IN THE MATTER OF THE WILLIAM J. RAGGIO FAMILY TRUST.

DALE CHECKET RAGGIO, INDIVIDUALLY AND AS TRUSTEE OF THE MARITAL DEDUCTION PORTION AND CREDIT SHARE OF THE WILLIAM J. RAGGIO FAMILY TRUST, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE DAVID A. HARDY, DISTRICT JUDGE, RESPONDENTS, AND LESLIE RAGGIO RIGHETTI; AND TRACY RAGGIO CHEW, CO-TRUSTEES OF THE WILLIAM J. RAGGIO AND DOROTHY B. RAGGIO TRUST UNDER AGREEMENT DATED JANUARY 27, 1998, AS DECANTED AND VESTED REMAINDERMEN OF THE MARITAL DEDUCTION TRUST PORTION OF THE WILLIAM J. RAGGIO FAMILY TRUST, REAL PARTIES IN INTEREST.

No. 76582

April 9, 2020 460 P.3d 969

Original petition for a writ of mandamus or, alternatively, prohibition, challenging a district court order compelling discovery.

Petition granted.

CADISH, J., with whom PICKERING, C.J., agreed, dissented.

Holland & Hart LLP and *Frank Z. LaForge, Tamara Reid*, and *J. Robert Smith*, Reno; *Echeverria Law Office* and *John P. Echeverria*, Reno, for Petitioner.

Maupin, Cox & LeGoy and *G. Barton Mowry* and *Enrique R. Schaerer*, Reno, for Real Party in Interest Leslie Raggio Righetti.

Michael A. Rosenauer, Ltd., and *Michael A. Rosenauer*, Reno, for Real Party in Interest Tracy Raggio Chew.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this original writ petition, we must determine whether language in a trust instrument that allows a trustee to pay "as much of the principal of the Trust as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of the beneficiary imposes an obligation on the trustee to consider the

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision in this matter.

beneficiary's other assets. We hold that neither the trust instrument nor Nevada trust law requires the trustee to consider the beneficiary's other assets before making distributions from the trust. Because discovery relating to those other assets is irrelevant to the claim that the trustee breached her fiduciary duties, we grant petitioner Dale Checket Raggio's petition for writ relief.

FACTS AND PROCEDURAL HISTORY

In 2007, William J. Raggio created the William J. Raggio Trust (Raggio Trust). It provided that, upon his death, the Raggio Trust would split into two subtrusts, the Marital Deduction Trust (Marital Trust) and the Credit Shelter Trust. Both subtrusts would be for the benefit of his second wife, petitioner Dale Checket Raggio, and detail support for Dale that allows the trustee to pay as much of the principal of the trust "as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of Dale. The Raggio Trust named Dale both the trustee and life beneficiary of the subtrusts. William Raggio's two daughters from a previous marriage, respondents Leslie Righetti and Tracy Chew (collectively, Righetti), were named as remainder beneficiaries of the Marital Trust. Dale's grandchildren from her previous marriage are the remainder beneficiaries of the Credit Shelter Trust.

In 2015, after William Raggio had died, Righetti sued Dale for breach of trust and breach of fiduciary duties as trustee of the Marital Trust. Righetti alleged that Dale, as trustee, improperly distributed funds solely from the Marital Trust, thereby intentionally depleting Righetti's remainder interest in the Marital Trust. Righetti argued that Dale seeks to preserve her grandchildren's remainder interest in the Credit Shelter Trust and that she breached her fiduciary duties, particularly her duties of good faith, loyalty, and impartiality, by drawing solely from the Marital Trust. Righetti also alleged that Dale breached the Marital Trust by paying herself distributions in amounts that were more than necessary and proper for her support, care, and maintenance. Consequently, Righetti sought discovery of Dale's accounting and distributions of the Credit Shelter Trust to prove these claims.

