cf. Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (recognizing that attorney misconduct presents a question of law subject to de novo review). In reviewing a claim of judicial misconduct, we consider the particular circumstances and facts surrounding the alleged misconduct to determine whether it was of such a nature as to have prejudiced the defendant's right to a fair trial. *See Kinna v. State*, 84 Nev. 642, 646-48, 447 P.2d 32, 35-36 (1968).

The trial judge committed misconduct during voir dire

"A trial judge has a responsibility to maintain order and decorum in trial proceedings." *Oade*, 114 Nev. at 621, 960 P.2d at 338. The judicial canons require a judge to "be patient, dignified, and courteous to . . . jurors," NCJC Canon 2, Rule 2.8(B), and to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and . . . avoid impropriety and the appearance of impropriety," NCJC Canon 1, Rule 1.2. We have previously "urged judges to be mindful of the influence they wield" over jurors, as a trial judge's words and conduct are likely "to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced." *Parodi*, 111 Nev. at 367-68, 892 P.2d at 589-90 (internal quotation marks omitted).

Here, the trial judge accused a prospective juror of fabricating an excuse (or, in the judge's own words, "thinking up shit and try[ing] to make shit up") to get out of jury service. The judge warned the venire of repercussions if a prospective juror were to change what he or she previously stated under oath in order to avoid serving on the jury. The judge then threw a book at the wall and berated the prospective juror for stating that she could not be fair and impartial to the defendant.

We are mindful that district court judges are often faced with a myriad of excuses from prospective jurors who wish to avoid sitting on a jury. It is clear from the judge's comments and behavior that he was frustrated by the prospective juror's explanation. And based on his reasoning in denying Azucena's motion to dismiss the venire, the judge's intent was to make clear to all of the prospective jurors

that they could not lie or make up excuses to avoid jury duty. While we recognize the frustration that the judge experienced, it was inappropriate to throw a book and curse and yell at the prospective juror. Trial judges are expected to treat jurors, as well as everyone else in the courtroom, with patience and dignity, and to act in a manner that promotes public confidence in the integrity of the judiciary at all times. As articulated by the Supreme Court of Kansas, the canons of judicial conduct impose high standards on judges:

> The judge should be the exemplar of dignity and impartiality, should exercise restraint over judicial conduct and utterances, should suppress personal predilections, and should control his or her temper and emotions. The judge should not permit any person in the courtroom to embroil him or her in conflict and should avoid conduct which tends to demean the proceedings or to undermine the judge's authority in the courtroom.

State v. Miller, 49 P.3d 458, 467 (Kan. 2002). The trial judge's words and actions during voir dire in this case fell regrettably short of those high standards.

Having determined that the trial judge's conduct during voir dire was inappropriate and constituted judicial misconduct, we must now decide whether the misconduct prejudiced Azucena's right to a fair trial such that a new trial is warranted.

The judicial misconduct deprived Azucena of his constitutional right to a fair trial before an impartial jury

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. U.S. Const. amend. VI; Nev. Const. art. 1, § 3. "The importance of a truly impartial jury, whether the action is criminal or civil, is so basic to our notion of jurisprudence that its necessity has never really been questioned in this country." *Whitlock v. Salmon*, 104 Nev. 24, 27, 752 P.2d 210, 212 (1988) (citing *Bear Runner*, 502 F.2d at 911). The voir dire process is a crucial means of ensuring the defendant's right to an impartial jury, as it allows the parties and the district court "to identify unqualified jurors" and "to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Morgan*, 504 U.S. at 729-30 (internal quotation marks omitted); *see also Whitlock*, 104 Nev. at 27, 752 P.2d at 212 ("The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given."). Voir dire is effective, however, only if the prospective jurors answer candidly. While we generally presume that jurors answer questions honestly during voir dire, *see Rowe*, 106 F.3d at 1229; *State v. Barnes*, 481 S.E.2d 44, 56 (N.C. 1997), that presumption disappears "when jurors are given reason to fear reprisals for truthful responses," *Rowe*,

106 F.3d at 1229. Creating such fear in the jurors "cut[s] off the vital flow of information from venire to court," thus depriving the defendant of an impartial jury. *Id.* at 1230.

Here, the trial court's statements and conduct with the prospective juror may have discouraged other prospective jurors from responding honestly about their own biases out of fear of repercussions. Because the judge created an atmosphere of intimidation and did nothing to alleviate the impact of his behavior, we cannot be confident that an impartial jury was selected.

The State argues that any judicial misconduct during voir dire was harmless and therefore does not warrant reversal. When considering whether judicial misconduct warrants reversal, we generally will consider the strength and extent of the evidence of guilt. *Kinna*, 84 Nev. at 647, 447 P.2d at 35. "However, even when evidence is quite apparent, misconduct may so interfere with the right to a fair trial as to constitute grounds for reversal." *Id.* We conclude this is such a case. The misconduct here interfered with the right to an impartial jury. As such, the strength and weight of the evidence does not afford us confidence in the verdict. *See Rowe*, 106 F.3d at 1230 (explaining that a defendant's right to an impartial jury may never be treated as harmless, and a defendant does not need to "show specific prejudice from a *voir dire* procedure that cut off meaningful responses to critical questions"); *see also Gomez v. United States*, 490 U.S. 858, 876 (1989) (stating that the right to an impartial jury is a "basic fair trial right[ ] that can never be treated as harmless" (internal quotation marks omitted)).

Accordingly, we reverse the judgment of conviction and remand for a new trial before a different district judge.[1]

STIGLICH and SILVER, JJ., concur.

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[1]Azucena raises several other issues on appeal, including that the district court abused its discretion in admitting testimony at trial that exceeded the scope of NRS 51.385, and that his convictions were not supported by sufficient evidence. We agree that the district court abused its discretion in admitting testimony exceeding the scope of NRS 51.385, but we reject his claim that the evidence was insufficient to support his convictions. *See* NRS 200.366; NRS 200.508(1); NRS 201.230; *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (providing that in reviewing a challenge to the sufficiency of the evidence, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). Because we reverse Azucena's convictions based on the district court's improper conduct during voir dire, we decline to address the remaining issues raised on appeal.

MMAWC, LLC, DBA WORLD SERIES OF FIGHTING, A NEVADA LIMITED LIABILITY COMPANY; BRUCE DEIFIK, AN INDIVIDUAL; AND NANCY AND BRUCE DEIFIK FAMILY PARTNERSHIP, LLLP, A COLORADO LIMITED LIABILITY PARTNERSHIP, APPELLANTS, *v.* ZION WOOD OBI WAN TRUST; SHAWN WRIGHT, AS TRUSTEE OF ZION WOOD OBI WAN TRUST; AND WSOF GLOBAL, LLC, A WYOMING LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 75596

September 5, 2019 448 P.3d 568

Appeal from a district court order denying a motion to dismiss and to compel arbitration. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Reversed and remanded.

Kennedy & Couvillier, PLLC, and *Maximiliano D. Couvillier III*, Las Vegas, for Appellants.

Law Offices of Byron Thomas and *Byron E. Thomas*, Las Vegas, for Respondents.

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

OPINION

By the Court, SILVER, J.:

The Federal Arbitration Act (FAA) protects arbitration agreements and preempts state laws that single out and disfavor arbitration. In this appeal, we determine whether the FAA preempts NRS 597.995, which requires agreements that include an arbitration provision to also include a specific authorization for the arbitration provision showing that the parties affirmatively agreed to that provision.

The parties to this appeal entered into a settlement agreement. That settlement agreement referenced a licensing agreement that included an arbitration provision. After the plaintiffs below sued to enforce the settlement agreement, the defendants moved to compel arbitration and dismiss the complaint on the basis that the settlement agreement incorporated the licensing agreement's arbitration clause. The district court denied the motion, concluding the arbitration provision was unenforceable because it did not include the specific authorization required by NRS 597.995.

We hold that the FAA preempts NRS 597.995, and accordingly, we conclude that statute does not void the arbitration clause at issue here. We further conclude that the claims in the underlying com-

plaint are subject to arbitration, and therefore the complaint must be dismissed.

I.

