DIRECT GRADING & PAVING, LLC, a Nevada Limited Liability Company, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ROB BARE, District Judge, Respondents, and CENTURY COMMUNITIES OF NEVADA, LLC, a Nevada Limited Liability Company, and ARGONAUT INSURANCE COMPANY, Real Parties in Interest.

No. 81933

July 8, 2021 491 P.3d 13

Original petition for a writ of mandamus challenging a district court order granting a motion for district court intervention during binding arbitration.

Petition granted.

Johnson & Gubler, P.C., and *Matthew L. Johnson* and *Russell Gene Gubler*, Las Vegas, for Petitioner.

Santoro Whitmire and *Nicholas J. Santoro* and *Oliver J. Pancheri*, Las Vegas, for Real Parties in Interest.

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

OPINION

By the Court, Silver, J.:

In this opinion, we address whether the district court has authority, either under NRS 38.222's provisional remedy allowance or through its inherent powers, to intervene in binding arbitration to sanction a party's misconduct. We clarify that NRS 38.222 provides limited authority to intervene in an arbitration only where the district court orders a provisional remedy. Because the parties here did not seek, and the district court did not provide, a provisional remedy, NRS 38.222 did not grant the district court authority to intervene in the arbitration. We further conclude that the district court did not have inherent authority to intervene in this arbitration to remedy alleged litigation misconduct because that matter was squarely before the arbitrator. Accordingly, we grant writ relief and instruct the district court to return the case to arbitration.

FACTS AND PROCEDURAL HISTORY

Petitioner Direct Grading & Paving, LLC (Direct) and real party in interest Century Communities of Nevada, LLC (Century) entered

into a Master Subcontract Agreement (MSA) and subsequent Project Work Authorizations for four construction projects to be performed on several of Century's properties. The MSA included an arbitration clause stating that "any disputed claim" between the parties "shall [be] settled by arbitration" unless both parties agreed not to arbitrate. Direct allegedly failed to timely perform the scope of the work, and Century fired Direct as a result. Direct then recorded the following four mechanics' liens in 2017: (1) $290,018.55 against the Inspirada property, (2) $301,043.48 against the Lake Las Vegas property, (3) $735,863.15 against the Freeway 50 property, and (4) $344,988.46 against the Rhodes Ranch property.

The parties agreed to Direct filing a complaint in district court, staying the action, selecting an arbitrator, and allowing the case to proceed through arbitration. During discovery in arbitration, Century hired an expert accountant who uncovered alleged discrepancies in Direct's documents suggesting that a Direct employee altered documents between the Bureau of Land Management and Direct to overstate the amount of dirt delivered to the Inspirada property. The alteration allegedly covered up Direct overcharging Century approximately $550,000 for the dirt. Century also learned that its former land development manager, Scott Prokopchuk, was employed by DGP Holdings, a company owned by Direct, in a possible conflict of interest, as Prokopchuk had the authority to approve invoices from Direct on Century's behalf.

Direct claimed it was unaware of the alterations and asserted the employee only altered the documents because she thought she was missing another document. Direct further asserted any errors in the Bureau of Land Management/Direct documents had "no legal bearing on Century," as Century ultimately received the materials needed for the project and was not actually overcharged. As to Prokopchuk, Direct claimed he worked for DGP Holdings, a legal entity separate and distinct from Direct, and that there was no conflict of interest because Century's upper management had to approve any Project Work Authorizations Prokopchuk processed.

The arbitrator ordered that an independent third-party information technology specialist perform a sweep of Direct's computers, cell phones, and server and that other discovery be stayed. The specialist who performed the sweep opined that Direct intentionally used a Windows upgrade to complicate the sweep and also purposely concealed computer data by withholding the computer or hard drive used by the employee who allegedly altered the records.

After the sweep of Direct's technology, Century submitted its first motion for discovery sanctions, asking the arbitrator to strike Direct's claims and enter adverse findings against Direct, to remove Direct's mechanics' liens and dismiss any claims Direct had against Century's surety bonds, and to award Century its fees and costs. The arbitrator issued an order fining Direct $130,000. But the

arbitrator declined to strike Direct's claims at that time, noting that while the evidence showed the employee altered the documents and that Direct as the employer was ultimately responsible, the arbitrator did not feel the altered documents required him to question all of Direct's documentation supporting its claims or necessarily strike any of Direct's claims. The arbitrator noted concern with evidence suggesting Direct had failed to preserve evidence, but he could not determine whether Direct engaged in spoliation of evidence and declined to rule on that issue at that time. Instead, the arbitrator reserved the right to supplement the order or make a further ruling at the close of discovery.

Century moved for clarification and reconsideration of the arbitrator's order, asking him to make an express ruling on Century's motion to expunge Direct's liens and release the bonds. Century specifically asserted that Prokopchuk's relationship with Direct was a clear breach of the parties' agreement and prevented Direct from receiving payment for any of its projects. Century further requested the arbitrator hold an evidentiary hearing to obtain any additional necessary evidence, issue a final ruling on discovery sanctions, and issue an interim award "so that Century can seek relief with the District Court." While that motion was still pending, Century submitted another motion for additional sanctions, explaining that Direct had not paid Century for the previous $130,000 sanction.

The arbitrator's subsequent order explained that the prior ruling was clear and unambiguous and that expunging any lien at that time would be inappropriate. The arbitrator ordered that the $130,000 in sanctions would be deducted from one of Direct's mechanics' liens if Direct did not pay that sanction within 30 days. The arbitrator denied the demand for an evidentiary hearing and ordered the parties to prepare a joint recommendation for proposed additional discovery.

Century then filed a motion in the district court for provisional relief pursuant to NRS 38.222, requesting that the district court take action to remedy the misconduct. After conducting a hearing, the district court found that it had authority to address the issues raised in the motion because (1) the district court had jurisdiction over the lawsuit Direct filed in court; (2) the court had inherent authority and permission under NRCP 37 to address alleged discovery misconduct and alteration of documents; (3) NRS 38.222 allows the court to provide provisional relief; and (4) judicial economy would be served by resolving the issues because the arbitrator was "not doing what a trial judge would do," was "not providing an adequate remedy," and had erred by refusing to conduct an evidentiary hearing. The district court ordered Century and Direct to file points and authorities in support of their respective positions on whether Century should be granted relief for Direct's alleged misconduct and fraud upon the

court. The district court stayed arbitration pending an evidentiary hearing and the court's ruling on Century's motion.

In early March 2020, shortly before the Covid-19 pandemic took hold, Direct filed a motion for reconsideration. The motion was denied after pandemic precautions prevented a hearing. In late September, after Direct filed additional briefing, the district court denied the motion for reconsideration. Direct then filed the instant petition.

DISCUSSION

The primary issue raised by this petition is whether the district court had authority to intervene in a binding arbitration to remedy alleged misconduct. We first determine whether our consideration of this petition for writ relief is warranted, before turning to whether the district court had authority to hear the misconduct dispute.

We exercise our discretion to entertain the writ petition

"A writ of mandamus is available to compel the performance of an act which the law . . . [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks and footnote omitted) (alterations in original). Mandamus is an extraordinary remedy, available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see Cote H.*, 124 Nev. at 39, 175 P.3d at 908.

The decision to entertain a petition for a writ of mandamus is within our sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "Because an appeal is ordinarily an adequate remedy, this court generally declines to consider writ petitions challenging interlocutory district court orders." *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 912, 362 P.3d 91, 94 (2015). "But we may consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served." *Id.*

We elect to consider Direct's writ petition because it raises important issues of first impression, including whether NRS 38.222 authorizes the district court to intervene in binding arbitration to remedy alleged misconduct. Clarifying the available procedures here will serve judicial economy by ensuring that the matter, which has not progressed beyond the discovery stage at this point, proceeds in the correct forum.[1]

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[1]Century argues that the doctrine of laches bars Direct's petition. We decline to apply the doctrine of laches here, as our review of the record shows that Direct filed its petition at most five months after the district court denied its motion for reconsideration, and moreover, we conclude the delay does not

The district court erred by hearing a discovery dispute from parties involved in arbitration

Direct argues the district court did not have authority under NRS 38.222 or through its inherent powers to remove Century and Direct's discovery dispute from arbitration. We agree.

NRS 38.222

Under NRS 38.222(2)(b), after an arbitrator has been appointed and is able to act, a party to the arbitration "may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." A provisional remedy is "[a] temporary remedy awarded before judgment and pending the action's disposition, such as a temporary restraining order, a preliminary injunction, a prejudgment receivership, or an attachment," that "is intended to maintain the status quo by protecting a person's safety or preserving property." *Remedy, provisional remedy*, *Black's Law Dictionary* (11th ed. 2019). Thus, the plain language of NRS 38.222 allows a district court to provide a temporary remedy to preserve the status quo if the arbitrator is not able to do so. It does not allow the district court to withdraw a case from arbitration or award potentially case-ending sanctions that the arbitrator previously declined to award. *Cf. Sea Vault Partners, LLC v. Bermello, Ajamil & Partners, Inc.*, 274 So. 3d 473, 478 (Fla. Dist. Ct. App. 2019) (addressing a statute identical to NRS 38.222(2)(b) and concluding "a plain reading of the statute . . . does not confer jurisdiction on the trial court to award sanctions simply because the [a]rbitrator declined to do so").

Here, nothing about Century's motion suggests NRS 38.222 applies to allow the district court's intervention. There is no indication that the arbitrator lacked enough time or was unable, as opposed to unwilling, to remedy any demonstrated misconduct. Century did not show why this matter was urgent, and Century's desire to expunge the liens does not require the district court's interference, as the arbitrator had the authority to expunge the liens, declined to do so at the time, and remains able to act timely and provide Century's requested remedy if the evidence supports it. Moreover, Century did not request any type of provisional remedy to preserve the status quo. The district court stated in its order that it stayed arbitration pending an evidentiary hearing and the court's ruling on

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warrant application of the laches doctrine under the facts of this case. *See, e.g.*, *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 148, 42 P.3d 233, 238 (2002) (acknowledging that writ relief is subject to the doctrine of laches and setting forth questions a court must consider in determining whether laches applies, including whether the delay was inexcusable); *Widdis v. Second Judicial Dist. Court*, 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998) (noting Nevada law does not set a specific time limit by which a petition for mandamus must be filed and finding that a petition was not barred by the doctrine of laches due to a seven-month delay in filing).

Century's motion. However, if the district court were to then grant Century's motion and expunge the liens, the district court effectively will have resolved the entire case in Century's favor rather than preserve the status quo. Accordingly, the district court did not have authority under NRS 38.222 to intervene in this arbitration.[2] We next consider whether the district court had authority through its inherent powers to intervene in this arbitration.

Inherent powers

Generally, we recognize the district courts' inherent powers to sanction parties for litigation abuse occurring during district court proceedings. "[C]ourts have 'inherent equitable powers to dismiss actions or enter default judgments for . . . abusive litigation practices.' " *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (alteration in original) (quoting *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 916 (9th Cir. 1987)). Additionally, NRCP 37(b)(1) provides that a district court may issue discovery sanctions if a party "fails to obey an order to provide or permit discovery." However, both sources of power address a district court's ability to sanction parties for litigation abuses occurring in proceedings before that court. We have never held that district courts have inherent or rule-based power to sanction perceived abuses occurring in an ongoing arbitration. Moreover, we have a strong preference in favor of arbitration and upholding arbitration clauses that weighs against extending the courts' inherent powers to arbitration cases in this manner. *Cf. Int'l Ass'n of Firefighters, Loc. No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1323-24, 929 P.2d 954, 957 (1996) (explaining Nevada courts will uphold and enforce arbitration clauses unless it is clear that the arbitration clause does not cover the dispute).

Here, the district court found that because Direct filed a complaint in the district court, the court had inherent authority over the case and, by extension, discretion to address the misconduct raised during arbitration. However, while the district court had authority over the case before it, it did not similarly have inherent authority over the arbitration case. The district court's reasoning is flawed here because it relied on *Bahena v. Goodyear Tire & Rubber Co.*,

[2]Century also argues the arbitrator improperly failed to rule on whether Direct established the validity of the mechanics' liens pursuant to NRS 108.2275 and, therefore, the district court can resolve the dispute. However, we are not convinced the arbitrator was bound by NRS 108.2275, which by its plain language concerns only the *district court's* actions following a hearing on frivolous or excessive liens. And while the arbitration agreement authorized the arbitrator to grant relief provided by NRS 108.2275, the agreement did not require the arbitrator to comply with NRS 108.2275's procedural requirements. Moreover, even if the arbitrator was required to comply with the statute and failed to do so, that issue is best suited for the district court's determination of whether to confirm the arbitrator's final award. Therefore, we decline to consider this argument further.