Dale objected to the discovery requests because they were not reasonably calculated to lead to discovery of admissible evidence and Righetti was not a beneficiary of the Credit Shelter Trust. Dale also filed a motion for partial summary judgment. She argued that the probate commissioner's resolution of a prior petition precluded Righetti's arguments that Dale is obligated to proportionally spend down the assets of the Credit Shelter Trust and that Righetti is entitled to an accounting of the Credit Shelter Trust. Righetti opposed summary judgment and filed a motion to compel discovery, arguing that issue and claim preclusion did not apply. Righetti further argued

that the terms of the Marital Trust, particularly the language "necessary for the proper support, care, and maintenance," fell within the exception of NRS 163.4175, which meant that Dale had an obligation to consider her other sources of income and resources before making support distributions to herself. In response, Dale argued that neither NRS 163.4175 nor the trust itself requires her to consider the Credit Shelter Trust, or any of her other assets, before making distributions from the Marital Trust as trustee.

The probate commissioner recommended denying Dale's motion for partial summary judgment because issue and claim preclusion did not apply, and the commissioner also recommended that Righetti's motion to compel discovery be held in abeyance, pending affirmance by the district court. At a hearing on the matter, Dale's counsel argued that while Dale owed Righetti "an accounting and a determination as to whether or not the spending of the marital trust is appropriate," Righetti was not entitled to an accounting of a trust to which she was not a beneficiary. The district court inquired into how an evaluation of Dale's "discretionary choice to support herself from one trust . . . [could] be measured without reference to how she's also supported elsewhere." Dale's counsel argued that the trustee's discretion is measured by the intent of the settlor of the trust, and that because William Raggio "did not express an intent on that," there is no requirement under the trust or Nevada trust law to look at other sources of income. The district court questioned whether "one of [William Raggio's] implicit intents was to preserve some trust corpus . . . for the benefit of his two daughters and not exhaust the bypass trust in favor of preserving the credit shelter trust." Dale's counsel denied that there was any such intent evident in the trust instrument.

The district court focused on the meaning of "necessary for the proper support, care, and maintenance," asking hypothetically, "[i]f there's a mountain of gold behind her but we don't get to see that mountain, how can we understand that her invasion of principal is necessary? It's necessary only because of something." Dale's counsel argued that whether a distribution is "necessary" depends on Dale's standard of living when her husband was alive. Righetti's counsel, on the other hand, argued that "necessary" refers to Dale's other resources and assets and whether she needs the money.

Following the hearing, the district court denied Dale's partial summary judgment request, reasoning that

> [i]ntegral to the present claims is whether the trustee's discretionary principal distributions from the marital deduction trust were "necessary" and "proper." The vested remainder beneficiaries are entitled to examine the need and propriety of the trustee's decision to withdraw principal from the marital deduction trust by reference to other trust and non-trust re-

> sources available for the trustee's necessary and proper support. It appears possible this [c]ourt cannot determine what is necessary and proper without a complete understanding of the trustee's circumstances, to include standard of living and supportive resources beyond the marital deduction trust.

Shortly thereafter, the district court granted Righetti's renewed motion to compel discovery of the accounting and distributions of the Credit Shelter Trust, finding that the requested discovery was relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence.

Dale filed the instant petition seeking a writ of prohibition or, alternatively, mandamus. Dale argues that the district court's discovery order was improper as a matter of law and asks us to vacate the district court's order compelling discovery.