MMAWC is a Nevada corporation that, at the time relevant here, was doing business as World Series of Fighting. In 2012, MMAWC and Vincent Hesser entered into a licensing agreement providing Hesser the right to use MMAWC's licensed marks outside of North America. Hesser thereafter assigned all of his rights and interest in the license to World Series of Fighting Global, Ltd. (WSOF Global). WSOF Global's president was Shawn Wright, who also served as trustee of the Zion Wood Obi Wan Trust, a member of MMAWC.

MMAWC and others, including Bruce Deifik and the Nancy & Bruce Deifik Family Partnership (of which Bruce Deifik is the general partner), became embroiled in litigation with various parties and entities, including WSOF Global, Wright, and Zion Wood Obi Wan Trust. Eventually these and other parties entered into a comprehensive settlement agreement. As part of that settlement, the parties also amended the licensing agreement and MMAWC's operating agreement.

Clause 9 of the settlement agreement provided that the settlement agreement was the entire agreement between the parties "[s]ave and except the separate agreements provided in Section[ ] . . . 2" of the settlement agreement. Pertinent here, clause 2.1 of the settlement agreement stated as follows:

> The 10/15/12 Hesser License shall be reaffirmed and remain in full force and effect as of the date of this Agreement, as amended by the execution of the Amendment to Consulting and Master Licensing Agreement in the form attached hereto and incorporated herein as Exhibit B. The license is a material part of settlement on behalf of Hesser and Wright . . . .

Importantly, the amended licensing agreement referenced in clause 2.1 also included a newly added arbitration clause, which stated in part:

> MMA and Consultant agree that any dispute, controversy, claim or any other causes of action whether based on contract, tort, misrepresentation, or any other legal theory, related directly or indirectly to the Master License (as amended hereby), which cannot be amicably resolved by the parties, shall be resolved by binding arbitration in accordance with the provisions of this Section 18.

WSOF Global, Wright, and Zion Wood Obi Wan Trust (collectively, Zion) thereafter filed a complaint against MMAWC and other defendants including Bruce Deifik and the Deifik Family Partner-

ship (collectively, MMAWC), claiming that MMAWC had breached the settlement agreement by breaching the licensing agreement. MMAWC moved to dismiss the complaint and compel arbitration, asserting the settlement agreement incorporated the licensing agreement and, by extension, the arbitration provision. The parties also contested whether the arbitration provision complied with NRS 597.995 and whether the FAA preempted that statute.

The district court concluded that the arbitration provision was unenforceable under NRS 597.995 because it failed to include any specific authorization, as required under that statute, and therefore denied the motion to dismiss the complaint and compel arbitration. MMAWC appeals, challenging the validity of NRS 597.995 under the FAA and the district court's refusal to enforce the arbitration provision.

II.

The threshold issue is whether the FAA preempts NRS 597.995. We review this question de novo. *See Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32, 176 P.3d 271, 274 (2008). We also review questions of statutory construction de novo. *Franks v. State*, 135 Nev. 1, 3, 432 P.3d 752, 754 (2019).

The FAA provides that written provisions for arbitration are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). In *United States Home Corp. v. Michael Ballesteros Trust*,[1] we explained that the United States Supreme Court "has made unmistakably clear that, when the FAA applies, it preempts state laws that single out and disfavor arbitration." 134 Nev. 180, 188, 415 P.3d 32, 40 (2018). Thus, where a law or rule "imposes stricter requirements on arbitration agreements than other contracts generally," it is preempted by the FAA. *Id.* at 190, 415 P.3d at 41.

In *Doctor's Associates, Inc. v. Casarotto*, for example, the United States Supreme Court held that the FAA preempted a Montana law requiring contracts subject to arbitration to include a typed notice of the arbitration provision in capital letters on the contract's first page. 517 U.S. 681, 683, 687 (1996). The Supreme Court explained that under the FAA, courts may not "invalidate arbitration agreements under state laws applicable only to arbitration provisions," as Congress has "precluded [s]tates from singling out arbitration provisions for suspect status" and requires arbitration provisions to be placed on "the same footing as other contracts." *Id.* at 687 (internal quotation marks and emphasis omitted). The Supreme Court concluded the Montana law conflicted with the FAA because Montana's law predicated "the enforceability of arbitration agreements

[1]*Ballesteros* was published after the district court reached its decision in this case, so the district court did not have the benefit of that opinion.

on compliance with a special notice requirement not applicable to contracts generally." *Id.*

We conclude that NRS 597.995 similarly imposes a special requirement on arbitration provisions that is not generally applicable to other contract provisions. As relevant here, NRS 597.995[2] voids an arbitration provision if the agreement containing the arbitration provision does not include "specific authorization" for the arbitration provision:

> 1. . . . [A]n agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
>
> 2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.

Because NRS 597.995 conditions the enforceability of arbitration provisions on a special requirement not generally applicable to other contract provisions, it singles out arbitration provisions as suspect and violates the FAA. Accordingly, we hold the FAA preempts NRS 597.995.[3] The district court therefore erred by applying the statute to void the arbitration provision here.[4] *See Ballesteros*, 134 Nev. at 188, 415 P.3d at 40 (holding that when it applies, the FAA preempts laws that disfavor arbitration).

This holding does not fully resolve this appeal, however, as a question remains as to whether the arbitration provision requires the parties to arbitrate the claims asserted in the complaint. Specifically, we consider whether the settlement agreement incorporated the licensing agreement and its arbitration provision.

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[2]This statute was amended in 2019, but that amendment did not affect the statutory language at issue here. *See* A.B. 286, 80th Leg. (Nev. 2019).

[3]We have held in a prior case that an arbitration provision was unenforceable under NRS 597.995 where the parties signed at the end of the contract and did not specifically authorize the arbitration provision. *Fat Hat, LLC v. DiTerlizzi*, Docket No. 68479 (Order Affirming in Part, Reversing in Part, and Remanding, September 21, 2016). In that case, we noted that the FAA may preempt NRS 597.995, but we did not address the issue because the parties had not raised it.

[4]We disagree with Zion's argument that the FAA does not apply here. The licensing agreement gave WSOF Global the right to use MMAWC's trade names in WSOF Global's business dealings with foreign nations, and the license therefore affects commerce. *See Ballesteros*, 134 Nev. at 186-87, 415 P.3d at 38-39 (explaining that contracts concerning transactions that involve or affect interstate commerce fall under the purview of the FAA). And, because we conclude the FAA preempts NRS 597.995, we do not address the parties' remaining arguments regarding that statute.

III.

Settlement agreements are governed by general principles of contract law. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Contract interpretation is a question of law that we review de novo where no facts are in dispute, considering the contract's language and surrounding circumstances. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). We will enforce a contract as written where the language is clear and unambiguous. *State, Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 554, 402 P.3d 677, 682 (2017). In interpreting a contract, we seek to discern the intent of the parties, but we will construe any ambiguity against the drafter. *Am. First Fed. Credit Union*, 131 Nev. at 739, 359 P.3d at 106. Generally the parties' intent must be "discerned from the four corners" of the contract. *MHR Capital Partners LP v. Presstek, Inc.*, 912 N.E.2d 43, 47 (N.Y. 2009). "[W]ritings which are made a part of the contract by annexation or reference will be so construed . . . ." *Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982) (quoting *Orleans Hornsilver Mining Co. v. Le Champ D'Or French Gold Mining Co.*, 52 Nev. 92, 284 P. 307 (1930)).