126 Nev. 606, 615, 245 P.3d 1182, 1188 (2010), *Bass-Davis v. Davis*, 122 Nev. 442, 452, 134 P.3d 103, 109 (2006), and *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 91, 787 P.2d 777, 779 (1990), and all of those cases concern the court's authority over its own pending case and say nothing about cases that have been stayed and removed to arbitration. Moreover, this court has routinely enforced arbitration agreements, and here, the parties expressly agreed to arbitrate and agreed on the presiding arbitrator. Further, Direct filed its complaint to preserve the statute of limitations while they arbitrated, and Century provides no adequate support for its assumptions that filing a complaint under these facts, or attempting to enforce a fraudulent lien during arbitration, would operate to remove the case from binding arbitration after the parties had contractually agreed to arbitrate.[3] Accordingly, the district court did not have inherent authority to remove Century and Direct's dispute from binding arbitration,[4] and writ relief is warranted.[5]

CONCLUSION

We conclude the district court did not have the authority under NRS 38.222 to intervene in this arbitration because Century did not seek, and the district court did not provide, a provisional remedy. We further conclude the district court did not have inherent authority to intervene in the arbitration because neither Nevada law, nor Direct's lawsuit filed in the district court, gave the court that authority under the facts of this case. Accordingly, we grant Direct's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting Century's motion for provisional relief and to return the case to arbitration.[6]

Parraguirre and Stiglich, JJ., concur.

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[3]As to the litigation abuse more specifically, discovery is ongoing and the alleged fraud regards only the Inspirada lien. Yet, troublingly, the district court concluded it had authority to assume jurisdiction over *all* liens.

[4]Direct also argues the doctrines of res judicata and judicial estoppel preclude Century's arguments and that the district court's decision unfairly prejudiced Direct. In light of our decision, we do not consider these arguments.

[5]Century also argues we should direct the district court to grant Century's request to appoint a new arbitrator pursuant to NRS 38.226. NRS 38.226(1) allows for the court to appoint a new arbitrator when the current arbitrator "fails or is unable to act." Here, the district court did not take any issue with the timeliness of the arbitrator's actions, and the record does not show that the arbitrator failed or was unable to act. Therefore, we decline to issue the order Century requests.

[6]We also lift the stay entered in this matter on November 13, 2020.

FILIPPO SCIARRATTA, An Individual, Appellant, *v.* FOREMOST INSURANCE COMPANY GRAND RAPIDS MICHIGAN, a Michigan Corporation; MID-CENTURY INSURANCE COMPANY, a California Corporation; and FARMERS INSURANCE EXCHANGE, a California Inter-Insurance Exchange, Respondents.

No. 79604

July 8, 2021 491 P.3d 7

Appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), in an insurance action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Affirmed.

[Rehearing denied July 27, 2021]

The Schnitzer Law Firm and *Jordan P. Schnitzer*, Las Vegas, for Appellant.

Christian, Kravitz, Dichter, Johnson & Sluga, PLLC, and *Gena LoPresto Sluga* and *Cara L. Christian*, Las Vegas; *The Feldman Firm, P.C.*, and *David J. Feldman*, Las Vegas, for Respondents.

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

OPINION

By the Court, Stiglich, J.:

This appeal concerns the validity of an exclusion in a personal umbrella liability insurance policy. Consistent with the third-party nature of liability insurance, the policy expressly excludes coverage for damages that are "payable to any insured." Appellant claims, however, that the exclusion is invalid because it veered from statutory requirements and was not disclosed to him at the time of purchase. We conclude that NRS 687B.147, which requires disclosures to be made in a certain manner when an exclusion like this one appears in a "policy of motor vehicle insurance," does not apply to umbrella policies. Further, while we recognize that an exclusion that is *never* disclosed to any insured may be unenforceable, we conclude that an insured who asserts such nondisclosure must offer admissible evidence supporting that assertion, such as an affidavit. In the proceedings below, the district court properly found that the exclusion was valid and precluded coverage. Accordingly, we affirm its order granting summary judgment.

FACTS AND PROCEDURAL HISTORY

Appellant Filippo Sciarratta and his then-wife Cynthia owned a Kawasaki motorcycle. In June 2015, Sciarratta allowed his brother-in-law Jonas Stoss to drive the motorcycle while Sciarratta rode as a passenger. Stoss lost control of the motorcycle, and Sciarratta was seriously injured. The parties have stipulated that Stoss was negligent.

At the time of the crash, Cynthia was the named insured on a personal umbrella policy (the Umbrella Policy) directly underwritten by respondent Farmers Insurance Exchange (Farmers). The Sciarrattas also had a motorcycle liability policy underwritten by respondent Foremost Insurance Company, and an automobile liability policy underwritten by respondent Mid-Century Insurance Company. The three insurers have a corporate relationship that is neither fully clear from the record nor relevant to the issues on appeal. The insurers have defended the suit together, and both sides refer to them collectively as the "Farmers Entities."

Sciarratta sought coverage for his injuries under all three policies. Foremost and Mid-Century paid over $500,000 under the auto and motorcycle policies, but Farmers denied coverage under the Umbrella Policy for two related reasons. Both reasons touch on the nature of liability insurance, which generally pays funds *to* third parties for damages that are caused *by* the insured, as opposed to first-party insurance such as health insurance, which pays funds to insureds. First, Farmers argued that Stoss was *not* an insured under the Umbrella Policy, and thus it was not responsible for the damages he caused. Second, Farmers pointed to an exclusion in the policy which stated that the insurance did not cover any damages "payable to an insured" (the Exclusion). Because Sciarratta *was* an insured under the Umbrella Policy, Farmers argued, he was not entitled to payment under the policy.

Sciarratta sued Foremost and Mid-Century for breach of contract, misrepresentation, and bad faith concerning all of the policies. He asserted that the Umbrella Policy was a part of the Mid-Century auto policy. In his operative complaint, Sciarratta alleged in general terms that his claims were covered under the Foremost and Mid-Century policies. Sciarratta also alleged that those insurers had misrepresented pertinent facts related to coverage, but he did not state what those facts were.

Farmers voluntarily joined the litigation and counterclaimed for a declaratory judgment that it owed nothing under the Umbrella Policy. It reiterated its original grounds for denying Sciarratta's claim. In his answer, Sciarratta denied the existence of the Exclusion on the ground that he was "without sufficient knowledge or information to form a belief as to the truth or falsity of the allegation[.]" He did not state that he did not receive a copy of the Umbrella Policy. He raised several affirmative defenses, including that Farmers was

estopped from seeking relief or had waived relief, but he asserted no facts in support of his position.

Approximately nine months later, Farmers moved for summary judgment. Farmers included a copy of the Umbrella Policy as an exhibit, accompanied by a sworn affidavit stating that the copy was a true and correct copy of the actual policy issued to Cynthia and in effect at the time of the accident in June 2015. The first page of the exhibit is a cover page dated April 3, 2017, which states the following: "Attached is a true copy of the original declaration page. The attached policyback and endorsements did not mail with this declaration page, but are included as requested." The next pages are declarations dated March 19, 2015, showing that the policy was in effect from March 18, 2015, to May 5, 2016. Next is a copy of the Umbrella Policy itself, including the Exclusion. Farmers included another exhibit which showed that Cynthia had declined uninsured motorist coverage under the Umbrella Policy in May 2014, indicating that the 2015 mailing was a renewal.

Sciarratta opposed the motion for summary judgment. He argued that summary judgment was premature and requested more time for discovery. He further argued that, even if the court could properly consider the motion on the existing record, the Exclusion was unenforceable for two different reasons. First, he argued that the Exclusion did not comply with NRS 687B.147. This statute, which applies to "a policy of motor vehicle insurance covering a passenger car," requires disclosure of any exclusion of the liability of one insured to another insured "on a form approved by the Commissioner." Farmers did not claim to have complied with the statute by disclosing the Exclusion on the form specifically approved for that purpose. Next, he argued that Farmers *never* sent him or his wife a copy of the policy containing the Exclusion. For this proposition, he relied solely on the copy of the policy Farmers had submitted, which stated that "[t]he attached policyback and endorsements did not mail with this declaration page."

The district court found that NRS 687B.147 does not apply to umbrella policies, and so the statute did not invalidate the Exclusion. Because the court also found that Sciarratta was an "insured" and thus excluded from coverage, it granted summary judgment to Farmers on its declaratory judgment action. The district court did not expressly address Sciarratta's contention that the Exclusion was never disclosed. The district court certified its decision as final pursuant to NRCP 54(b) and stayed proceedings on Sciarratta's misrepresentation and bad faith claims pending this appeal.

DISCUSSION

There is no dispute that the Exclusion, if valid, precludes coverage, as Sciarratta does not challenge the district court's finding that

he is an "insured" under the Umbrella Policy. Therefore, the issue on appeal is limited to whether the Exclusion is valid. As to this issue, we review the district court's grant of summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment must be granted if the pleadings and other evidence on file show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Id.* As this court has explained, "[w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." *Id.* at 731, 121 P.3d at 1030-31.

NRS 687B.147 applies only to primary motor vehicle policies

We first address Sciarratta's contention that the Exclusion is unenforceable because Farmers did not comply with NRS 687B.147. We have never construed NRS 687B.147, much less stated the consequences for noncompliance. Nor must we do so today, because we hold that a personal umbrella liability policy is *not* a "policy of motor vehicle insurance." Thus, the statute does not apply here.

In *Estate of Delmue v. Allstate Insurance Co.*, 113 Nev. 414, 936 P.2d 326 (1997), this court examined the scope of NRS 687B.145(2), which requires insurance companies to offer "uninsured and underinsured vehicle coverage in an amount equal to the limits of coverage for bodily injury sold to an insured under *a policy of insurance covering the use of a passenger car*." (Emphasis added.) The issue was whether an umbrella policy was subject to the statute. We concluded that "the phrase 'a policy of insurance covering the use of a passenger car,' does not distinguish between primary automobile coverage policies and umbrella policies," and thus umbrella policies were subject to the requirements of NRS 687B.145(2). *Delmue*, 113 Nev. at 417, 936 P.2d at 328. But the Legislature soon changed the statute by expressly excluding umbrella policies from the operation of NRS 687B.145. *See* 1997 Nev. Stat., ch. 603, § 22.4, at 3032-33 (now codified as NRS 687B.145(5)).

Sciarratta argues that when the Legislature amended NRS 687B.145, it did *not* amend NRS 687B.147. Thus, he asserts, if NRS 687B.147 ever applied to umbrella policies, then it continues to apply to umbrella policies. Conversely, Farmers argues that the Legislature, in amending NRS 687B.145, directed this court to interpret the phrase "a policy of insurance covering the use of a passenger car" as excluding umbrella policies wherever it appears.

This case is simpler than the parties' arguments make it appear to be. We are puzzled by the parties' emphasis on the phrase "a policy of insurance covering the use of a passenger car," because

that phrase does not appear in NRS 687B.147.[1] The operative language in NRS 687B.145 and NRS 687B.147 is critically different: whereas NRS 687B.145 applies to "a policy of insurance covering the use of a passenger car," which we read in *Delmue* as including *any* policy of insurance covering the use of a passenger car, NRS 687B.147 applies only to "a policy of *motor vehicle insurance* covering a private passenger car." (Emphasis added.)[2] Neither party addresses the inclusion of the words "motor vehicle" in one statute and their omission from the other. And yet those words must mean something distinct from the fact that a car is covered; otherwise, they would be redundant and meaningless. *See C. Nicholas Pereos, Ltd. v. Bank of Am.*, 131 Nev. 436, 441, 352 P.3d 1133, 1136 (2015) ("We will not interpret a statute in a way that would render any part of [the] statute meaningless." (alteration in original) (internal quotation marks omitted)).

The Vermont Supreme Court, citing *Delmue*, has distinguished statutes "predicated . . . on the type of *coverage*," like a "policy of insurance covering the use of a passenger car," from statutes predicated on "the type of *policy*," like a "motor vehicle polic[y]." *Ins. Co. of Pa. v. Johnson*, 987 A.2d 276, 282-83 (Vt. 2009). We are generally "reluctant to rely on other jurisdictions' treatment" of their own insurance statutes, as those statutes vary in their wording. *Delmue*, 113 Nev. at 418 n.5, 936 P.2d at 329 n.5. However, the Vermont Supreme Court's comparative analysis is persuasive, precisely because it takes the differences between statutes into account. Under this analysis, NRS 687B.145 is predicated on the type of coverage, but NRS 687B.147 is predicated on the type of policy. We conclude that the words "motor vehicle" distinguish NRS 687B.147 from NRS 687B.145 by limiting the application of NRS 687B.147 to primary motor vehicle policies.