DISCUSSION

We exercise our discretion to entertain Dale's petition for a writ of prohibition

Writ relief is an extraordinary remedy that is only available if a petitioner does not have "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330; *see Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). "[T]he issuance of a writ of mandamus or prohibition is purely discretionary with this court." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 373, 399 P.3d 334, 340-41 (2017) (alteration in original) (internal quotation marks omitted). A writ of prohibition is the proper remedy to prohibit the district court from compelling a party to disclose privileged or irrelevant discovery. *See id.* at 374, 399 P.3d at 341; *see also* NRS 34.320; *Toll v. Wilson*, 135 Nev. 430, 432 n.1, 453 P.3d 1215, 1217 n.1 (2019) ("A writ of prohibition is appropriate when the relief is to arrest the proceedings and prohibit some exercise of judicial function." (internal quotation marks omitted)).[2]

Although we generally decline to review a discovery order through a petition for extraordinary relief, we may exercise our discretion to do so if the challenged discovery order is likely to cause irreparable harm and a later appeal would not effectively remedy an improper disclosure of information. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. Here, the discovery order implicates Dale's privacy interests as the district court concluded it needed to review her "standard of living and supportive resources beyond the marital deduction trust" to determine if the distributions were necessary and proper. If the discovery permitted by the district court is legally ir-

[2]Accordingly, we deny Dale's alternative request for a writ of mandamus.

relevant, a later appeal would not remedy the improper disclosure of the information. *See Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1344 (1977) (finding that it was an irreparable "invasion into a litigant's private affairs" to order discovery of information without regard to relevancy). We thus exercise our discretion to entertain this petition.

The terms "necessary" and "proper" do not sufficiently trigger the exception of NRS 163.4175

Dale argues that neither Nevada trust law nor the terms of the trust instrument itself impose an obligation on her to consider her other assets before making trust distributions. She argues that the order compelling discovery of the Credit Shelter Trust accounting and distributions is thus contrary to Nevada trust law and we should issue a writ of prohibition arresting said discovery. Righetti contends that the district court properly ordered discovery of the Credit Shelter Trust accounting and distributions because Dale's distributions from that trust are relevant to the claims of breach of trust and breach of fiduciary duties.

Parties may obtain discovery regarding any nonprivileged matter "which is relevant to the subject matter involved in the pending action." NRCP 26(b)(1) (2008).[3] Generally, a district court's ruling on discovery matters is within its sound discretion and will not be disturbed absent a clear abuse of that discretion. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. But the interpretation of NRS 163.4175, which informs whether the accounting and distribution records of the Credit Shelter Trust are relevant to Righetti's breach of fiduciary duty claims, is a question of law that we review de novo. *See In re W.N. Connell & Marjorie T. Connell Living Tr.*, 133 Nev. 137, 139, 393 P.3d 1090, 1092 (2017) (examining trust interpretation de novo).

The narrow question before us is whether Dale, as trustee, has an obligation to consider other assets, including those in the Credit Shelter Trust, before making distributions to herself, as beneficiary, from the Marital Trust. We conclude she does not. NRS 163.4175 states, "[e]xcept as otherwise provided in the trust instrument, the trustee is not required to consider a beneficiary's assets or resources in determining whether to make a distribution of trust assets." Thus, Nevada trust law does not obligate a trustee to consider other assets or resources before making a distribution unless the trust instru-

[3]The Nevada Rules of Civil Procedure were recently amended, and the amendments became effective on March 1, 2019. *See* ADKT 522 (*Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules*, Dec. 31, 2018). Because this case predates the effective date of the amendments to the civil procedure rules, we cite to the 2008 version of NRCP 26 in effect at the time of this action.

ment itself sets forth such a requirement. Accordingly, to determine whether Dale has such an obligation, we must look to the language of the trust instrument.

Section 5.1 of the Marital Trust states, in relevant part, that the trustee "shall pay to or apply for the benefit of [Dale] as much of the principal of the Trust as the Trustee, in the Trustee's discretion, shall deem necessary for the proper support, care, and maintenance" of Dale. Both Dale and Righetti argue that the term "necessary" is the focal point for our inquiry, and they offer two conflicting interpretations of it. Dale interprets "necessary" as referring only to the *amount* of disbursement needed for her "proper support, care, and maintenance," without regard to her other assets. Righetti, on the other hand, interprets "necessary" as creating a threshold of *financial need*. Under this interpretation, Dale, as trustee, cannot distribute trust funds unless she can first show that without the trust distributions, she could not provide for her own "support, care, and maintenance." Righetti argues that the relevant discovery inquiry in determining whether a distribution is "necessary" to Dale is to determine what other financial means she has for her support, care, and maintenance.