We have carefully reviewed the settlement and licensing agreements and the parties' arguments pertaining thereto, and we conclude the claims asserted in the complaint are subject to the arbitration clause. First, the settlement agreement expressly incorporated the licensing agreement and, by extension, its arbitration clause. Clause 2.1 of the settlement agreement specifically states that the licensing agreement is "attached hereto and incorporated herein." Second, the interplay between clause 2 and clause 9 compels the requirement to arbitrate, as clause 9 specifically exempts the licensing agreement incorporated in clause 2 from the dispute provisions of the settlement agreement. This language is plain, and we must construe it as written. But even if the settlement agreement did not incorporate the licensing agreement and its arbitration provision, Zion is nonetheless bound by the arbitration provision. MMAWC maintained in its briefs and during oral argument that the claims in Zion's complaint alleged a breach of the licensing agreement, and Zion not only failed to refute this argument but also conceded at oral argument that the complaint was inartfully pleaded. Because Zion is attempting to enforce the licensing agreement, it is bound by the arbitration provision in that agreement. *See Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634-37, 189 P.3d 656, 660-62 (2008) (explaining that a person may be bound by an arbitration provision in a contract to which he was not a party where he receives a direct benefit from or asserts a claim that seeks to enforce the contract containing the arbitration provision). Finally, the claims in the complaint fall within the arbitration provision's scope. As described

above, Zion's claims relate directly or indirectly to the license, and the arbitration provision requires arbitration of any disputes related either directly or indirectly to the license. Accordingly, the district court should have enforced the arbitration clause.

IV.

The FAA preempts NRS 597.995 because it singles out and disfavors arbitration by requiring a specific authorization for arbitration that does not apply to any other contractual provisions. We therefore conclude that the district court erred by deeming the arbitration clause here unenforceable under NRS 597.995. Because we further conclude the arbitration clause in the licensing agreement applies to the claims alleged in the underlying complaint, we reverse and remand to the district court with instructions to grant MMAWC's motion to dismiss and enforce the arbitration clause.

Hardesty and Stiglich, JJ., concur.

DERRICK POOLE, Appellant, *v.* NEVADA AUTO DEALERSHIP INVESTMENTS, LLC, a Nevada Limited Liability Company, dba SAHARA CHRYSLER; and COREPOINTE INSURANCE COMPANY, Respondents.

No. 74808-COA

September 5, 2019 449 P.3d 479

Appeal from a district court final order and summary judgment in a deceptive trade practices action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Reversed and remanded.

Law Offices of George O. West III and *George O. West III*, Las Vegas; *Law Offices of Craig B. Friedberg* and *Craig B. Friedberg*, Las Vegas, for Appellant.

Moran Brandon Bendavid Moran and *Jeffery A. Bendavid* and *Stephanie J. Smith*, Las Vegas, for Respondents.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

OPINION

By the Court, Gibbons, C.J.:

This appeal arises from a deceptive trade practices action. Appellant Derrick Poole sued respondents Nevada Auto Dealership

Investments, LLC, and its surety company, Corepointe Insurance Company, under the Nevada Deceptive Trade Practices Act (NDTPA) and NRS 41.600 (consumer fraud). Poole alleged that Nevada Auto knowingly failed to disclose material facts about a truck that it sold to him and misrepresented the truck's condition. The district court granted summary judgment for respondents on each of Poole's claims.

In this opinion, we consider the meaning of "knowingly" and "material fact" under the NDTPA. These terms appear frequently throughout the NDTPA but remain undefined under the Act. We conclude that "knowingly" means that the defendant is aware that the facts exist that constitute the act or omission, and that a fact is "material" if either (a) a reasonable person would attach importance to its existence or nonexistence in determining a choice of action in the transaction in question; or (b) the defendant knows or has reason to know that the consumer regards or is likely to regard the matter as important in determining a choice of action, although a reasonable person may not so regard it. Using these definitions, we conclude that Poole presented sufficient evidence to raise genuine issues of material fact[1] under each of his claims, and thus that the district court erred in granting summary judgment. We therefore reverse the district court's order granting summary judgment and remand this matter to the district court for further proceedings consistent with this opinion.

BACKGROUND

Poole purchased a certified pre-owned (CPO) Dodge truck from Nevada Auto. Nevada Auto advertises that "CPO vehicles must pass a stringent certification process that guarantees only the finest late model vehicles get certified." The truck's previous owner had been in an accident and repaired the truck before selling it to Nevada Auto. The previous owner's insurer, Allstate, prepared an Allstate Collision Estimate (ACE) listing each replaced or repaired part. The ACE listed damage to the truck's frame, and a "reconditioned" replacement for a damaged wheel. Despite its knowledge of the damage that the ACE described, Nevada Auto certified the truck as a CPO vehicle.

Poole test-drove the truck with a Nevada Auto salesperson who told him that the truck had been in a "minor" collision. When Poole asked about the extent of the damage from the collision, the salesperson repeated that it was only minor and explained that Nevada

[1]Our dual usage of the term "material fact" is unavoidable in this case. The first usage is that of the summary judgment standard under *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (providing that summary judgment is proper when "no genuine issue of material fact remains"); the second is that of NRS 598.0923(2) (enumerating "[f]ail[ure] to disclose a material fact" as a deceptive trade practice).

Auto would not sell the truck were the collision significant. Nevada Auto also disclosed the collision by providing a Carfax report to Poole. The Carfax report did not reveal the frame damage, the reconditioned wheel, or the cost of repairs, and Nevada Auto did not disclose to Poole the ACE's contents or even its existence. Two years later, Poole learned the extent of the damage when he tried to refinance the loan on the truck. The lender explained to Poole that it had declined his loan application because it discovered that the collision had damaged the truck's frame and significantly reduced its value.

Poole sued Nevada Auto and Corepointe,[2] alleging violations of several deceptive trade practice statutes under the NDTPA, codified in NRS Chapter 598, and seeking equitable relief for consumer fraud under NRS 41.600. Respondents moved for summary judgment, arguing that no genuine issues of material fact existed under Poole's deceptive trade practices claims. After a hearing on the motion, the district court granted summary judgment, concluding that each of Poole's deceptive trade practices claims failed, and thus that his equitable claims likewise failed.

ANALYSIS

Poole appeals, arguing that the district court erred by determining that no genuine issue of material fact existed as to whether Nevada Auto knowingly (1) failed to disclose a material fact under NRS 598.0923(2); (2) misrepresented the truck's certification under NRS 598.0915(2) or its certified standard, quality, or grade under NRS 598.0915(7); (3) made a false representation under NRS 598.0915(15); or (4) misrepresented the truck's mechanical condition under the Federal Trade Commission Act (FTCA), 16 C.F.R. § 455.1(a)(1) (2018), in violation of NRS 598.0923(3). Respondents answer that no genuine issue of material fact remains because Nevada Auto disclosed all material facts, properly certified the truck, and in any case, did not "inten[d] to knowingly defraud" Poole.

As Poole notes, however, the NDTPA does not define "knowingly" or "material," and the district court did not define them in granting summary judgment. The Nevada Supreme Court, too, has not addressed either NDTPA term, and respondents offer little guidance. Because the application of these terms is essential in this case and in

[2]Poole sued Corepointe, Nevada Auto's surety company, under NRS 482.345(7)(a)(1), which provides that "[i]f the court enters . . . [a] judgment on the merits against the dealer . . . , the judgment is binding on the surety." He notes that respondents disputed his claim against Corepointe in their motion for summary judgment and asks this court to "dispose of this" issue. Because the district court did not address Corepointe's liability, however, we decline to do so in the first instance. *See, e.g.*, *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (declining to address an argument that the district court did not address).

many other deceptive trade practices actions, we take this opportunity to address each term's meaning under the NDTPA.

"We review questions of statutory meaning de novo." *Knickmeyer v. State*, 133 Nev. 675, 679, 408 P.3d 161, 166 (Ct. App. 2017). The primary goal of interpreting statutes is to effectuate the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). We interpret clear and unambiguous statutes based on their plain meaning. *Id.* When a statute "is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application." *State, Dep't of Bus. & Indus. v. Granite Constr. Co.*, 118 Nev. 83, 87, 40 P.3d 423, 426 (2002). "[W]hen a statute is ambiguous, we consult other sources, such as legislative history, reason, and policy to identify and give effect to the Legislature's intent." *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673-74, 310 P.3d 574, 578 (2013). "When a legislature adopts language that has a particular meaning or history, rules of statutory construction also indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004).

The meaning of "knowingly" under the NDTPA

Respondents argue that Poole presented no evidence that Nevada Auto "inten[ded] to knowingly defraud" him. Poole replies that he did present such evidence, but that under the NDTPA, "knowingly" means only general intent—not intent to deceive, but mere knowledge of the facts that constitute the act or omission.