Therefore, we hold that NRS 687B.147 does not apply to the Umbrella Policy—not because *Delmue* was legislatively overruled,

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[1]This mistaken focus was shared by the United States District Court for the District of Nevada when it held that NRS 687B.147 does not apply to umbrella policies. *State Farm Fire & Cas. Co. v. Repke*, No. 2:06-CV-0366-JCM-RJJ, 2007 WL 7121693, at *5 (D. Nev. Feb. 27, 2007), *aff'd*, 301 F. App'x 698 (9th Cir. 2008). The district court in this case treated *Repke* as if it were controlling authority. While we conclude the *Repke* court reached the correct result, albeit for the wrong reason, we take this opportunity to remind the bench and bar that a federal court's "interpretation of a Nevada statute on a matter of state law does not constitute mandatory precedent." *In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 242, 277 P.3d 449, 456 (2012).

[2]Incidentally, no party has ever discussed whether it matters to this analysis that Sciarratta was injured on a motorcycle, which is not a "passenger car." Because we hold that the statute does not apply, we assume without deciding that the difference between a motorcycle and a passenger car is immaterial here. *But cf.* 2021 Nev. Stat., ch. 118 (A.B. 130) (amending NRS 687B.145 to apply to motorcycles in addition to passenger cars).

but because *Delmue* never would have governed the scope of NRS 687B.147, which, unlike NRS 687B.145, is expressly limited to "polic[ies] of motor vehicle insurance."[3]

Sciarratta failed to create a genuine issue of material fact that would defeat summary judgment

Sciarratta also argues that the Exclusion is unenforceable because it was never mailed, and thus no insured received written notice of the Exclusion. He notes that other courts generally agree that where an insurer does not disclose the existence of an exclusion before an otherwise covered loss, the exclusion is not enforceable by the insurer. *See, e.g.*, *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 236-37 (Utah 1985); *Kozlik v. Gulf Ins. Co.*, 673 N.W.2d 343, 348-49 (Wis. Ct. App. 2003). He urges this court to adopt that rule.

We conclude that this case does not present an opportunity either to adopt or reject Sciarratta's proposed rule. Even if we chose to adopt such a rule, it would not trump the requirement that, at the summary judgment phase, a party has a duty to support its assertions with evidence by "citing to particular parts of materials in the record." NRCP 56(c)(1)(A). To defeat summary judgment under his proposed rule, Sciarratta would have had to demonstrate either that there was no dispute that the Exclusion was not disclosed before the accident, or at least that there was a genuine dispute as to whether it was disclosed. Sciarratta appears to recognize his burden, stating that the evidence undisputedly shows that the policy was not mailed. But the only evidence that he cites is the cover letter showing that Farmers did not mail a copy of the policy in March 2015.

That was not enough. Other evidence showed that the Umbrella Policy was already in effect in 2014, and thus the March 2015 mailing contained renewal documents. The fact that a complete copy of the policy was not sent in March 2015 does not lead to the conclusion that no copy was *ever* sent to the insured—at least not without significant speculation that cannot defeat summary judgment. *See Wood*, 121 Nev. at 731, 121 P.3d at 1030. If Sciarratta intended to rely on his assertion that no insured ever received a copy of the policy, he was required to "by affidavit or otherwise, set forth specific facts" to that effect. *See id.* He did not meet this burden of production, and the district court properly granted summary judgment.[4]

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[3]Sciarratta also argues that the Exclusion is a household exclusion and that such exclusions violate public policy and are unenforceable in the absence of a statute specifically permitting them. The sole case he cites for this proposition, *Progressive Gulf Insurance Co. v. Faehnrich*, 130 Nev. 167, 327 P.3d 1061 (2014), does not support a public policy against the enforcement of household exclusions. Indeed, there, we enforced a household exclusion in an automobile policy issued out of state, despite a lack of strict compliance with Nevada statutes. *See id.* at 176-77, 327 P.3d at 1067.

[4]In holding that Sciarratta did not present sufficient evidence to demonstrate a genuine dispute as to the disclosure or nondisclosure of the Exclusion, we of

The district court did not abuse its discretion in denying Sciarratta's NRCP 56(d) request

Sciarratta finally contends the district court should have granted his request for more time to conduct additional discovery before it granted summary judgment. Under NRCP 56(d),[5] if a party opposing summary judgment "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." NRCP 56(d) is phrased permissively ("the court may"), and thus unlike the summary judgment decision itself, "[t]he decision to grant or deny a continuance of a motion for summary judgment to allow further discovery is reviewed for an abuse of discretion." *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011).

When the nonmovant has no "dilatory motive," it is an abuse of discretion to deny such a continuance at an early stage in the proceedings. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118, 110 P.3d 59, 62 (2005). But the nonmovant has the burden to "affirmatively demonstrat[e] why he cannot respond to a movant's affidavits as otherwise required . . . and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Bakerink v. Orthopaedic Assocs., Ltd.*, 94 Nev. 428, 431, 581 P.2d 9, 11 (1978). Federal courts interpreting FRCP 56(d), which is identical to NRCP 56(d), have stated that "a party must show that the requested discovery, if obtained, 'would alter the court's determination.'" *Harrison v. Office of the Architect of the Capitol*, 281 F.R.D. 49, 52 (D.D.C. 2012) (quoting *Cheyenne Arapaho Tribes of Okla. v. United States*, 558 F.3d 592, 596 (D.C. Cir. 2009)).

Here, Sciarratta's counsel filed an affidavit declaring that he intended to depose several individuals for several reasons. The only such deposition that appears arguably relevant to Sciarratta's theory that the policy was not delivered was that of Farmers' NRCP 30(b)(6) designee, whom he stated he wished to question "regarding various matters including representations agents are expected to make to insureds, the purchase process, the policies at issue in this matter, *when the policies were provided to the insureds* as well as

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course express no opinion as to what would happen if an insured *did* present such evidence. Difficult and unsettled legal questions might well arise. The difficulty of these possible questions underscores the need to decide them in a properly presented case, on a clearly developed record.

[5]NRCP 56 was amended in 2019. At the time of summary judgment, the relevant subsection was NRCP 56(f). "The changes are stylistic" and do not affect the applicable legal standards. NRCP 56(d), Advisory Committee Note—2019 Amendment. For consistency and clarity, this opinion uniformly refers to the rule as NRCP 56(d), its current designation.

the insurance entities positions regarding the insurance clauses."[6] (Emphasis added.) We conclude that this did not clearly enunciate how discovery might alter the district court's determination. *See Harrison*, 281 F.R.D. at 52. Further, Sciarratta failed to meet his burden to affirmatively demonstrate why he could not respond to Farmers' evidence without further delay. *See Bakerink*, 94 Nev. at 431, 581 P.2d at 11. As noted above, if Sciarratta intended to rely on his assertion that no insured received a copy of the Umbrella Policy, he could have (and should have) filed an affidavit to that effect himself. There was no need to wait to depose Farmers' NRCP 30(b)(6) designee. Thus, the district court could have concluded that Sciarratta was dilatory. Accordingly, we conclude that the district court did not abuse its discretion by denying a continuance.

CONCLUSION

We hold that NRS 687B.147 applies only to policies of "motor vehicle insurance" and not to umbrella policies. While we agree that an insurer's complete failure to disclose a policy exclusion might make the exclusion unenforceable, we hold that an insured who alleges that an exclusion was not disclosed must make that allegation in an affidavit rather than rely solely on the arguments of counsel. Finally, we hold that the district court did not abuse its discretion by denying a continuance where the insured did not clearly explain how further discovery would change the outcome. We thus affirm the district court's order granting Farmers summary judgment.

Parraguirre and Silver, JJ., concur.

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[6]Sciarratta also stated he intended to depose both Cynthia and the agent from whom she bought the Umbrella Policy "to demonstrat[e] misrepresentations on [Farmers'] part." He further requested more time to obtain the underwriting file and Farmers' promotional materials, which he claimed were relevant "to show what the Sciarrata's [sic] believed they were purchasing" and to his bad faith claims. Sciarratta's misrepresentation and bad faith claims are not at issue in this appeal and remain pending below.

Sciarratta further stated he intended to depose an expert regarding "what an insured expects regarding umbrella policies." Even assuming without deciding that this is the proper subject of expert testimony, this information would not be relevant to the applicability of the Exclusion. While *ambiguities* in exclusions are interpreted narrowly to effectuate the insured's reasonable expectations, *unambiguous* exclusions are enforced according to their plain meaning. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011). Sciarratta does not (and cannot) argue that the Exclusion of damages "due directly or indirectly to an insured" is ambiguous. He only argues that the Exclusion was not disclosed. An expert could not have testified as to that factual issue.

POPE INVESTMENTS, LLC, a Delaware Limited Liability Company; POPE INVESTMENTS II, LLC, a Delaware Limited Liability Company; and ANNUITY & LIFE REASSURANCE, LTD., an Unknown Limited Company, Appellants, *v.* CHINA YIDA HOLDING, CO., a Nevada Corporation, Respondent.

No. 79807

POPE INVESTMENTS, LLC, a Delaware Limited Liability Company; POPE INVESTMENTS II, LLC, a Delaware Limited Liability Company; and ANNUITY & LIFE REASSURANCE, LTD., an Unknown Limited Company, Appellants, *v.* CHINA YIDA HOLDING, CO., a Nevada Corporation, Respondent.

No. 80709

July 8, 2021 490 P.3d 1282

Consolidated appeals from a district court summary judgment and post-judgment order awarding attorney fees in a corporations action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Reversed and remanded.

Boies Schiller Flexner LLP and *Richard J. Pocker*, Las Vegas; *Chasey Law Offices* and *Peter L. Chasey*, Las Vegas, for Appellants.

Holland & Hart LLP and *Joshua M. Halen* and *J. Robert Smith*, Las Vegas, for Respondent.

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

OPINION

By the Court, Stiglich, J.:

These consolidated appeals concern whether shareholders had a right to dissent from a corporate merger and seek fair value for their shares. When a corporation executes a merger, shareholders that object may dissent and obtain payment of fair value for their shares. There is generally no right to dissent, however, when the shares are publicly traded securities. This limitation is known as the market-out exception. This exception is itself subject to several exceptions, including where the board of directors' resolution approving the merger expressly provides otherwise.

What constitutes a board of directors' "resolution" and when a resolution approving a plan of merger provides dissenters' rights

are issues of first impression that we clarify here. We hold that a board's resolution is the expression of its intent to bind the corporation to a specific course of conduct, when the directors are acting as agents of the corporation. The resolution is not defined by any particular formal requirements or "magic words." We further hold that for a shareholder to exercise dissenters' rights when the market-out exception applies, the resolution must "expressly provide otherwise" than that "there is no right to dissent."

Appellants here owned shares of respondent's stock and sought to exercise dissenters' rights when respondent commenced a corporate merger offering per-share compensation that appellants found inadequate. The shareholders had a right to dissent because the board's resolution stated that it unconditionally approved the merger agreement and the merger agreement provided that there was a right to dissent that could be validly exercised and a class of shareholders that could exercise it. The board's resolution thus provided appellants with the right to obtain an appraisal of the fair value of their shares. We reverse and remand for further proceedings.

PROCEDURAL HISTORY AND FACTS

In 2016, respondent China Yida Holding, Co. (CY) merged with a private holding company, taking CY private and delisting it from the NASDAQ stock exchange. Appellants Pope Investments, LLC, Pope Investments II, LLC, and Annuity & Life Reassurance, Ltd. (collectively, Pope) owned 23% of CY's shares and opposed the per-share payment in the merger as inadequate.