The district court appears to have adopted Righetti's interpretation of "necessary," in that it creates a threshold of *financial need*. The district court determined that it "cannot determine what is necessary and proper without a complete understanding of the trustee's circumstances, to include standard of living and supportive resources beyond the marital deduction trust." We conclude that this determination was clearly erroneous for several reasons.

First, evident from the instrument itself, a fair and reasonable interpretation of the text as a whole shows William Raggio did not restrict Dale's discretion and require that she consider her other assets before making distributions. We "construe[ ] trusts in a manner effecting the apparent intent of the settlor." *Hannam v. Brown*, 114 Nev. 350, 356, 956 P.2d 794, 798 (1998); *see* Jonathan M. Purver, Annotation, *Propriety of Considering Beneficiary's Other Means Under Trust Provision Authorizing Invasion of Principal for Beneficiary's Support*, 41 A.L.R.3d 255, 262-63 (1972). In determining the settlor's intent, "we employ contract principles, including determining the intentions of the settlor by considering [the trust] as a whole, and favoring the most fair and reasonable interpretation of the trust's language." *In re W.N. Connell & Marjorie T. Connell Living Tr.*, 134 Nev. 613, 616, 426 P.3d 599, 602 (2018) (alteration in original) (internal quotation marks and citation omitted). Article 8.1(a), which details Dale's "powers" as trustee, states "[i]n the event any of such powers or discretion" in the agreement are inconsistent with NRS 163.265 to NRS 163.410, "the *most liberal [interpretation] shall control* to give the *greatest latitude and discretion* to the Trustee." (Emphases added.) Section 5.1, which details Dale's

authority for the administration and distribution from the Marital Trust, provides that Dale may distribute "as much of the principal of the Trust as [Dale], in [her] *discretion*, shall deem necessary for the proper support, care, and maintenance" of Dale. (Emphasis added.) It is evident from this language that William Raggio intended Dale to have discretion in making distributions and did not invoke NRS 163.4175's exception by requiring Dale first consider her other income or resources. *See President, Dirs. & Co. of Farmers Bank of Del. v. Del. Tr. Co.*, 95 A.2d 45, 47 (Del. Ch. 1953) (determining that settlor's knowledge of beneficiary's assets demonstrated that settlor did not intend to employ language of condition when creating a support provision in a will).

Moreover, the district court's reading is contrary to the other provisions of the trust instrument itself. In contrast to Section 5.1's discretionary language, Section 6.4, which covers the administration and distribution to the living issue of a grandson, provides that Dale shall pay such amounts that "[Dale], in [her] discretion, shall deem necessary for their proper support . . . *after taking into consideration . . . any other income or resources* of such issue known to" Dale. This language exhibits that William Raggio understood how to restrict Dale's authority as trustee in the manner Righetti asks us to read into Section 5.1, but he deliberately chose not to limit Dale's discretion in that regard with respect to the Marital Trust. Accordingly, as we consider the trust as a whole to determine the most fair and reasonable interpretation of Section 5.1, we determine the trust instrument does not invoke NRS 163.4175's exception, and therefore, Dale is not required to consider her assets or resources to make distributions from the trust assets.[4]

We thus conclude that the district court's interpretation is contrary to NRS 163.4175, which requires trustees to consider other assets only if the trust instrument itself invokes the exception. The district court should have begun its analysis from the position that Dale was not obligated to consider her other assets or resources before making a distribution unless the exception was invoked. Instead, the district court disregarded NRS 163.4175 and began evaluating whether one of William Raggio's "implicit intents was to preserve some trust corpus . . . for the benefit of his two daughters and not exhaust the bypass trust in favor of preserving the credit shelter trust." NRS 163.4175 clearly provides that, if a settlor wants trustees to consid-