Poole directs this court to several civil and criminal Nevada statutes that define "knowingly" in similar contexts, two of which predate the NDTPA's passage in 1973. For example, NRS Chapter 624, which addresses licensing and discipline of contractors, provides in NRS 624.024, codified in 2003, that

> "Knowingly" imports a knowledge that the facts exist [that] constitute the act or omission, and does not require knowledge of the prohibition against the act or omission. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry.

Each of the statutes defines "knowingly" in nearly identical language and requires no more than general intent. *See also* NRS 193.017 (addressing crimes and punishments, and first codified in 1912); NRS 208.055 (addressing correctional institutions and aid to victims of crime, and first codified in 1912); NRS 281A.115 (addressing ethics in government, and first codified in 2009); *Bolden v. State*, 121 Nev.

908, 923, 124 P.3d 191, 201 (2005) ("General intent is 'the intent to do that which the law prohibits.'" (quoting *Black's Law Dictionary* 810 (6th ed. 1990))), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008).

The above definition of "knowingly" best effectuates the Legislature's intent under the NDTPA. The Legislature has used "knowingly" as a term of art and defined it consistently elsewhere in the Nevada Revised Statutes, and thus presumably intended to use it consistently under the NDTPA. *See NAIW v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) ("We presume that the Legislature enact[s a new] statute with full knowledge of existing statutes relating to the same subject."); *cf. Beazer*, 120 Nev. at 587, 97 P.3d at 1139-40 ("Generally, when a legislature uses a term of art in a statute, it does so with full knowledge of how that term has been interpreted in the past, and it is presumed that the legislature intended it to be interpreted in the same fashion."); *see also State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980) ("In the absence of a statutory definition, resort may be had to case law or related statutory provisions [that] define the term . . . ."); *Nelson v. Transamerica Ins. Servs.*, 495 N.W.2d 370, 373 n.18 (Mich. 1992) ("The Legislature is presumed to be aware of existing statutes."). Each of those statutes in which the Legislature has defined "knowingly" is part of a statutory scheme with a purpose similar to that of a consumer protection act—protecting and assisting the public. *See, e.g.*, NRS 624.005 ("[T]he provisions of this chapter . . . are intended to . . . protect the health, safety and welfare of the public."); NRS 217.010 ("[T]he policy of this State [is] to provide assistance to . . . victims of violent crimes . . . ."); *see also Thomas v. Sun Furniture & Appliance Co.*, 399 N.E.2d 567, 570 (Ohio Ct. App. 1978) (The purpose of Ohio's deceptive trade practices act "was to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement of proof of an intent to deceive in order to establish fraud.").

We therefore conclude that a "knowing[ ]" act or omission under the NDTPA does not require that the defendant intend to deceive with the act or omission, or even know of the prohibition against the act or omission, but simply that the defendant is aware that the facts exist that constitute the act or omission. For example, a defendant auto dealer "knowingly" makes a false representation of a car's condition to a plaintiff consumer if the car has been damaged in a collision and the dealer is aware that it represented to the consumer that the car has never been damaged in a collision. "[K]nowingly" does not require that the dealer intended to deceive the consumer or knew of such a misrepresentation's prohibition—the defendant must simply be aware of the fact that it represented that the car had

never been damaged in a collision. *See* NRS 598.0915(15) ("*Knowingly mak*[*ing*] any other false representations in a transaction" is a deceptive trade practice. (Emphasis added)).

We also find support for our conclusion in the statutory interpretive canon *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of another," *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). As Poole notes, NRS 598.0915 includes both "knowingly" and specific intent elements, *compare* NRS 598.0915(1) ("Knowingly passes off goods or services for sale or lease as those of another person."), *with* NRS 598.0915(9) ("Advertises goods or services with intent not to sell or lease them as advertised."). This implies that the Legislature deliberately omitted any further intent requirement from those subsections that require only knowing acts. In light of the Legislature's inclusion of specific intent elements in some statutes and subsections and omission from others, the NDTPA provisions that include "knowing[ ]" acts but lack a specific intent element require only knowledge that the facts exist that constitute the act or omission. *See Galloway*, 83 Nev. at 26, 422 P.2d at 246 (noting that *expressio unius est exclusio alterius* "has been repeatedly confirmed in this State"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Text*s 170 (2012) ("[A] material variation in terms suggests a variation in meaning."); *see generally Sheriff, Pershing Cty. v. Andrews*, 128 Nev. 544, 548, 286 P.3d 262, 264 (2012) (reasoning that where the Legislature "clearly knows how to prohibit" an act under one statute and does not prohibit it under a second statute, the Legislature did not intend to prohibit it under the second statute).

Our review of other jurisdictions that have addressed the meaning of "knowingly" in similar statutes also supports our conclusion. Kansas, New Mexico, and Ohio require "knowing[ ]" acts or omissions under their respective deceptive trade practices acts. *E.g.*, Kan. Stat. Ann. § 50-626(b)(1) (2005) (defining deceptive trade practices to include "[r]epresentations made knowingly or with reason to know"); N.M. Stat. Ann. § 57-12-2(D)(14) (LexisNexis 2010) (defining deceptive trades practices to include "knowingly . . . failing to state a material fact"); Ohio Rev. Code Ann. § 1345.09(F)(2) (LexisNexis 2018) (providing that a prevailing complainant may recover attorney fees when "[t]he supplier has knowingly committed" a deceptive trade practice). Courts in each state have likewise concluded that those statutes do not require intent to deceive or knowledge of the act's or omission's prohibition. *Moore v. Bird Eng'g Co.*, 41 P.3d 755, 764 (Kan. 2002) ("knowingly or with reason to know" does not require intent to deceive); *Richardson Ford Sales, Inc. v. Johnson*, 676 P.2d 1344, 1347-48 (N.M. Ct. App. 1984) ("A knowing nondisclosure requires [only] an awareness of the nondis-

closure."); *Einhorn v. Ford Motor Co.*, 548 N.E.2d 933, 936 (Ohio 1990) ("knowingly" requires only that the supplier "intentionally do the [violative] act").

Similarly, Utah's Consumer Sale Practices Act distinguishes knowing from intent to deceive and awareness of an act's or omission's prohibition by requiring *either* "knowing[ ] or intentional[ ]" acts. Utah Code Ann. § 13-11-4(2) (LexisNexis 2009). The Utah Legislature has amended the Act twice—the first time to include an intent element by adding "intent to deceive," and the second time to replace "with intent to deceive" with "knowingly or intentionally." *Martinez v. Best Buy Co., Inc.*, 283 P.3d 521, 523 n.2 (Utah Ct. App. 2012). Although Utah courts have not yet addressed the meaning of "knowingly" under the Act, the Utah Legislature's amendments further support our conclusion that "knowing[ ]" acts do not require intent to deceive.

Colorado and New Jersey courts, however, have concluded otherwise. Under Colorado's Consumer Protection Act, deceptive trade practices include "[e]ither knowingly or recklessly mak[ing] a false representation," Colo. Rev. Stat. Ann. § 6-1-105(1)(b) (West 2019), and the Colorado Supreme Court held that a "knowingly" false representation under the Act requires an intent to defraud. *Crowe v. Tull*, 126 P.3d 196, 204 (Colo. 2006). Similarly, the New Jersey Supreme Court held that a "knowing[ ] . . . omission . . . of any material fact" under New Jersey's Consumer Fraud Act requires intent to commit a violative omission. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 461-62 (N.J. 1994) (quoting N.J. Stat. Ann. § 56:8-2 (West 2012)).