CY was a Nevada holding company owning subsidiary entities that operate tourist destinations in China. CY was publicly traded on NASDAQ under the ticker symbol CNYD before the merger here. CEO Minhua Chen and COO Yanling Fan (Principal Shareholders) are board directors who collectively owned 58% of CY's shares. The board consisted of Principal Shareholders and three non-shareholding directors, Renjiu Pei, Chunyu Yin, and Fucai Huang. Principal Shareholders proposed purchasing the company. The independent directors formed the Special Committee to consider the proposal and structure a going-private transaction. The Special Committee recommended a merger where CY would merge into a new holding company in which Principal Shareholders would hold the new shares, while the outstanding shares of CY would be canceled and the shareholders paid cash consideration. Principal Shareholders opposed requiring the merger to be approved by a majority of the minority shareholders, and thus their votes alone would determine the outcome. The Special Committee concluded that $3.32 per share would be appropriate. The Special Committee recommended and the board approved the original merger agreement in March 2016. Following revisions to the transaction

structure, the Special Committee approved and recommended the amended merger agreement on April 12, 2016. The same day, the board (with Principal Shareholders abstaining as required by statute) authorized, approved, and recommended that the shareholders approve the merger agreement.[1]

The merger agreement begins with declarations stating the relevant actions of the parties involved. The provision addressing the board's action states:

> [T]he Company Board (acting upon the unanimous recommendation of the Special Committee) has (i) unanimously approved this Agreement, and approved the execution and delivery by the Company of this Agreement, the performance by the Company of its covenants and agreements contained herein and the consummation of the transactions contemplated hereby in accordance with the NRS upon the terms and subject to the conditions contained herein and (ii) resolved to recommend that the Company Shareholders authorize this Agreement and the Merger in accordance with the NRS[.]

The merger agreement repeated this acknowledgment in its operative provisions. The merger agreement also stated its effect on dissenting shareholders' interests, setting forth treatment for four classes of shares: the dissenting shares, Principal Shareholders' shares, other common stock (excluding dissenting and Principals' shares), and the existing shares of the new company. The agreement set forth the specific treatment for the class of dissenting shares, notably providing that a dissenting shareholder

> who has validly exercised and not lost its rights to dissent from the Merger pursuant to the NRS (collectively, the "Dissenting Shares") shall not be converted into or exchangeable for or represent the right to receive the Per Share Merger Consideration . . . and shall entitle such Dissenting Shareholder only to payment of the fair value of such Dissenting Shares as determined in accordance with the NRS. If any Dissenting Shareholder shall have effectively withdrawn (in accordance with the NRS) or lost the right to dissent, then . . . the Dissenting Shares held by such Dissenting Shareholder . . . shall be cancelled and converted into and represent the right to receive the Per Share Merger Consideration . . . .

The merger agreement did not discuss the procedure by which a shareholder may dissent from or support the proposed merger.

The proxy statements discussed this procedure in depth. Shortly after filing the proposed merger agreement with the U.S. Securities

[1]All references to the merger agreement refer to the April amended merger agreement, which superseded the original.

and Exchange Commission (SEC), CY filed preliminary and then final proxy statements with the SEC and mailed the same to shareholders.[2] The proxy statement provided: "You have a statutory right to dissent from the Merger and demand payment of the fair value of your shares of Company Common Stock as determined in a judicial appraisal proceeding in accordance with [NRS 92A.300-.500]." It informed shareholders that the demand must be made within 30 days of when the "Notice of Merger and Dissenters' Rights" is mailed and must otherwise comply with the relevant statutory provisions and that failure to comply with the "Dissenters' Rights Provision," annexed to the proxy statement, would forfeit dissenters' rights.[3] In discussing why the board's Special Committee concluded that the merger proposal was fair to shareholders other than Principal Shareholders, the Special Committee noted that other shareholders were "entitled to exercise dissenters' rights and demand fair value for their shares of Company Common Stock as determined by a Nevada state district court." Principal Shareholders (collectively with their wholly owned new entity) represented that the proposal was fair for the same reason. The annexed section discussing "Dissenters' Rights for Holders of Common Stock" again provides that a shareholder "is entitled to dissent to the Merger, and obtain payment of the fair value of the Shares," setting forth the procedures by which those rights are exercised in considerable detail. Pope timely notified CY of its intent to invoke these statutory rights and seek fair value for its shares.

On June 28, 2016, CY held a shareholder meeting, at which a majority of the shareholders entered a resolution approving the merger. Subsequently, Pope submitted a payment demand, and CY paid Pope the amount CY proffered as the fair value for the shares, $3.32 per share, as the appraisal process continued. Pope submitted its fair-value estimate to CY, valuing the company at $23.28 per share and its shares at more than $21 million, based on Pope's determination of CY's net asset value. CY rejected Pope's determination and petitioned the district court to determine fair value for the shares. The parties retained experts to support their competing valuations and litigated the dispute.

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[2]All references to the proxy statement refer to the May 25, 2016, definitive proxy statement, rather than the April 13, 2016, preliminary proxy statement.

[3]The proxy statement reiterated these points in a question-and-answer section:

> Q: Am I entitled to exercise dissenters' or appraisal rights instead of receiving the Merger Consideration for my shares of Company Common Stock?
>
> A: Yes, Nevada law provides that you may dissent from the disposal of assets. If you do not comply with the procedures governing dissenters' rights set forth under the Nevada Revised Statutes and explained elsewhere in this proxy statement, you may lose your dissenters' and appraisal rights.

In 2019, CY moved for summary judgment, arguing that Pope never had dissenters' rights because the market-out exception applied and the board did not pass a resolution providing dissenters' rights. CY made an offer of judgment pursuant to NRCP 68 of $10,000 that Pope refused. The district court granted summary judgment for CY. The district court found that CY was a covered security and thus that the market-out exception applied. It found that the resolution adopted at the June 28, 2016, shareholders' meeting did not provide dissenters' rights and that this exception to the market-out exception did not apply. It also found that neither the merger agreement nor the proxy statement was a board resolution and that the merger agreement did not provide a right to dissent.

CY moved for attorney fees, seeking payment for its fees incurred from the time of its offer of judgment. Pope opposed the motion, arguing that CY's offer was unreasonable and its rejection was reasonable. The district court ruled for CY and awarded fees under NRCP 68. Pope appealed both rulings.

DISCUSSION

Pope argues that it had a right to dissent from the merger and obtain an appraisal of the fair value of its shares because the board approved a right to dissent for dissenting shareholders. Conversely, CY argues that there was no right to dissent because the market-out exception applied and no exception to that exception was present.

This court reviews de novo a district court's summary judgment, without deference to the district court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the pleadings and other evidence present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (applying NRCP 56). The evidence and reasonable inferences from it "must be viewed in a light most favorable to the nonmoving party." *Id.*

The court also reviews matters of statutory interpretation de novo, applying the statute's plain meaning where it is not ambiguous. *Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006). A statute is ambiguous when it is susceptible to multiple reasonable interpretations. *Id.* An ambiguous statute should be interpreted consistent with legislative intent, taking into account reason and public policy. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 174, 162 P.3d 148, 151 (2007).

CY's shares were covered securities, and Pope had dissenting rights only if it demonstrated an exception to the market-out exception

Determining whether Pope had a right to dissent requires reviewing the statutes providing and limiting the availability of a right to dissent, NRS 92A.380 and NRS 92A.390, and the relevant board

actions to determine whether they constituted "the resolution of the board of directors approving the plan of merger," within the meaning of NRS 92A.390(1).

Nevada law provides that a majority of a corporation's shareholders must approve a corporate merger. *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 9, 62 P.3d 720, 726 (2003). Shareholders have a right to dissent from certain corporate actions—merger among them—and to obtain payment of fair value for their shares. NRS 92A.380(1)(a). NRS 92A.300-.500 set forth the procedures by which a dissenting shareholder exercises the right to dissent. The right to dissent is limited by the so-called "market-out" exception, which provides that there is no right to dissent for shareholders in a "covered security," which is a security registered under the relevant provisions of the Securities Act of 1933, 15 U.S.C. § 77r(b)(1). NRS 92A.390(1)(a). Covered securities include securities trading on a national securities exchange, 15 U.S.C. § 77r(b)(1)(A), which includes NASDAQ for the purposes of this rule, *Cape Ann Inv'rs LLC v. Lepone*, 296 F. Supp. 2d 4, 11 (D. Mass. 2003).

The market-out exception is subject to several limitations, pertinently here that "there is no right of dissent . . . unless the articles of incorporation of the corporation issuing the class or series or the resolution of the board of directors approving the plan of merger, conversion or exchange expressly provide otherwise." NRS 92A.390(1). Here, the basic facts are not in dispute. CY was a corporation that sought to merge with a private company, the Pope entities were shareholders that sought to dissent and receive fair value for their shares, CY was listed on NASDAQ at the time of the proposed merger, CY's stock was thus a covered security, and CY's articles of incorporation are silent as to a right to dissent. The contested facts turn on whether the board resolution approving the plan of merger expressly provided otherwise than that there was no right to dissent.

"Resolution" is not a term of art or an instrument with specific formal requirements when discussing board resolutions generally. NRS Chapter 92A does not define a board resolution or impose any procedural or formal requirements for board action to constitute a resolution. NRS 78.315(1) provides simply that an act by directors holding a majority of the directors' voting power is an act of the board, unless the articles of incorporation or the bylaws provide otherwise.[4] *Black's Law Dictionary* defines a corporate resolution as "[f]ormal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment." *Resolution*, *Black's Law Dictionary* (11th ed. 2019); *see also* 18A Am. Jur. 2d *Corporations* § 253 (2015) (stating that a resolution is an "enactment of a temporary nature providing for the disposition

[4]The articles of incorporation and corporate charter are silent in this regard, and the record does not contain CY's bylaws.

of certain administrative business of the corporation"). We therefore hold that a board resolution is an act by the board of directors, taken in their capacity as directors of the corporation, to authorize the corporation to undertake a particular course of conduct, unless defined otherwise by the articles of incorporation or bylaws.

The legislative history likewise supports the conclusion that the board's resolution in this instance need not meet any formal requirements beyond being a clear expression of the intent of the directors acting in their capacity as directors. NRS 92A.390(1) was amended in 2013 to add this particular clause, permitting companies to provide dissenters' rights by board resolution, in addition to by statement in the articles of incorporation. 2013 Nev. Stat., ch. 281, § 25 at 1285. The proponent of the bill, Robert Kim, acting as chair of the State Bar's business law section, explained that the addition was to allow a board to adopt dissenters' rights on behalf of shareholders to ensure fair value in corporate transactions and protect shareholders' interests. Hearing on S.B. 441 Before the S. Judiciary Comm., 77th Leg. (Nev., Apr. 2, 2013); Hearing on S.B. 441 Before the Assemb. Judiciary Comm., 77th Leg. (Nev., May 6, 2013). Thus, the applicable law provides that the board's resolution need not meet any formal requirements beyond being a clear expression of the intent of the directors acting in their capacity as directors. And accordingly, whether a resolution provides "otherwise" will depend on what, precisely, is determined to be the resolution in question.

CY's board resolution provided a right to dissent

As a threshold matter, the district court's determination regarding the board resolution is incorrect. The district court considered the shareholders' resolution at the June 28 meeting where the shareholders voted on the merger proposal. Of note, both parties contributed to this error by mistakenly directing the court to the minutes of the shareholders' meeting.[5] Plainly, this was not a board resolution.

It is evident that a board resolution approving the merger existed. In describing the background of the merger, both the merger agreement and the proxy statement represent that the board agreed to approve the plan of merger on April 12, after the Special Committee approved the merger plan and recommended it to the board. Correspondingly, no party argues that there was no board resolution approving the plan of merger. The record does not contain minutes of the April 12 board meeting or any standalone document purporting to be the April 12 board resolution approving the plan of merger. The only April 12 document in the record containing the board's

[5]Reasonably, whether a right to dissent is part of the transaction voted upon should be resolved before the meeting so that shareholders can be fully informed of their options.

approval of the merger is the April 12 merger agreement itself.[6] The court thus looks to the provisions of the merger agreement describing the board's action to determine what the board resolved in approving the merger.

Merger agreements are contracts, and the court seeks to ascertain the parties' shared intent in interpreting them. *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834 (Del. Ch. 2007). "When the facts are not disputed, contract interpretation is subject to de novo review as a question of law." *Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 459, 453 P.3d 1229, 1231 (2019). The court should harmonize contractual provisions and seek to ensure that no provision is rendered meaningless. *Id.* at 459, 453 P.3d at 1231-32.

The declarations to the merger agreement briefly describe the actions of the board, the Special Committee of the board, Principal Shareholders, CY, and the acquisition company. It does not state that it is the board's resolution to approve the merger, but it does state that the board approved the merger agreement, approved CY's execution and delivery of the merger agreement, approved CY's performance of the merger agreement's provisions, approved CY's consummation of the transactions contemplated in the agreement, and resolved to recommend the agreement to shareholders.[7] The declarations conclude with the company's acknowledging and agreeing to be bound by the provisions in the merger agreement. The operative provisions of the merger agreement provide that one class of shareholders is dissenting shareholders and address their treatment where they have "validly exercised and not lost [their] rights to dissent."

We conclude that the board resolution "expressly provided otherwise" than that "there is no right to dissent" because the introduction stated that it unconditionally approved the merger agreement and its terms and execution and the merger agreement provided that there was a right to dissent that could be validly exercised and a class of shareholders that could exercise it. The exception in NRS 92A.390(1) states that "[t]here is no right of dissent" unless the board resolution "expressly provide[s] otherwise"; it does not require expressly providing a right to dissent. This distinction is important here, as the resolution stated that the board agreed to be bound by the merger agreement, and dissenting shareholders exercising a right to dissent are part of that transaction.

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[6]The preliminary proxy statement does not appear to be the relevant board resolution because it was dated April 13. Moreover, its purpose was to give notice of that approval and the upcoming vote and to recommend that shareholders support the merger.

[7]The declarations describe several separate agreements related to the merger and those agreements are described in the declarations and attached to the merger agreement as exhibits. No such reference is made to a standalone board resolution.

This interpretation is also consistent with the representation in the proxy statement that shareholders had a right to dissent. Moreover, the Special Committee and Principal Shareholders—collectively comprising the board of directors—represented in the proxy statement that the merger was fair in part because there was a right to dissent. The directors, therefore, intended to provide this remedy to shareholders, consistent with the reason given to the Legislature to amend the statute and provide this exception. Noting that a resolution generally is not constrained by any formal requirements, reading the declaration of the board's action in the merger agreement as a resolution permitting a right to dissent is reasonable in light of (1) the provision for dissenting shareholders in the merger agreement, (2) the contemporaneous separate agreement of all of the directors that dissenters' rights were available, and (3) the notice to shareholders that they had dissenters' rights.

CY's arguments that dissenters' rights were not available are not persuasive

CY disagrees that the merger agreement provisions regarding dissenters' rights envisioned the operation of such rights. Its contentions are unpersuasive. In rebutting the argument that the merger agreement constituted a board resolution, CY dismisses the merger agreement's treatment of dissenting shareholders as having no effect because it did not clearly waive the market-out exception or expressly state a right to dissent. This reads requirements into the statute that are not there. CY seeks to impose a requirement that the company must affirmatively waive the market-out exception or bestow a right to dissent on shareholders. This is not what NRS 92A.390(1) requires. Rather, the board's resolution must provide otherwise than that there is no right to dissent—that is, for a set of circumstances in which there is a right to dissent—to trigger the exception to the market-out exception.

CY also urges that the dissenting-shareholder section in the merger agreement had no effect because it merely described the dissent statutes. This is unpersuasive because it renders these provisions of the merger agreement meaningless and it requires the absurd reading that the merger agreement provides for the treatment of a class of shareholders that does not exist. *See* Restatement (Second) of Contracts § 203 (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]").

Relatedly, CY argues that the provisions regarding dissenters' rights do not state that there is a right to dissent because the provisions note that the rights must be exercised in accordance with the relevant statutory provisions and the statutes set forth the market-out

exception. The relevant statutes, however, also state circumstances where the exception to the exception applies. The availability of dissenters' rights is "in accordance with the NRS" just as much as the market-out exception is.

Accordingly, the district court erred in concluding that the board's resolution did not authorize dissenting shareholders to seek a fair-value appraisal, and we reverse its grant of summary judgment. And as Pope has no longer failed to obtain a more favorable judgment after rejecting CY's offer of judgment, we reverse the award of attorney fees. *See* NRCP 68(f); *Schwabacher & Co. v. Zobrist*, 97 Nev. 97, 98, 625 P.2d 82, 82 (1981) (reversing NRCP 68 award because the basis for the ruling no longer existed, where the underlying decision was reversed for a trial on the merits).

CONCLUSION

When a corporation executes a merger, its board of directors may ensure that the rights of shareholders are protected by authorizing that shareholders may dissent from the transaction and obtain payment of fair value for their shares. This decision turns on identifying the board's resolution approving the merger and determining whether it showed that the board intended to confer this right. What constitutes the board's resolution is not limited by any particular formal requirements, and here, the statement of the board's approving the merger agreement in the introduction to the merger agreement constitutes the relevant board resolution. The resolution here provided the shareholders with a right to dissent because the merger agreement envisioned that there was authority to dissent that could be validly exercised. In so doing, the resolution provided a right to dissent. This reading is supported by contemporaneous representations to shareholders that they had rights to dissent and by all of the directors that the transaction was fair because objecting shareholders had a right to dissent. Accordingly, Pope is entitled to a fair-value appraisal, and we thus reverse the district court's summary judgment and NRCP 68 award and remand for further proceedings consistent with this opinion.

Parraguirre and Silver, JJ., concur.

MICHAEL WHITFIELD, Appellant, *v.* NEVADA STATE PERSONNEL COMMISSION; STATE OF NEVADA DEPARTMENT OF ADMINISTRATION; LORNA WARD, Appeals Officer; and THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS, as Employer, Respondents.

No. 79718

July 29, 2021 492 P.3d 571

Appeal from a district court order dismissing a petition for judicial review in an employment matter. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Affirmed.

[Rehearing denied September 9, 2021]

Pickering, J., with whom Parraguirre, J., agreed, dissented.

Snell & Wilmer LLP and *Gil Kahn* and *Kelly H. Dove*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, and *Kevin A. Pick*, Senior Deputy Attorney General, Carson City, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

NRS 233B.130(2)(a) requires petitions for judicial review to name "all parties of record to the administrative proceeding" as respondents. In *Washoe County v. Otto*, we held that NRS 233B.130(2)(a)'s naming requirement is "mandatory and jurisdictional" and that strict compliance therewith is necessary. 128 Nev. 424, 432-33, 282 P.3d 719, 725 (2012). More recently, in *Prevost v. State, Department of Administration*, we concluded the petitioner's failure to name one party of record in the caption of a petition for judicial review was not jurisdictionally fatal under NRS 233B.130(2)(a) because the petitioner named the missing respondent in the body of the petition, attached the administrative decision naming the missing respondent in the petition, and served the missing respondent with the petition. 134 Nev. 326, 328, 418 P.3d 675, 676-77 (2018). As a result, *Prevost* forces the courts to deviate from NRS 233B.130(2)(a)'s plain language and determine whether the facts of each case are more like *Otto* or *Prevost*, a problem foreshadowed by *Prevost*'s dissent. Because courts should not be making this kind of determination where the statute plainly requires petitioners to name all parties as

respondents, we overrule *Prevost*. And because appellant Michael Whitfield failed to strictly comply with NRS 233B.130(2)(a), we affirm the district court's dismissal of his petition. Whitfield also failed to timely file his amended petition, which named all parties as respondents, pursuant to NRS 233B.130(2)(d); accordingly, we affirm the district court's denial of his motion to amend.

FACTS AND PROCEDURAL HISTORY

Michael Whitfield was employed by the Nevada Department of Corrections (NDOC) as a correctional officer for approximately 13 years. NDOC regulations required Whitfield to carry a firearm and maintain Peace Officer Standards and Training (POST) certification, and in order to maintain his POST certification, he had to biannually qualify with a firearm.

In August 2017, a California court entered a domestic violence restraining order against Whitfield, making it illegal for Whitfield to use or handle firearms for a three-year period. The order made no allowance for Whitfield's employment as a correctional officer. NDOC gave Whitfield until January 2018 to resolve the protection order issue and regain the ability to carry a firearm. Whitfield was unable to get the restraining order modified, and following multiple notices and a hearing, Whitfield was dismissed from state service for failing to maintain his POST requirements.

Whitfield appealed his dismissal to the Nevada State Personnel Commission (the Commission). Hearing Officer Lorna Ward affirmed the termination. Whitfield, acting pro se, timely filed a petition for judicial review. Whitfield's petition cited the correct administrative case number and named the judgment from the Commission, but did not name any party as a respondent in the caption or body of the petition. Whitfield timely served the petition, and also summonses, upon the Attorney General's Office, the director of NDOC, and the Nevada Department of Administration.

NDOC moved to dismiss the case, arguing the court lacked jurisdiction because Whitfield's petition failed to comply with NRS 233B.130(2)(a). NDOC argued that the statute required Whitfield to name NDOC, the Commission, Hearing Officer Ward, and the Nevada Department of Administration as respondents. NDOC further contended that because NRS 233B.130(2)(d)'s 30-day window to petition for judicial review had passed, the district court no longer had jurisdiction.

Four days later, Whitfield filed an amended petition for judicial review. The caption to this amended petition included the entities and individuals that NDOC argued in its motion were required to be named as respondents. Whitfield also filed an opposition to NDOC's motion to dismiss, arguing that under *Prevost v. State, Department of Administration*, 134 Nev. 326, 418 P.3d 675 (2018), the failure

to name a required respondent in the petition's caption does not deprive a court of subject matter jurisdiction. Whitfield further contended that his amended petition, filed pursuant to NRCP 15, mooted NDOC's motion.

The district court granted NDOC's motion to dismiss. The court held that (1) Whitfield's original petition did not comply with NRS 233B.130 because he "failed to name any respondent in the caption or the body" and (2) the amended petition was not filed within 30 days after the agency's final decision as required by NRS 233B.130(2)(d). Whitfield appeals.

DISCUSSION

The fundamental question before us is the interpretation of NRS 233B.130. In this opinion, we first address whether *Prevost*, 134 Nev. 326, 418 P.3d 675, conflicts with the plain language of NRS 233B.130(2)(a). We conclude it does and therefore overrule *Prevost*. We also conclude Whitfield's petition failed to comply with NRS 233B.130(2)(a) and the district court appropriately dismissed the petition. Finally, because Whitfield's amended petition was untimely filed under NRS 233B.130(2)(d), we conclude NRCP 15 did not allow him to amend the petition and the district court did not err by granting the motion to dismiss.

NRS 233B.130(2)(a) requires every party of record to be named as a respondent in the petition

Whitfield argues that his petition for judicial review satisfied NRS 233B.130(2)(a) and *Prevost* because he named the Commission and NDOC in the body of the petition. NDOC argues Whitfield did not properly name the Commission and NDOC as respondents anywhere in his petition as required under NRS 233B.130(2)(a) and *Otto*, 128 Nev. 424, 282 P.3d 719.[1]

NRS 233B.130(2)(a) provides in pertinent part that "[p]etitions for judicial review must . . . [n]ame as respondents the agency and all parties of record to the administrative proceeding." As we explained in *Otto*, courts have appellate jurisdiction over the acts of administrative agencies only where the Legislature provides for judicial review by statute. 128 Nev. at 431, 282 P.3d at 724. Nevada's Administrative Procedure Act (the APA) controls judicial review of many administrative decisions, and the Legislature's procedure is controlling. *Id.* If a party fails to strictly comply with the statutory requirements for judicial review, the courts have no jurisdiction over the case. *Id.* at 431, 282 P.3d at 725.

[1]NDOC further argues that Whitfield's petition fails because he did not name Ward or the Department of Administration as respondents. We need not address this argument in light of our decision.

In *Otto*, we concluded that NRS 233B.130(2)(a)'s plain language required strict compliance, and that its naming requirement is mandatory and jurisdictional. *Id.* at 432-33, 282 P.3d at 725. There, the petitioner failed to name the respondents individually in the caption, in the petition's text, or in an attachment, and we held that the petition was properly dismissed and that the district court lacked jurisdiction to allow the petitioner to amend its petition. *Id.* at 429, 434-35, 282 P.3d at 723, 726-27.

Subsequently, in *Prevost*, we distinguished *Otto* and concluded that the petitioner's failure to name a respondent in the petition's caption was not jurisdictionally fatal under NRS 233B.130(2)(a). *Prevost*, 134 Nev. at 328, 418 P.3d at 676-77. Pointing to *Otto*'s language faulting the petition for failing to name the respondents "in the caption, in the body of the amended petition, or in an attachment," we concluded *Otto* recognized that the failure to name a respondent in the petition's caption was not a fatal jurisdiction defect. *Id.* at 328, 418 P.3d at 676 (emphasis and internal quotation marks omitted). Accordingly, we concluded the petitioner in *Prevost* met the requirements of NRS 233B.130(2)(a) by attaching the administrative decision to the petition and thereby named the respondent "in the body of the petition through incorporation by reference." *Id.*

"[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnote omitted). But while we are loath to depart from the doctrine of stare decisis, we also cannot adhere to the doctrine so stridently that the law is everlasting. *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011); *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974). A prior holding that has proven "badly reasoned" or "unworkable" should be overruled. *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (internal quotation marks omitted).