Alaska, Tennessee, and Texas have also defined "knowingly" otherwise. Each state's deceptive trade practices act requires "knowing[ ]" acts or omissions, *e.g.*, Alaska Stat. § 45.50.471(b)(12) (2018) (defining deceptive trade practices to include "knowingly concealing, suppressing, or omitting a material fact"); Tenn. Code Ann. § 47-18-109(a)(3) (2013) (providing that a court may award treble damages for a "knowing violation"); Tex. Bus. & Com. Code Ann. § 17.46(b)(13) (West 2011) (defining deceptive trade practices to include "knowingly making false or misleading statements"), and defines "knowingly" to require awareness not of the act, but of the falsity or deception, Alaska Stat. § 45.50.561(11) (2018) (" '[K]nowingly' means actual awareness of the falsity or deception . . . ."); Tenn. Code Ann. § 47-18-103(10) (2013) (" 'Knowingly' or 'knowing' means actual awareness of the falsity or deception . . . ."); Tex. Bus. & Com. Code Ann. § 17.45(9) (West 2011) (" 'Knowingly' means actual awareness . . . of the falsity, deception, or unfairness . . . .").

We conclude, however, that our interpretation better serves the NDTPA's remedial purpose. Because the NDTPA is a remedial stat-

utory scheme, *Sellinger v. Freeway Mobile Home Sales, Inc.*, 521 P.2d 1119, 1122 (Ariz. 1974) (recognizing that remedial statutes are those that "are designed to redress existing grievances and introduce regulations conducive to the public good"), we "afford[ ] [it] liberal construction to accomplish its beneficial intent," *see Welfare Div. of State Dep't of Health, Welfare & Rehab. v. Washoe Cty. Welfare Dep't*, 88 Nev. 635, 637, 503 P.2d 457, 458 (1972) (construing a remedial public welfare statute liberally to accomplish its intent). Interpreting "knowingly" to require more than general intent would render NDTPA and common law fraud claims redundant, *see Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992) (listing "knowledge or belief that the representation is false" and intent to deceive as elements of a common law fraud claim), disserve the NDTPA's remedial purpose, and discourage claims by forcing parties to clear a significantly higher bar. *Cf. Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010) ("Statutory offenses that sound in fraud are separate and distinct from common law fraud. Therefore, we conclude that deceptive trade practices, as defined under NRS Chapter 598, must only be proven by a preponderance of the evidence."); *see also United States v. Krohn*, 573 F.2d 1382, 1386-87 (10th Cir. 1978) (recognizing the difficulty of proving fraudulent intent); *Thomas*, 399 N.E.2d at 570 (The purpose of Ohio's deceptive trade practices act "was to give the consumer protection from a supplier's deceptions which he lacked under the common law requirement of proof of an intent to deceive in order to establish fraud. To require proof of intent would effectively emasculate the act and contradict its fundamental purpose."); *Einhorn*, 548 N.E.2d at 935-36 (concluding that interpreting "knowingly" to require knowledge of the act's or omission's prohibition would "take[ ] the teeth out of" Ohio's deceptive trade practices act, "is inapposite to" its remedial purpose, and would discourage consumers from suing under the act).

The meaning of "material fact" under the NDTPA

NRS 598.0923(2) provides that a seller who "[f]ails to disclose a material fact" engages in a deceptive trade practice. Poole, citing an extensive array of caselaw across multiple jurisdictions, argues that a material fact is one that is reasonably relevant to the transaction and one to which a reasonable person would attach importance. Poole thus proposes an objective standard of materiality. Respondents answer that only the fact of the collision was material—not the extent of the damage—because Poole is, by his own admission, not "a car guy." Respondents thus implicitly propose a subjective standard. We conclude, however, that applying both the objective and subjective definitions best effectuates the Legislature's intent and is most consistent with the NDTPA.

Nevada law generally directs us to the definition of "material fact" in the Second Restatement of Torts:

> The matter is material if
>
> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[3]

§ 538(2) (Am. Law Inst. 1977). The Nevada civil pattern jury instructions, for instance, adopt subsection (a)'s objective "attach importance" language. Nevada Jury Instructions: Civil § 11.19 (State Bar of Nevada 2018) (addressing "material misrepresentation . . . in [an] application for insurance or the claims process"). Instruction 11.19 provides that "[a] fact is material if it concerns a subject reasonably relevant . . . and if a reasonable person would attach importance to that fact." Further, the Nevada Supreme Court applied subsection (a)'s objective standard in *Winn v. Sunrise Hospital & Medical Center*, a professional negligence case in which the court considered whether a hospital withheld material information and thus tolled the applicable statute of limitations. 128 Nev. 246, 255, 277 P.3d 458, 464 (2012).

A subjectively material fact under subsection (b) of the Second Restatement may be no less important to a buyer in some special circumstances than an objectively material fact, however, and applying a subjective standard of materiality is consistent with the NDTPA's legislative purpose to protect consumers.[4] *See Washoe Cty. Welfare Dep't*, 88 Nev. at 637, 503 P.2d at 458 (holding that remedial legislation "should be afforded liberal construction to accomplish its beneficial intent"); *see also* Restatement (Second) of

[3]Subsection (b) does not address failure to disclose, but its affirmative opposite—representation. Nevertheless, we hold that failure to disclose a fact is equivalent to affirmative representation of that fact's nonexistence. *See Ollerman v. O'Rourke Co.*, 288 N.W.2d 95, 100 (Wis. 1980) ("If there is a duty to disclose a fact, failure to disclose that fact is treated in the law as equivalent to a representation of the non existence of the fact."). We thus interpret subsection (b) to apply to failure to disclose material facts as well as affirmative misrepresentations thereof.

[4]For instance, if a buyer sought to purchase a used truck and preferred, for some purely idiosyncratic reason, that the truck had originally not been sold in California; the dealer knew or had reason to know of the buyer's preference and the truck's sales history; and the truck had in fact been sold in California, then the dealer must disclose that fact to the buyer under NRS 598.0923(2). Although a reasonable person may consider such a fact unimportant, the dealer knew or had reason to know that the idiosyncratic buyer considered the fact important to the decision to purchase the truck.

Torts § 538(2) cmt. f (Am. Law Inst. 1977) ("There are many persons whose judgment, even in important transactions, is likely to be determined by considerations that the normal man would regard as altogether trivial or even ridiculous. One who practices upon another's known idiosyncracies cannot complain if he is held liable when he is successful . . . .").

Our approach is consistent with a majority of other jurisdictions that likewise look to the Second Restatement of Torts to define "material fact" in contexts similar to the NDTPA.

New Jersey and Tennessee use the objective subsection (a) and the subjective subsection (b) alike, *Mango v. Pierce-Coombs*, 851 A.2d 62, 69 (N.J. Super. Ct. App. Div. 2004) (applying subsections (a) and (b) in a claim under New Jersey's Consumer Fraud Act); *Odom v. Oliver*, 310 S.W.3d 344, 349 (Tenn. Ct. App. 2009) (applying subsections (a) and (b) in a fraudulent concealment claim), while Arizona has used subsection (a), *Caruthers v. Underhill*, 287 P.3d 807, 815 (Ariz. Ct. App. 2012) (applying subsection (a) in a fraudulent inducement claim). Several others simply use subsection (a)'s "importance" standard without citing the Restatement, and without expressly rejecting subsection (b). *E.g.*, *Weinstat v. Dentsply Int'l, Inc.*, 103 Cal. Rptr. 3d 614, 622 n.8 (Ct. App. 2010) (Under California's Unfair Competition Law, "[t]he question of materiality . . . is whether a reasonable person would attach importance to the representation or nondisclosure in deciding how to proceed in the particular transaction . . . ."); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011) (In a fraudulent misrepresentation claim, "[m]aterial means a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." (quoting *Smith v. KNC Optical, Inc.*, 296 S.W.3d 807, 812 (Tex. Ct. App. 2009)); *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 945 A.2d 855, 859 (Vt. 2008) (Under Vermont's Consumer Fraud Act, a material fact is one that "a reasonable person would regard as important in making a decision.").

Ohio, however, uses a unique objective standard, *Davis v. Sun Ref. & Mktg. Co.*, 671 N.E.2d 1049, 1058 (Ohio Ct. App. 1996) (In a fraudulent concealment claim, a fact is material if it "would be likely, under the circumstances, to affect the conduct of a reasonable person with reference to the transaction in question."), while Illinois uses a combination of unique objective and subjective standards, *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E. 2d 584, 595 (Ill. 1996) (Under Illinois' Consumer Fraud Act, "[a] material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase.").

Only a small minority of states uses a purely subjective standard, and none expressly reject an objective standard. *Briggs v. Am. Nat'l Prop. & Cas. Co.*, 209 P.3d 1181, 1186 (Colo. App. 2009) (Under

the Colorado Consumer Protection Act, "[u]ndisclosed facts are 'material' if the consumer's decision might have been different had the truth been disclosed."); *Casavant v. Norwegian Cruise Line, Ltd.*, 919 N.E.2d 165, 170 (Mass. App. Ct. 2009) ("To determine if the nondisclosure was of a material fact [in an unfair or deceptive act or practice claim], we ask whether the plaintiff likely would have acted differently but for the nondisclosure."); *Colaizzi v. Beck*, 895 A.2d 36, 39-40 (Pa. Super. Ct. 2006) (Under the Pennsylvania Consumer Protection Act, "a misrepresentation is material if it is of such character that if it had not been misrepresented, the transaction would not have been consummated."); *see also Carcano v. JBSS, LLC*, 684 S.E.2d 41, 53 (N.C. Ct. App. 2009) (In a fraud claim, "[a] fact is material if had it been known to the party, [it] would have influenced that party's decision in making the contract at all.").

We therefore conclude that applying both the objective and subjective definitions in the Second Restatement of Torts best effectuates the Legislature's intent and is most consistent with the NDTPA.

Whether a genuine issue of material fact exists under Poole's NRS 598.0923(2) claim

We review 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.*; *see also* NRCP 56. "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

"A person engages in a 'deceptive trade practice' when, in the course of his or her business or occupation, he or she knowingly . . . [f]ails to disclose a material fact in connection with the sale or lease of goods or services." NRS 598.0923(2). Poole argues that a genuine issue of material fact exists as to whether Nevada Auto failed to disclose a material fact under NRS 598.0923(2). He argues that he offered evidence sufficient to raise a genuine factual dispute under this claim, including deposition testimony from three Nevada Auto employees.

Respondents answer that disclosure of the fact of the collision was sufficient under NRS 598.0923(2), and that more specific information about the damage from the collision would have been irrelevant and immaterial because Poole, by his own admission, is not "a car guy." They argue that construing NRS 598.0923(2) to require

a dealer to disclose as facts material to the sale "each and every nut and/or bolt, which may have been repaired and/or replaced" would be "absurd." Respondents also argue that Poole presented no evidence that they "inten[ded] to knowingly defraud, misrepresent, or to otherwise omit 'material' information."

Respondents' "each and every nut and/or bolt" argument misstates Poole's argument and frames the issue as a false dilemma in which the district court must either (1) limit the scope of material facts to the single fact of the collision, as the district court did in its order, or (2) broaden the scope of material facts to an extent that requires an unconscionably burdensome and painstaking account of the damage from the collision. This ignores, of course, a vast intermediate territory in which the scope of material facts may exclude relatively useless ones, such as "each and every repaired bolt or penny spent," but include those to which a reasonable person may attach importance, such as the nature and extent of the collision damage. Nonetheless, the district court found that "the material . . . fact is that the vehicle was in a prior accident"[5] and that "[t]he duty to disclose under NRS 598.0923 does not extend to the entire effect of the accident, such as a price breakdown of every part and service provided as listed in the ACE."

The district court also found that "[t]here is no indication in the record that [Poole] inquired about the parts and services used to repair the vehicle as provided in the ACE, and such information was then withheld."[6] The court concluded by finding that "[Poole] relied on the [CPO] report, which the undisputed evidence shows would only have notated frame damage if a repair, if any, was not up to standard."

This reasoning begs the question, however, by assuming that Nevada Auto's certification standards are interchangeable with the statute's materiality standard—that a fact immaterial to CPO status is perforce immaterial under NRS 598.0923(2). The district court appeared to reason that had the damage been material under the statute, the truck would have been "not up to [certification] standard," and the damage would have been noted in the CPO report; and because the damage was not noted in the CPO report, it must not have been

[5]Why the district court deemed the fact of the accident "the material fact" is unclear. NRS 598.0923(2) addresses "fail[ure] to disclose *a* material fact." (Emphasis added.) The indefinite article "a" implies an indefinite scope of potentially material facts. The district court appeared to limit that scope to a single material fact by using the definite article "the," which is inconsistent with the statute's plain language.

[6]Poole argues the district court misapprehended NRS 598.0923(2) when it found that he must have inquired about a fact before Nevada Auto assumed the duty to disclose it. Poole is correct—by its plain language, NRS 598.0923(2) does not require inquiry, but provides for an affirmative duty to disclose.

material. Thus, the court effectively replaced the legal standard that governs this issue—materiality under NRS 598.0923(2)—with Nevada Auto's self-imposed certification standards.[7] Such reasoning would allow a seller to determine the scope of its duty to disclose by dictating its own "certification" standards and prevail against an NRS 598.0923(2) claim simply by upholding those standards, however lax they may be. In Poole's words, this "establishe[s] a quasi-irrebuttable presumption." We agree, and we caution district courts against substituting a commercial certification standard for any legal standard.

Poole offered deposition testimony from himself and three Nevada Auto employees. In his own deposition, he testified that he asked the Nevada Auto salesperson about the collision and that the salesperson assured him that the collision was only "minor." Notably, two of Nevada Auto's own employees agreed with Poole that the nature and extent of the damage from a collision are as important to a buyer as the fact of the collision itself. The third testified that he "thoroughly reviewed" the ACE before purchasing the truck for Nevada Auto, suggesting that Nevada Auto considered the ACE's contents, which indicated the nature and extent of the damage, reasonably relevant to the truck's sale.

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that Nevada Auto failed to disclose a fact to which a reasonable person would attach importance in determining a choice of action in the transaction, such as the frame damage, and thus that Nevada Auto failed to disclose an objectively material fact. Alternatively, a rational trier of fact could find that Nevada Auto knew or had reason to know that Poole would regard or was likely to regard the extent of the damage, for instance, as important in determining his choice of action, even if a reasonable person would not attach importance to it, and thus that Nevada Auto failed to disclose a subjectively material fact. In either case, a rational trier of fact could find that Nevada Auto knowingly failed to disclose a material fact because it knew that it did not disclose that fact. We therefore conclude that a genuine issue of material fact exists such that the district court erred by granting summary judgment on this claim.

Whether a genuine issue of material fact exists under Poole's NRS 598.0915(2) and (7) claims

"A person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . [k]nowingly

[7]Despite abandoning the statutory standard for Nevada Auto's CPO standard, the district court declined to consider "[t]he sufficiency of the CPO inspection standards" because it was "not at issue."

makes a false representation as to the . . . certification of goods or services for sale or lease," NRS 598.0915(2), or "[r]epresents that goods . . . are of a particular standard, quality or grade, or that such goods are of a particular style or model, if he or she knows or should know that they are of another standard, quality, grade, style or model," NRS 598.0915(7). Poole argues that a genuine issue of material fact exists under his claim that Nevada Auto knowingly made a false representation as to the truck's certification under NRS 598.0915(2), or misrepresented the truck's certified standard, quality, or grade under NRS 598.0915(7). He argues that he produced evidence that the extent of the damage from the collision precluded certification, including a declaration from an expert who inspected the truck and a statement from the Fiat Chrysler Automobiles (FCA) website indicating that the truck's repaired wheel may be inconsistent with certification standards. Respondents answer that Poole failed to produce evidence proving that the truck's standard, quality, or grade was anything other than certified, that Nevada Auto did not inspect and certify the truck, or that Nevada Auto should not have certified it.

The district court concluded that because Nevada Auto certified the truck, "[Poole] cannot argue that [Nevada Auto] misrepresented that the vehicle was . . . certified, as it was. The sufficiency of the CPO inspection standards is not at issue for this argument, but rather that the vehicle was ultimately certified as pre-owned." We disagree. Poole did not argue that Nevada Auto *did not certify* the truck, but that Nevada Auto *should not have certified* the truck under the CPO standards, and thus made a false representation as to its certification and likewise misrepresented its standard, quality, or grade.