Here, Whitfield failed to name *any* respondent in the petition's caption and did not refer to any person or party as a "respondent" in the body of the petition. Although Whitfield's petition for judicial review mentions the Commission's judgment, his inability to be reinstated at NDOC, and his request to reverse the Commission's decision, it failed to identify those parties as respondents. Under *Otto*, Whitfield's petition clearly fails, as he did not name every party as a respondent anywhere in the petition. However, *Prevost* introduces confusion in this situation, as seen by Whitfield's argument that his citation to the administrative appeal number and reference to the Commission is the equivalent of attaching a decision identifying the missing respondent and therefore his petition adequately names the respondents. But we never intended to create a sliding scale where parties are required to argue whether their

case is more like *Otto* or *Prevost*, nor should courts make this determination where the statute plainly requires the petitioner to name all parties as respondents. Whitfield's argument highlights how *Prevost* created an unworkable standard that conflicts with NRS 233B.130(2)(a)'s plain language and our holding in *Otto*, a problem foreshadowed by *Prevost*'s dissent. Accordingly, we overrule *Prevost* to the extent it contradicts NRS 233B.130(2)(a)'s plain language. We hold that a petitioner must name as respondents, within the caption or petition itself, every party of record to the underlying administrative proceedings. NRS 233B.130(2)(a). If the petitioner fails to strictly comply with this requirement, the petition must be dismissed as jurisdictionally defective. *See Otto*, 128 Nev. at 426, 282 P.3d at 721. Because Whitfield failed to name any respondent in the petition,[2] we conclude the district court lacked jurisdiction to hear the petition and properly granted NDOC's motion to dismiss.

Because Whitfield failed to invoke the district court's jurisdiction, he could not amend his petition

Whitfield argues that he should be allowed to amend his petition because NRS 233B.130(2)(d) addresses only the time for filing a petition, not the time to amend a petition, and because this court should give liberal discretion to a pro se petitioner to amend his petition to correct a technical deficiency when doing so would further equity, fairness, and justice. Whitfield further argues that because NRS 233B.130(2)(d) does not address the time to amend a petition, NRCP 15(a)'s timing requirement applies and allows for the amendment. Whitfield contends *Otto*'s rule requiring strict compliance with NRS 233B.130(2)(d)'s 30-day time limit is unworkable and deprives petitioners of due process, and he urges this court to abrogate *Otto* to allow petitioners to amend a petition outside the 30-day window.

Questions of subject matter jurisdiction are reviewed de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). In *Otto*, we explained that a district court cannot consider a petition that is amended after NRS 233B.130(2)(d)'s deadline if the original petition failed to invoke the district court's jurisdiction. 128 Nev. at 434-35, 282 P.3d at 727.

Here, Whitfield failed to invoke the district court's jurisdiction when he failed to name any party as a respondent in his petition for

[2]Although Whitfield noted the Commission's decision in the body of his petition, he did not clearly indicate that the Commission itself was a respondent to the petition. Moreover, we are not persuaded that Whitfield's passing reference to his position with NDOC served to name NDOC as a respondent. Thus, even assuming, arguendo, the Commission and NDOC were the only parties of record to the underlying administrative proceedings, Whitfield's petition fails to name those necessary parties.

judicial review. Whitfield also moved to amend his petition after the statutory 30-day filing deadline had passed. Therefore, the district court lacked jurisdiction to allow Whitfield to amend his petition.[3] *Cf. Otto*, 128 Nev. at 435, 282 P.3d at 727. And the Nevada Rules of Civil Procedure will not apply if they conflict with the APA. *See* NRCP 81(a) ("These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute."). NRCP 15(a)(1)-(2) allows a party to amend its pleading "within . . . 21 days after serving it" or with "the court's leave," and "[t]he court should freely give leave when justice so requires." However, the district court never obtains jurisdiction over an appeal from an administrative decision if the petitioner fails to comply with NRS 233B.130(2)(d). *Otto*, 128 Nev. at 434-35, 282 P.3d at 727. If the district court does not have jurisdiction and cannot hear the case, NRCP 15(a) will not apply to allow amendment past NRS 233B.130(2)(d)'s 30-day filing deadline. *See id.*

Moreover, the statute itself, when read as a whole, weighs against adopting Whitfield's position. Notably, NRS 233B.130(5) allows the district court to extend the time for serving parties upon a showing of good cause. Because NRS 233B.130(2)(d) does not include a similar provision allowing the district court to extend the filing deadline, we conclude the Legislature intended the statute to have a strict deadline and did not intend to allow a party to amend a noncompliant petition outside the 30-day window. *Cf. Bopp v. Lino*, 110 Nev. 1246, 1252, 885 P.2d 559, 563 (1994) (applying the maxim *expressio unius est exclusio alterius*—that the inclusion of one thing implies the exclusion of another—when interpreting a statute). Therefore, we decline to modify *Otto*.

CONCLUSION

NRS 233B.130(2)(a) requires a petitioner to name "the agency and all parties of record to the administrative proceeding" as respondents in a petition for judicial review of an administrative proceeding. We uphold *Otto*'s ruling that NRS 233B.130(2)(a)'s requirements are "mandatory and jurisdictional." 128 Nev. at 432-33, 282 P.3d at 725. We overrule *Prevost*, 134 Nev. 326, 418 P.3d 675, which held that a petitioner meets NRS 233B.130(2)(a)'s naming requirement whenever the party's name appears in a document

[3]We decline Whitfield's invitation to create an exception to NRS 233B.130(2)(d) for pro se litigants on the basis of equity and fairness, as that would require us to judicially legislate. *See McKay v. Bd. of Cty. Comm'rs*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) ("[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.").

attached to the petition. We therefore affirm the district court's decision to dismiss Whitfield's petition, as he failed to meet NRS 233B.130(2)(a)'s naming requirements. We also affirm the district court's denial of Whitfield's untimely motion to amend, as he failed to invoke the district court's jurisdiction.

Hardesty, C.J., and Stiglich, Cadish, and Herndon, JJ., concur.

Pickering, J., with whom Parraguirre, J., agrees, dissenting:

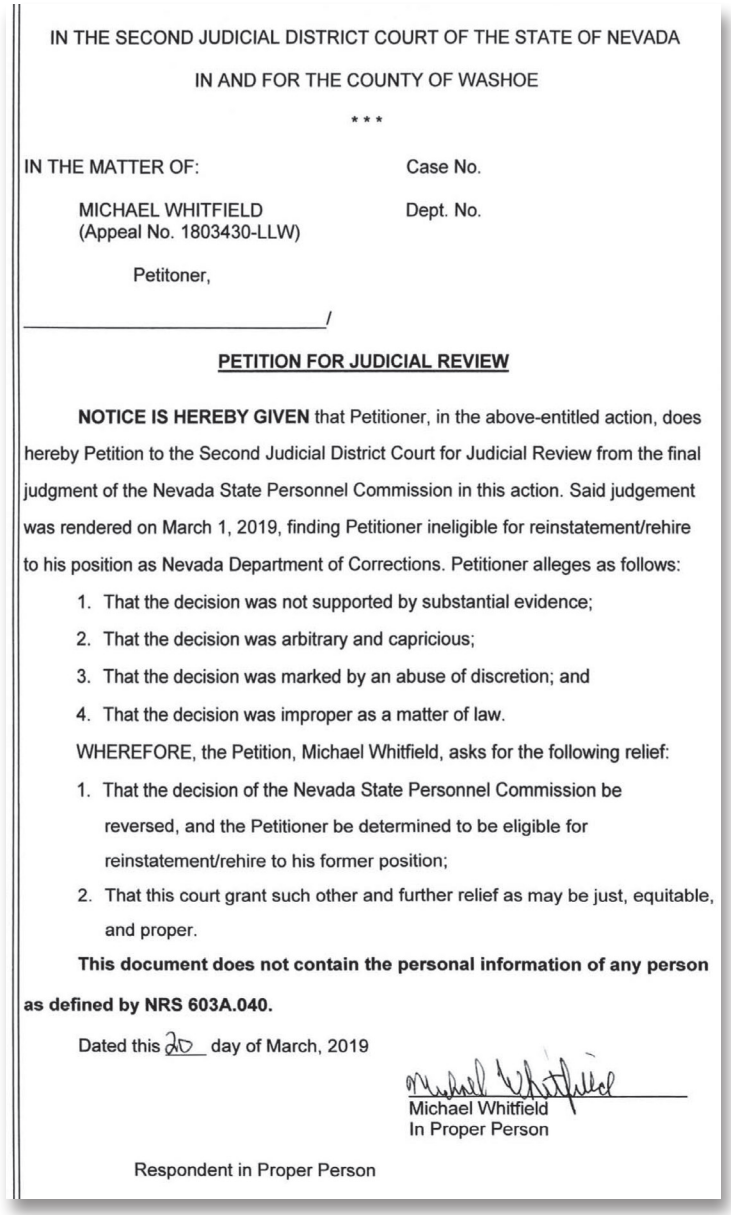
Administrative agencies make decisions every day that affect people's lives and livelihoods. By law, a person who loses a contest with a Nevada administrative agency has the right to have a court review the agency's decision. Under NRS 233B.130(1),

> Any party who is:
>
> (a) Identified as a party of record by an agency in an administrative proceeding; and
>
> (b) Aggrieved by a final decision in a contested case,
>
> is entitled to judicial review of the decision.

To exercise this right, the aggrieved person must file a "petition for judicial review." NRS 233B.130(2) spells out how to go about doing this:

> Petitions for judicial review must:
>
> (a) Name as respondents the agency and all parties of record to the administrative proceeding;
>
> (b) Be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the aggrieved party resides or in and for the county where the agency proceeding occurred;
>
> (c) Be served upon:
>
> (1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and
>
> (2) The person serving in the office of administrative head of the named agency; and
>
> (d) Be filed within 30 days after service of the final decision of the agency.

Aggrieved by the Nevada State Personnel Commission's decision upholding the Nevada Department of Corrections' termination of his employment, appellant Michael Whitfield timely filed the following petition for judicial review:



IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

IN THE MATTER OF: Case No.

MICHAEL WHITFIELD Dept. No.
(Appeal No. 1803430-LLW)

Petitoner,

_____/

PETITION FOR JUDICIAL REVIEW

NOTICE IS HEREBY GIVEN that Petitioner, in the above-entitled action, does hereby Petition to the Second Judicial District Court for Judicial Review from the final judgment of the Nevada State Personnel Commission in this action. Said judgement was rendered on March 1, 2019, finding Petitioner ineligible for reinstatement/rehire to his position as Nevada Department of Corrections. Petitioner alleges as follows:

1. That the decision was not supported by substantial evidence;
2. That the decision was arbitrary and capricious;
3. That the decision was marked by an abuse of discretion; and
4. That the decision was improper as a matter of law.

WHEREFORE, the Petition, Michael Whitfield, asks for the following relief:

1. That the decision of the Nevada State Personnel Commission be reversed, and the Petitioner be determined to be eligible for reinstatement/rehire to his former position;
2. That this court grant such other and further relief as may be just, equitable, and proper.

This document does not contain the personal information of any person as defined by NRS 603A.040.

Dated this 20 day of March, 2019

Michael Whitfield
In Proper Person

Respondent in Proper Person

Whitfield served the petition, alongside summonses, on the Office of the Attorney General for the Nevada Department of Administration (of which the Nevada Personnel Commission is a division) and the director of Nevada's Department of Corrections (NDOC). The

agencies knew who Whitfield was and the decision he sought to have judicially reviewed—represented by the Attorney General's Office, they responded to the petition by filing a motion to dismiss, which the district court granted.

Whitfield did what NRS 233B.130(2) told him to do and was entitled to have the district court review his case. The crux of the majority opinion is that the petition failed to "[n]ame as respondents" the two agencies that Nevada's Administrative Procedure Act (the APA) required Whitfield to name, NRS 233B.130(2)(a)—the Nevada Personnel Commission and NDOC. The omission is fatal, the majority holds, because by the time Whitfield amended the petition in response to the agencies' motion to dismiss to add the word "respondents," the 30-day filing deadline in NRS 233B.130(2)(d) had expired. But language's *ordinary* meaning inheres in statute, *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003), a principle particularly important here because APA petitioners are very likely to proceed without the aid of counsel. And, in this context, to "name as" only means to "identify," *Name*, *Merriam-Webster's Collegiate Dictionary* 823 (11th ed. 2020), while even the legal definition of a "respondent" is simply "[t]he party against whom an appeal is taken," *Respondent*, *Black's Law Dictionary* (11th ed. 2019). Whitfield's petition identified his former employer and the agency that reviewed his termination by name, stated that one fired him and the other upheld his termination, and explained that he sought reversal of those agencies' decisions (i.e., took an appeal against them). This plainly satisfies what NRS 233B.130(2)(a) requires. *See* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (stating that "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings" of statutes).

But without regard to how an ordinary petitioner would read NRS 233B.130(2)(a), the majority interprets it to impose hyper-technical requirements that Whitfield's petition failed to meet. And, despite the majority's purported devotion to workable standards, the actual scope of the theoretically bright-line rule it imposes is far from clear. That is, to the extent it claims to overrule *Prevost v. State, Department of Administration*, 134 Nev. 326, 328, 418 P.3d 675, 677 (2018) (holding that a petition that did not name the respondent agency in the caption was sufficient where the agency was named in the body of the petition through incorporation by reference to the attached appealed administrative decision and the agency was timely served), does the majority therefore read NRS 233B.130(2)(a) to require that the relevant agency be named *in the caption*? This would rob, by construction, NRS 233B.130(2)(a) of its plain and obvious meaning, ignore the substance of the petition itself—which clearly invokes Whitfield's right of judicial review, *see Associated Grocers' Co. of St. Louis, Mo. v. Crowe*, 389 S.W.2d

395, 399 (Mo. Ct. App. 1965)—and set entirely different and more stringent formalities for a petition under the APA than a civil complaint requires. *See* 5A Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure* § 1321 (4th ed. 2018) ("[T]he caption is not determinative as to the identity of the parties to the action.").

Alternatively, does the majority hold that Whitfield's petition missed the mark because it lacks the formality of the word "respondents" adjacent to the agencies' names in the body of the petition? *See Prevost*, 134 Nev. at 329, 418 P.3d at 677 (Stiglich, J., dissenting) (disagreeing "that the statute is satisfied, sufficient to confer jurisdiction, when the relevant party is simply mentioned somewhere in the petition" (emphasis omitted)).[1] But requiring non-lawyers to add labels to persons whose status as respondents the wording and context of the petition already convey creates a trap for the unwary, in that it imposes a requirement that the statute does not itself state. The better—and fairer—approach is that taken by the Iowa Supreme Court in *Cooksey v. Cargill Meat Sols. Corp.*, 831 N.W.2d 94, 104 (Iowa 2013), which upheld as adequate a petition for judicial review like that Whitfield filed here, noting that "[w]hile the term 'respondent' was not used, the petition plainly demonstrated the [agencies were] respondent[s]," as their respective decisions were being contested in an administrative appeal. *See also* I. Joseph Story, *Commentaries on the Constitution of the United States* § 451, at 436-37 (1833) (noting that because laws "are not designed for metaphysical or logical subtleties, for niceties of expression, [or] for critical propriety," they should be "designed for common use, and fitted for common understandings").

The rule the majority announces is not only unclear, it also conflicts with the doctrine of stare decisis. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (noting that this court will not overturn its precedent "absent compelling reasons for so doing"); *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion) (recognizing that stare decisis protects the courts' interest in orderly adjudication, as well as the broader societal interests in evenhanded, consistent, and predictable application of legal rules). Thus, the majority overturns a two-year-old opinion, *Prevost*, 134 Nev. at 328, 418 P.3d at 677, due to its supposed conflict with *Washoe County v. Otto*, 128 Nev. 424, 434, 282 P.3d 719, 726 (2012) (holding that a petition with a "deficient caption" and that "failed to identify any individual taxpayer; [and] merely described 'certain taxpayers (unidentified)' in the body of the petition as 'unidentified "certain taxpayers" who were named as parties to the matter before

[1]Of note, the summonses the court issued and Whitfield served the agencies with, along with copies of the petition, referred to each by name as "the respondent."

the State Board'" was not sufficient), which itself overturned *Civil Service Commission v. Second Judicial District Court*, 118 Nev. 186, 190, 42 P.3d 268, 271 (2002) (holding that district court erred by dismissing petition for judicial review despite the petition's failure to name an indispensable party as respondent or timely serve it on the agency because those requirements were not jurisdictional). In fact, *Otto* and *Prevost* are not in conflict—the petition in *Otto* was insufficient because it failed to name any specific respondent at all, whether in the petition caption, in the petition's body, *in haec verba*, or not, *see* 128 Nev. at 434, 282 P.3d at 726, while the pro se petitioner in *Prevost* attached, as an exhibit to what may otherwise have been a deficient petition, the decision he appealed and served the entire document on the relevant agency, thereby incorporating the respondent's name into the body of the petition by reference, 134 Nev. at 328, 418 P.3d at 676. In the absence of such conflict, this court should not overrule its very recent precedent with such enthusiasm.

Finally, apart from its departure from the ordinary rules of statutory interpretation and the strictures of stare decisis, the rule announced today renders our state an outlier among those who operate under similar APAs. *See Hopper v. Indus. Comm'n*, 558 P.2d 927, 932 (Ariz. Ct. App. 1976) (holding that petition for judicial review was jurisdictionally sufficient despite its failure to "identify the respondent employer or respondent carrier in either the caption or the body of the petition [because] it did accurately identify the new injury claim in both the caption and the body of the petition by reference to the . . . claims file number");[2] *D.C. Dep't of Admin. Servs. v. Int'l Bhd. of Police Officers, Local 445, Serv. Emps. Int'l Union, AFL-CIO*, 680 A.2d 434, 438 (D.C. 1996) (holding that petition for judicial review was sufficient, though it did not identify an agency in a caption or refer to an agency as respondent, because the agency "acted, for all practical purposes, as the respondent it truly [was]"); *Cooksey*, 831 N.W.2d at 104 (holding that "the contents of a petition seeking review of administrative action should be evaluated in its entirety" and that identifying the respondents in the body of the petition and serving respondents with notice satisfies the requirement); *Crowe*, 389 S.W.2d at 399 (stating that *in haec verba* recital of certain language was not required to satisfy jurisdictional requirements of petition for judicial review); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cty.*, 958 P.2d 962, 969 (Wash. 1998) (holding that a petitioner substantially complied with requirement of APA that parties to administrative proceeding below be named in body of petition where petitioner attached

[2]Similar to *Hopper*, Whitfield's petition included the agency proceeding number in the caption, a correlation confirmed by the agency decision the agencies attached as an exhibit to their motion to dismiss.

and incorporated administrative board's order in its petition and order identified all parties to proceedings before board); *cf. Fisher v. Mayfield*, 505 N.E.2d 975, 976 (Ohio 1987) (holding that a notice of appeal that failed to explicitly meet the statutory pleading requirements was sufficient to invoke the appellate jurisdiction of the court of common pleas when the parties were able to ascertain from the notice of appeal the cause being appealed). Simply put: *Otto* was correct; *Prevost* was correct; and the standard resulting from their harmonization is not unworkable. *See Cooksey*, 831 N.W.2d at 104 (harmonizing cases allowing petitions to move forward when an agency was not named in the caption but was named in the body of the petition or when the decision appealed from was identified and attached, with those when the petition was dismissed because of "a total failure to name a party within the four corners of the petition").

Respectfully, I dissent.

SOMERSETT OWNERS ASSOCIATION, a Domestic Nonprofit Corporation, Appellant, *v.* SOMERSETT DEVELOPMENT COMPANY, LTD., a Nevada Limited Liability Company; SOMERSETT, LLC, a Dissolved Nevada Limited Liability Company; SOMERSETT DEVELOPMENT CORPORATION, a Dissolved Nevada Corporation; Q & D CONSTRUCTION, INC., a Nevada Corporation; PARSONS BROS ROCKERIES, INC., a Washington Corporation; and STANTEC CONSULTING SERVICES, INC., Respondents.

No. 79921

July 29, 2021 492 P.3d 534

Appeal from a district court summary judgment in a construction defect action. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Affirmed.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, John Samberg*, and *Royi Moas*, Reno, for Appellant.

Castronova Law Offices, P.C., and *Stephen G. Castronova*, Reno, for Respondent Parsons Bros Rockeries, Inc.

Hoy Chrissinger Vallas, P.C., and *Theodore E. Chrissinger*, Reno, for Respondent Stantec Consulting Services, Inc.

Lee, Landrum & Ingle and *Natasha A. Landrum*, Las Vegas, for Respondent Q & D Construction, Inc.

Thorndal Armstrong Delk Balkenbush & Eisinger and *Charles L. Burcham*, Reno, for Respondents Somersett Development Company, Ltd.; Somersett, LLC; and Somersett Development Corporation.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Pickering, J.:

The miles of stacked rock retaining walls (rockery walls) that entwine and support the Somersett residential development in northern Nevada are failing, and via the underlying action, appellant Somersett Owners Association (SOA) seeks to recover damages

[1]The Honorable James W. Hardesty, Chief Justice, voluntarily recused himself from participation in this matter.

against those involved in the rockery walls' design and construction. But the Nevada Legislature has effected its judgment with regard to such suits—in the form of a statute of repose—that defendants like those SOA sued in the underlying action generally should "be free from liability after the legislatively determined period of time." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010)). In this case, a six-year period applies. NRS 11.202 (2015). That six-year period begins when the improvement to the real property is "substantial[ly] complet[e]," NRS 11.202(1); NRS 11.2055, which we clarify in the context of the common law, means sufficiently complete so that the owner can occupy or utilize the improvement. Here, SOA failed to offer anything beyond "gossamer threads of whimsy, speculation, and conjecture" to support its argument that it commenced this action within that six-year period. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (quoting *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002)). Thus, "[l]ike a discharge in bankruptcy, [the] statute of repose can be said to provide a fresh start or freedom from liability" for the respondents in this case. *CTS Corp.*, 573 U.S. at 9. Accordingly, the district court did not err by granting their collective motion for summary judgment, and we affirm.

I.

In early 2006, respondent Q & D Construction, Inc., graded the property that would eventually become the development into terraced residential lots and streets. Respondent Parsons Bros Rockeries, Inc., then constructed more than 13 miles of rockery walls to support the terraced lots. This phase of the development's construction ceased in December 2006, at which time respondent Stantec Consulting Services, Inc., issued letters to Somersett Development Company, Ltd.,[2] indicating that Stantec had conducted a final inspection on the rockery walls and that "the inspected work was performed . . . in accordance with the approved (stamped) plans, specifications[,] and the . . . International Building Code." Somersett then divided and sold the lots to individual builders to construct housing units on them. At the time of appeal, there were more than 3,000 such units in the development.

Though the expected lifespan of the rockery walls was at least 50 years, some began failing as early as 2011. After two walls collapsed on the same day in February 2017, SOA hired an inspector to determine whether there were additional as-yet undetected defects

[2]The suit also names Somersett Development Company's predecessors in interest, respondent Somersett Development Corporation and Somersett, LLC. Because the facts are unclear as to each entity's alleged separate role, this opinion refers to them collectively as Somersett.

in the rockery walls. In fact, the inspector concluded that the 70,000 lineal feet of rockery walls were "globally unstable," and a separate investigation further revealed that two-thirds of the rockery walls materially deviated from the original plans and specifications. Accordingly, in 2017, SOA brought suit against Somersett, Parsons Bros, Q & D, and Stantec (collectively, respondents) for negligence and negligence per se, breach of express and implied warranties, negligent misrepresentation and/or failure to disclose, declaratory relief, and bad faith. The respondents moved for summary judgment on the ground that the six-year statute of repose in NRS 11.202 (2015), which limited certain civil actions for damages "commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property," had expired.[3] The district court granted respondents' motion for summary judgment, and this appeal followed.

II.