To prove that Nevada Auto should not have certified the truck, and thus violated NRS 598.0915(2) and NRS 598.0915(7) by doing so, Poole offered the ACE, an expert's declaration, and deposition testimony from the Nevada Auto mechanic who inspected the truck for certification purposes. The ACE indicates frame damage and lists a "reconditioned" wheel among the replacement parts. The expert opined that several of the truck's components remained misaligned after repair, and that the misaligned components, frame damage, and reconditioned wheel each should have precluded certification. The Nevada Auto mechanic testified that he could not recall whether he reviewed the ACE before inspecting the truck and confirmed the expert's opinion that frame damage precludes certification.

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that the certification was improper, and Nevada Auto knew that it certified the truck, and thus violated NRS 598.0915(2) by making a false representation as to the truck's certification and NRS 598.0915(7) by misrepresenting the truck's standard, quality, or grade as a CPO vehicle. We therefore

conclude that a genuine issue of material fact exists as to whether Nevada Auto violated NRS 598.0915(2) and NRS 598.0915(7), and thus that the district court erred by granting summary judgment on these claims.

Whether a genuine issue of material fact exists under Poole's NRS 598.0915(15) claim

Poole argues that a genuine issue of material fact exists as to whether Nevada Auto knowingly made any other false representation in a transaction under NRS 598.0915(15), which provides that "[a] person engages in a 'deceptive trade practice' if, in the course of his or her business or occupation, he or she . . . [k]nowingly makes any other false representation in a transaction." He argues that Nevada Auto "affirmatively mis[led]" him when, after Nevada Auto disclosed the fact of the collision, he asked about the collision and Nevada Auto answered that it was "minor." He notes that he offered several forms of evidence to prove that the collision was more than "minor," and that the district court did not address this issue in its order granting summary judgment.

Respondents answer that Poole failed to offer such evidence. They also argue that Poole "conceded" this issue by "neglecting this portion of the statute" in his opposition to their motion for summary judgment.[8]

Although the district court rendered summary judgment on all of Poole's claims, it did not expressly address this claim. We conclude, however, that a genuine issue of material fact exists here.

To prove that Nevada Auto made a false representation when it characterized the collision as only "minor," Poole offered the ACE, his expert's declaration, and deposition testimony from Nevada Auto's mechanic. The ACE lists each repaired and replaced part and its cost, and the total cost of $4,088.77. The expert opined that the extent of the damage left the truck's value substantially diminished. The Nevada Auto mechanic testified that only the collision—not ordinary wear—could account for the frame repair listed in the ACE.

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that Nevada Auto made a false representation by describing the collision as "minor," and did so knowingly because it knew that it gave the description. We therefore conclude that a genuine issue of material fact exists, and thus that the district court erred by granting summary judgment on this claim.

[8]Respondents cite no authority for the proposition that Poole somehow conceded the issue, and their underlying claim is inaccurate—Poole addressed the issue in his opposition to the motion for summary judgment by alleging that Nevada Auto violated NRS 598.0915(15).

Whether a genuine issue of material fact exists under Poole's 16 C.F.R. § 455.1(a)(1) claim

"It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce . . . [t]o misrepresent the mechanical condition of a used vehicle[.]" 16 C.F.R. § 455.1(a)(1). The FTCA, including 16 C.F.R. § 455.1(a)(1), does not provide a private cause of action. *See Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) (explaining that the FTCA confers remedial power solely on the Federal Trade Commission). As Poole notes, however, the NDTPA provides a private cause of action for an FTCA violation. *See* NRS 598.0923(3) ("A person engages in a 'deceptive trade practice' when in the course of his or her business or occupation he or she knowingly . . . [v]iolates a state or federal statute or regulation relating to the sale or lease of goods or services.").

Poole argues that a genuine issue of material fact exists as to whether Nevada Auto misrepresented the truck's mechanical condition under 16 C.F.R. § 455.1(a)(1). He refers to the evidence that he offered for his claims under NRS 598.0915(2), (7), and (15). Respondents answer that he failed to offer any such evidence. Like Poole's NRS 598.0915(15) claim, the district court did not expressly address this claim. Again, however, we conclude that a genuine issue of material fact exists.

To prove that Nevada Auto misrepresented the truck's mechanical condition, Poole offered the ACE, the expert's declaration, and an FCA statement regarding the dangers of reconditioned wheels. The ACE lists a reconditioned wheel among the replacement parts. The expert opined that Nevada Auto should not have certified the truck because of the reconditioned wheel and misaligned components. The FCA position statement on reconditioned wheel usage confirms that reconditioned wheels are "not recommend[ed]" for use because the repairs "may alter mechanical properties" and "result in a sudden catastrophic wheel failure."

Viewed in a light most favorable to Poole, this evidence is such that a rational trier of fact could find that Nevada Auto misrepresented the truck's mechanical condition by certifying it despite mechanical conditions that preclude certification, and did so knowingly because it knew that it certified the truck despite those conditions. We therefore conclude that a genuine issue of material fact exists, and thus that the district court erred by granting summary judgment on this claim.

CONCLUSION

Because genuine issues of material fact exist as to each of Poole's statutory claims, we reverse the district court's order granting sum-

mary judgment in its entirety.[9] Accordingly, we remand this case to the district court for further proceedings consistent with this opinion.

Tao and Bulla, JJ., concur.

SPAR BUSINESS SERVICES, INC., Appellant, *v.* RENEE OLSON, Administrator of the Employment Security Division; STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION, EMPLOYMENT SECURITY DIVISION; and KATIE JOHNSON, in Her Capacity as Chairperson of the Employment Security Division Board of Review, Respondents.

No. 75783

September 5, 2019 448 P.3d 539

Appeal from a district court order dismissing a petition for judicial review in an unemployment compensation matter. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

Bongiovi Law Firm, LLC, and *Gina J. Bongiovi*, Las Vegas; *Fabyanske, Westra, Hart & Thomson, P.A.*, and *Thomas J. Vollbrecht*, Minneapolis, Minnesota, for Appellant.

Troy Curtis Jordan, Senior Legal Counsel, State of Nevada Employment Security Division, Carson City, for Respondents.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

NRS Chapter 233B provides a mechanism for a party aggrieved by a final administrative decision to petition a district court for ju-

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[9]The district court also summarily disposed of Poole's equitable claims, finding that because it granted summary judgment for respondents on each of Poole's statutory claims, "there are no grounds to grant equitable relief." We note that our reversal of summary judgment reinstates Poole's equitable relief claims.

Further, the district court granted summary judgment in favor of Corepointe because it dismissed the claims against Nevada Auto. Because we reverse the district court's order granting summary judgment for Nevada Auto, we also reverse the order dismissing Poole's claims against Corepointe. The district court should also reexamine the award of attorney fees to respondents.

dicial review. A party seeking judicial review of an administrative decision must strictly comply with that chapter's jurisdictional requirements. In this case, appellant timely filed a petition for judicial review of an administrative decision. Pursuant to NRS 233B.130(5), appellant then had to serve the petition within 45 days. Appellant neglected to do so, leading the district court to dismiss the petition. This appeal presents an issue of first impression: whether the untimely service of a timely filed petition for judicial review is a jurisdictional defect mandating dismissal. We hold that the 45-day service requirement in NRS 233B.130(5) is not a jurisdictional requirement because the statute affords the district court discretion to extend the time frame upon a showing of good cause. Here, however, because appellant did not demonstrate good cause for the late service, we affirm the district court's order dismissing the petition.

BACKGROUND

In 2006, Michael DeBoard filed a claim for unemployment insurance benefits with respondent State of Nevada, Department of Employment, Training and Rehabilitation, Employment Security Division (ESD) and named appellant Spar Business Services, Inc. (Spar) as his employer.[1] This claim sparked a broader ESD investigation as to whether DeBoard and other similarly situated individuals who provided merchandising services to Spar were independent contractors or employees of Spar subject to assessment under Nevada law. Following a series of administrative appeals brought by Spar, the ESD Administrator entered a determination that Spar was required to report all individuals as employees and pay contributions to the ESD. Spar timely appealed, and the ESD Board of Review affirmed this determination in April 2017. The ESD decision became final on May 5, 2017.

Spar timely filed its petition for review in district court on May 15, 2017. Pursuant to NRS 233B.130(5), Spar then had 45 days to serve the petition for review on the ESD. But Spar did not serve the petition on the ESD until July 14, 2017—15 days *after* the 45-day deadline under NRS 233B.130(5) had passed.[2] The ESD moved to dismiss Spar's petition based upon Spar's failure to timely serve the petition pursuant to NRS 233B.130(5), which the ESD contended deprived the district court of subject matter jurisdiction. The district court granted the ESD's motion to dismiss Spar's petition, finding that Spar did not effect service within the requisite 45-day deadline and did not show good cause to extend the service deadline pursuant to NRS 233B.130(5).

[1]This opinion refers collectively to all respondents as "the ESD."

[2]It appears from the record that Spar had requested the ESD accept service in early July and the ESD refused.

DISCUSSION

Spar claims the district court erred in dismissing its petition for judicial review because NRS 233B.130(5)'s 45-day service period is not jurisdictional and because Spar established good cause for an extension. Whether NRS 233B.130(5)'s service requirement is jurisdictional implicates an issue of statutory construction, which we review de novo. *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 724 (2012) (applying de novo review when construing a statute and when determining subject matter jurisdiction). Conversely, we review a district court's good cause determination for an abuse of discretion. *See Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm'r*, 134 Nev. 1, 5, 408 P.3d 156, 160 (2018).

Service within 45 days of a timely filed petition is not a jurisdictional requirement

To obtain review of an ESD decision, a petitioner must proceed under NRS Chapter 612, which governs claims for unemployment benefits. *Cf.* NRS 612.010. Though special provisions of NRS Chapter 612 prevail where applicable, NRS 233B.039(3)(a), Nevada's Administrative Procedures Act (NAPA), codified as NRS Chapter 233B, sets forth the procedural requirements for judicial review of administrative agency actions generally, NRS 233B.020(1). NRS Chapter 612 requires service of a petition for judicial review contesting an award subject to its provisions, but is silent regarding the timing of service. NRS 612.530(2). Accordingly, we look to the relevant procedures set forth in NRS Chapter 233B.

Pursuant to NRS 233B.130(1), an aggrieved party may petition a district court for judicial review of a final administrative decision—so long as the decision is challengeable under and challenged according to NAPA. *Otto*, 128 Nev. at 431, 282 P.3d at 724-25. A party petitioning for judicial review of an administrative decision must strictly comply with the NAPA's jurisdictional requirements. *Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989). NRS 233B.130(2) mandates who must be named as respondents to a petition for judicial review, where the petition must be filed, who must be served with the petition, and the time for filing the petition in the district court. Because NRS 233B.130(2) is silent on the court's authority to excuse noncompliance with those requirements, we have determined that the statute's plain language requires strict compliance and have held the requirements in NRS 233B.130(2) to be jurisdictional. *Heat & Frost*, 134 Nev. at 4-5, 408 P.3d at 159-60. Conversely, NRS 233B.130(5) expressly grants the district court authority to consider whether there is good cause to extend the time to serve the petition. Specifically, NRS 233B.130(5) provides that "the petition for judicial review . . . must be served upon the agency and every party within 45 days after the filing of the petition,

unless, upon a showing of good cause, the district court extends the time for such service." (Emphasis added.) Accordingly, NRS 233B.130(5) authorizes a district court to use its discretion to determine whether there was good cause for any delay in service. This authorization is notably absent in NRS 233B.130(2). As such, NRS 233B.130(5)'s plain language illustrates that the time for serving a petition for judicial review, unlike the requirements listed under NRS 233B.130(2), is not a jurisdictional requirement. *See Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010) (interpreting clear and unambiguous statutes based on their plain meaning).

This reading is further supported by our holding in *Fitzpatrick v. State ex rel. Department of Commerce, Insurance Division*, 107 Nev. 486, 813 P.2d 1004 (1991). In *Fitzpatrick*, we concluded that the requirement in NRS 233B.133 for filing a memorandum of points and authorities in support of a timely filed petition for judicial review is not jurisdictional. *See id.* We noted that a petition for judicial review must be timely filed to invoke the district court's jurisdiction, but "if the petition for judicial review is timely filed, NRS 233B.133 allows the district court to accept a tardy memorandum of points and authorities in support of the petition." *Id.* at 488, 813 P.2d at 1005. Similar to the extension of the service deadline for good cause allowed by NRS 233B.130(5), NRS 233B.133(6) provides that "[t]he court, for good cause, may extend the times allowed in this section for filing memoranda [of points and authorities]." We see no reason to treat NRS 233B.130(5) differently from NRS 233B.133(6). Thus, we conclude the 45-day period for service of a timely filed petition for judicial review under NRS 233B.130(5) is not a jurisdictional requirement, and therefore dismissal of a timely filed petition for untimely service is not mandatory where the district court finds good cause is shown to extend the service deadline. Accordingly, we must now determine whether the district court abused its discretion in determining Spar did not demonstrate good cause to extend the time to serve the petition.

Good cause consideration

As a preliminary matter, Spar argues the district court never considered whether there was good cause to extend the service deadline, and thereby abused its discretion in dismissing the petition. This is belied by the record. Spar contends, as it did below, that it demonstrated good cause because it mistakenly relied upon the 120-day period for service of process under NRCP 4(i).[3] Spar's mistake ostensibly stemmed from NRS 233B.039(3)'s language providing that NRS Chapter 612 prevails over the general provisions of

[3]NRCP 4(i) was amended as NRCP 4(e) in 2019. ADKT No. 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018).

NRS Chapter 233B with respect to petitions for judicial review of ESD decisions, coupled with NRS Chapter 612's silence as to the time period for serving such petitions. *Cf.* NRCP 81(a) (providing that Nevada Rules of Civil Procedure do not take precedence over contrary procedural rules in special statutory proceedings). Additionally, Spar argues it was waiting for its out-of-state counsel to be given pro hac vice status before serving the ESD. On these premises and because Spar's mistake did not prejudice the ESD, Spar posits the district court should have found there was good cause to extend the service deadline.

In evaluating a motion to dismiss a timely filed petition for failure to timely serve the petition, a district court is required to consider whether there is good cause to extend the service deadline if the petitioner asserts such cause exists. *See Heat & Frost*, 134 Nev. at 5, 408 P.3d at 160 (concluding that the district court had jurisdiction to determine whether good cause warranted extending time to serve a petition for judicial review); *Fitzpatrick*, 107 Nev. at 489, 813 P.2d at 1006 (holding the district court erred in concluding it lacked jurisdiction to consider a petition without considering "the merits of [the petitioner's] claim that he had good cause for filing a tardy memorandum of points and authorities in support of the timely filed petition for judicial review").[4] The record reflects the district court considered good cause here. The district court noted that both of Spar's attorneys, the out-of-state counsel and local counsel of record, previously complied with the service requirements for a petition for judicial review in a different case representing Spar. Further, the register of actions demonstrates that the motion to associate Spar's out-of-state counsel was filed after this service, undermining Spar's argument that it was waiting for its out-of-state counsel to be approved prior to serving the ESD in the underlying matter. The district court did not abuse its discretion in finding Spar failed to demonstrate good cause to extend the period to serve the petition and accordingly granting the ESD's motion to dismiss. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances.").

CONCLUSION

We hold that, by its plain language, the 45-day service deadline for timely filed petitions for judicial review set forth in NRS

[4]We reject Spar's contention that a district court is required to follow the framework as set forth in *Scrimer v. Eighth Judicial District Court*, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000), in evaluating good cause under NRS 233B.130(5), as *Scrimer* applies to the service deadline for a complaint in a civil action.

The parties do not raise and this opinion does not address whether service of a petition for judicial review must accord with NRCP 4.

233B.130(5) is not a jurisdictional requirement because the statute grants the district court authority to extend the deadline for good cause. Because, however, we find the district court did not abuse its discretion in finding Spar failed to show good cause here and denying Spar an extension of time to serve the petition, we affirm the district court's order dismissing Spar's petition for judicial review.

HARDESTY and SILVER, JJ., concur.