NRS 11.202 (2015) prohibits the commencement of a construction defect action such as this one[4] "more than 6 years after the *substantial completion*" of the improvement to real property in question. (emphasis added). Accordingly, the threshold question that guides our de novo review, *see Wood*, 121 Nev. at 729, 121 P.3d at 1029 (noting that a ruling on summary judgment is subject to de novo review), is when the rockery walls achieved "substantial completion" for purposes of NRS 11.202. A companion statute, NRS 11.2055, undertakes to define "substantial completion." It provides:

[3]The 2019 version of this statute of repose (which offers a more generous ten-year period) may have applied to the underlying action, given its retroactivity clause. *See* 2019 Nev. Stat., ch. 361, § 11(4), at 2268 ("The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019."); *see also Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 826, 313 P.3d 849, 858 (2013) (explaining that a statute may apply retroactively where "the Legislature clearly manifests an intent to apply the statute retroactively") (quoting *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008)). But the retroactive effect of the 2019 version was not a matter briefed by SOA, who indicated at oral argument that it only raised the 2015 statute. Accordingly, we apply NRS 11.202 (2015) here. The change from six to ten years would not alter the outcome in this case, because the suit was filed in 2017, more than ten years after the December 2006 substantial completion date discussed *infra*.

[4]SOA argues that its claims under NRS Chapter 116 are not subject to the statute of repose, but such claims are not listed among the exceptions to the statute of repose set forth in NRS 11.202, and the maxim that the expression of one thing is the exclusion of another accordingly applies. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967).

> 1. Except as otherwise provided in subsection 2, for the purposes of this section and NRS 11.202, the date of substantial completion of an improvement to real property shall be deemed to be the date on which:
>
> (a) The final building inspection of the improvement is conducted;
>
> (b) A notice of completion is issued for the improvement; or
>
> (c) A certificate of occupancy is issued for the improvement,
>
> whichever occurs later.
>
> 2. If none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law.

The summary judgment proceedings in district court advanced on the basis that the trigger dates specified in NRS 11.2055(1)(a)-(c) did not apply, so "the date of substantial completion . . . must be determined by the rules of the common law," NRS 11.2055(2), the contours of which are a matter of first impression for this court. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 545 (2010) (reviewing summary judgment based on issues raised and resolved in district court).

Accepting NRS 11.2055(2)'s reference to the common law as their starting point, both sides purport to endorse the definition of substantial completion offered by the American Institute of Architects (the AIA)—"the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use." Werner Sabo, *Legal Guide to AIA Documents* § 4.56 (6th ed. 2018). This definition is well recognized and frequently used. *See Markham v. Kauffman*, 284 So. 2d 416, 419 (Fla. Dist. Ct. App. 1973) (noting that a building is substantially complete "when it has reached the stage where it can be put to the use for which it was intended, even though some minor items might be required to be added") (quoting *Sherwood Park, Ltd. v. Meeks*, 234 So. 2d 702, 703 (Fla. Dist. Ct. App. 1970)); *State ex rel. Stites v. Goodman*, 351 S.W.2d 763, 766 (Mo. 1961) (accord); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1093 (N.J. 1996) (holding that the statute of repose began running at substantial completion as defined by the AIA); *Etheridge ex rel. Etheridge v. YMCA of Jackson*, 391 S.W.3d 541, 548 (Tenn. Ct. App. 2012) (calling the AIA definition of substantial completion "[t]he most popular") (internal quotation omitted); *see also* 57 Joel Lewin & Eric F. Eisenberg, *Mass. Prac., Construction Law* § 3:12 (2020) (discussing the "widely-used" definition). We therefore adopt the AIA definition of substantial completion as stating the rules of the common law for purposes of NRS 11.2055(2).

Under this standard, whether an improvement to property is substantially complete is a fact-intensive inquiry, turning on the specific circumstances of the improvement in question. *PIH Beaverton, LLC v. Super One, Inc.*, 323 P.3d 961, 971 (Or. 2014) (examining record evidence of occupancy and completion notice in determining whether an improvement was substantially complete). And here, SOA bore the burden of submitting evidence of those circumstances to support that its action was timely. *G & H Assocs. v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997) (stating that "in addition to proving the elements of the cause of action, one must also prove that the cause of action was brought within the time frame set forth by the statute of repose"). Specifically, the district court properly granted respondents' motion for summary judgment unless SOA, "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue" as to whether the action was brought within the time frame set forth by NRS 11.202 (2015). *Wood*, 121 Nev. at 731, 121 P.3d at 1030-31 (internal quotation omitted).

As relevant to this particular record, it has been said that "[p]aperwork can be important for determining the date of substantial completion." 2A Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor Construction Law* § 7:29 (2020); *see also Suffolk City Sch. Bd. v. Conrad Bros., Inc.*, 495 S.E.2d 470, 473 (Va. 1998) (noting that the statute of repose began to run upon the architect's submittal of final certificates for payment to the school board despite that work had not yet ceased). Although the final project report letters that Stantec issued in November and December 2006 were part of the summary judgment record in district court, respondents did not argue that these letters qualified to trigger the statute of repose under NRS 11.2055(1)(a). *See Schuck*, 126 Nev. at 437, 245 P.3d at 545. Nonetheless, under NRS 11.2055(1), the letters remain relevant insofar as they support the conclusion that work on the rockery walls was "sufficiently complete" under the AIA's common law standard. Buttressing the implication from these letters is the fact that Parsons Bros ceased construction on the rockery walls around the same time, and the parcels that the rockery walls framed and supported were sold and thereafter developed into thousands of single-family housing units and community common areas. Viewed together, these facts offer convincing evidence that the walls were substantially complete under the AIA's common law definition when Stantec issued its final project report letters, that is, in December 2006 at the latest. Meanwhile, the action in question did not commence until 2017, which sets it well outside the scope of the six-year statute of repose established by NRS 11.202 (2015).

Rather than submitting evidence or affidavits contradicting the facts set forth above, SOA tacks an entirely different direction. Specifically, SOA stands on its experts' opinions that the AIA's

definition of substantial completion requires that the improvement be "*fit* to be utilized for [its] intended use," and that the rockery walls in question were not. (emphasis added). Put differently, SOA does not dispute respondents' timeline but instead argues that the rockery walls are *still not* substantially complete—despite Stantec's letters, Parsons Bros' cessation of construction, the sale of the parcels they surround, and subsequent development and occupation of those parcels—because the rockery walls allegedly deviate from the planning documents by being multitiered, over ten feet in height, and load bearing where not so intended. This does not land.

First, accepting SOA's twist on the AIA's definition would, in practice, defeat the purpose of the statute of repose. *See Etheridge*, 391 S.W.3d at 548 (rejecting argument that defects in the property precluded the statute of repose from commencing because "accepting [that] argument would defeat the statute's purpose"). These deviations raise questions regarding the *quality* of the rockery walls' construction, not whether that construction was substantially complete under the AIA definition, which requires neither "'substantial compliance' with the contract [n]or an absence of defects." *Trinity Church v. Lawson-Bell*, 925 A.2d 720, 730 (N.J. Super. Ct. App. Div. 2007). Indeed, it is well accepted that substantial completion for purposes of the AIA definition may occur even where the improvement in question deviates from the contract specifications, therefore "requiring . . . finishing, corrective[,] or remedial work." *Russo Farms*, 675 A.2d at 1093 (quoting *Viking Builders, Inc. v. Felices*, 391 So. 2d 302, 303 n.1 (Fla. Dist. Ct. App. 1980)) (adopting AIA's definition of substantial completion in the context of the state statute of repose); *see also Meyer v. Bryson*, 891 S.W.2d 223, 225 (Tenn. Ct. App. 1994) (rejecting the argument that an improvement was not substantially complete "because there [were] still defects in the house that [had] not been repaired"); *cf. Strickland v. Arch Ins. Co.*, 718 F. App'x 927, 929 (11th Cir. 2018) (holding that the time to commence a payment bond claim under a Georgia statute providing for the commencement of the period upon "completion" was interpreted not to mean total completion but to include "substantial completion" with only "punch list" items remaining to be done).

Moreover, any testimony by SOA's experts redefining the legal standard for determining "substantial completion" improperly invades the province of the court, whose job it is to determine applicable law. *See United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 509, 780 P.2d 193, 196 (1989) ("[C]ourts should exclude testimonial opinion on the state of the law."). And, because the experts' declarations further measure substantial completion by an improper legal standard—introducing a concept of fitness for intended use—the experts' declarations cannot themselves satisfy SOA's burden of producing evidence that the rockery walls were substantially complete within six years of the commencement of this action.

III.

Perhaps recognizing the shortcomings in their proffer, SOA leans heavily on the perceived inequity of applying the statute of repose here. Specifically, SOA argues that the six-year period of repose in NRS 11.202 (2015) should be tolled because Somersett controlled the homeowner association board until January 2013. But SOA bases this argument on *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 860 (Colo. App. 1996), which is neither controlling nor persuasive on these facts, because there, the court found a statute of repose to be tolled by an express agreement between the parties. *Id*. at 860-61. That is, *Central Bank* supports the contention that a party could theoretically waive their rights under a statute of repose by agreement, but no such waiver is alleged here. And, while SOA also includes a string cite from *Central Bank*, the cases cited therein are generally distinguishable because they involve the application of equitable principles to *statutes of limitations*, *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070-71 (7th Cir. 1978) (applying equitable estoppel to statute of limitations); an express tolling agreement, *see McCool v. Strata Oil Co.*, 972 F.2d 1452, 1459 (7th Cir. 1992) (holding that statute of repose was not implicated because parties agreed to toll any applicable statute of limitations); *One N. McDowell Ass'n of Unit Owners, Inc. v. McDowell Dev. Co.*, 389 S.E.2d 834, 836 (N.C. Ct. App. 1990) (tolling statute of repose on equipment warranty claims based on express agreement); or legislation that expressly tolls a statute of repose. *Southard ex rel. Southard v. Miles*, 714 P.2d 891, 898 (Colo. 1986) (tolling statute of repose as well as statute of limitations in malpractice actions under legislative exception); *see also Alfred v. Esser*, 15 P.2d 714, 716 (Colo. 1932) (tolling statutes of repose because the specific statutes at issue "contemplate that some sort of notice be given" and none was); *Bryant v. Adams*, 448 S.E.2d 832, 837 (N.C. Ct. App. 1994) (holding that specific statutes envisioned tolling of the statute of repose for products liability in the case of minors and others under disability).

Entirely contrary to SOA's position, a preclusion on tolling is generally "the hallmark of statutes of repose." *Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc.*, 833 F.3d 1125, 1132 (9th Cir. 2016); *see Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 511 (2017) (stating that "[c]onsistent with the different purposes embodied in statutes of limitations and statutes of repose, it is reasonable that the former may be tolled by equitable considerations even though the latter in most circumstances may not"); *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003) (noting that "[t]here is a crucial distinction in the law between 'statutes of limitations' and 'statutes of repose,'" and that "[s]tatutes of repose are not subject to equitable tolling," collecting cases); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014); *Stein v. Regions Morgan*

Keegan Select High Income Fund, Inc., 821 F.3d 780, 795 (6th Cir. 2016); *Prasad v. Holder*, 776 F.3d 222, 228 (4th Cir. 2015). And this court has recognized this general principle. *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (noting that a statute of limitations may be equitably tolled, while a statute of repose may not).

The perceived unfairness resulting from the application of the statute of repose on these facts is not within this court's purview to resolve—"[s]tatutes of repose effect a *legislative* judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *CTS Corp.*, 573 U.S. at 9 (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010)) (emphasis added). True, the 2019 Legislature amended NRS 11.202 to add a fraud exception, *see* NRS 11.202(2) (2019), and some courts have applied equitable estoppel to prevent a defendant from sheltering under a statute of repose when fraud is alleged. *Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 587 (7th Cir. 1987) (equitable estoppel may defeat statute of repose where "one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage") (quoting *Union Mut. Ins. Co. v. Wilkinson*, 80 U.S. 222, 233 (1871)); *Craven v. Lowndes Cty. Hosp. Auth.*, 437 S.E.2d 308, 310 (Ga. 1993). But, as noted in note 3 *supra*, SOA expressly indicated at oral argument that it raised only the 2015 statute, not the subsequent amendments. And SOA further conceded in oral argument that it has not presented potentially qualifying fraud allegations here. We therefore leave the question of the existence and scope of any such exceptions open for when that question is actually at issue.

IV.

In sum, SOA failed to set forth specific facts demonstrating the existence of a genuine factual issue as to whether it brought the underlying suit within the six-year period set by NRS 11.202 (2015). Instead, the record indicates that the period of repose began running, at the latest, in December 2006, when the rockery walls were substantially complete within the phrase's common law meaning. And, particularly in the absence of any allegations of intentional fraud, that period of repose is not subject to equitable tolling based on Somersett's prior control of the homeowner board. We therefore affirm the district court order granting summary judgment to respondents.

Parraguirre, Stiglich, Cadish, Silver, and Herndon, JJ., concur.