[4]Righetti relies heavily in her briefs and argument before us on Restatement (Third) of Trusts § 50 cmt. e (Am. Law Inst. 2003) (detailing that where the trust instrument does not address the question, there is a presumption that a trustee must take a beneficiary's other resources into account in determining whether and in what amounts distributions are to be made). We conclude that Righetti's argument is without merit. Based on the plain language of the statute, it is apparent that the Legislature rejected this presumption when it enacted NRS 163.4175.

er a beneficiary's other assets, the settlor must so state in the trust instrument. We cannot infer an exception to NRS 163.4175 based solely on the terms "necessary" and "proper" in the trust instrument, as those terms appear frequently in trusts but their meanings depend on the circumstances and text of the instruments. *See, e.g.*, *Del. Tr. Co.*, 95 A.2d at 47 (holding that "upon a full reading of the will in the light of the surrounding circumstances . . . [the term 'necessary' was] not language of condition[,] but [rather, was] language fixing the standard by which the trustee is to exercise its discretion in determining the amount to be spent"). Rather, it must be clear from the trust as a whole that the settlor's intent is to require the trustee to consider other assets. William Raggio did not express that intent.

Therefore, we conclude the district court erred as a matter of law in compelling discovery of the accounting and distributions of the Credit Shelter Trust. Neither NRS 163.4175 nor the Raggio Trust requires Dale to consider her other assets in making distributions from the Marital Trust, and thus, information about those assets is irrelevant.[5]

CONCLUSION

Because the district court erred when it compelled the production of irrelevant information, we grant Dale's petition for writ relief and direct the clerk of this court to issue a writ of prohibition directing the district court to vacate its order compelling discovery of the accounting and distributions of the Credit Shelter Trust.

Gibbons, Stiglich, and Silver, JJ., concur.

Cadish, J., with whom Pickering, C.J., agrees, dissenting:

I do not believe the instant writ petition meets the standard to warrant our discretionary review, and I therefore dissent. Dale filed the instant petition for writ of prohibition or mandamus to challenge a discovery order entered by the district court. The majority correctly notes that we generally decline to review discovery orders through such a petition, but that we may do so "if the challenged discovery order is likely to cause irreparable harm *and* a later appeal would not effectively remedy an improper disclosure of information." Majority op. at 175 (emphasis added) (citing *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012)). The majority then states, in conclusory fashion, that a later appeal would not remedy the disclosure here if the discovery were later determined to be inappropriate and chooses to exercise its

[5]Because we conclude that neither Nevada law nor the trust instrument requires a consideration of Dale's other assets, Righetti's argument over the proportionate spend-down between the two trusts is also without merit. Dale, as a trustee, is not required to consider her other assets, which necessarily includes the assets of the Credit Shelter Trust and the distributions made from it.

discretion to entertain the petition. The majority, however, makes no determination that the challenged discovery order is likely to cause irreparable harm, as required by the very standard it states. Indeed, Dale has made no showing of a likelihood of irreparable injury, having acknowledged that the requested discovery would not result in the disclosure of any privileged information, and failed to demonstrate any particular harm if the records were to be disclosed.

Moreover, the majority identifies the key question before it as "whether Dale, as trustee, has an obligation to consider other assets, including those in the Credit Shelter Trust, before making distributions to herself, as beneficiary, from the Marital Trust." Majority op. at 176. However, the district court in this case has not yet made a final ruling on this issue, and thus it is not proper for this court's consideration in the context of this interlocutory writ proceeding.[1] *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (setting forth scope of prohibition and mandamus and observing that both are "purely discretionary" with this court). Issuing an opinion on this issue at this point is contrary to our general practice of ruling on issues only after the district court has had the opportunity to fully analyze and reach its own conclusion on them, particularly since the majority's conclusion rests on its factual determination of the trustor's intent. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 823, 407 P.3d 702, 708 (2017) ("To efficiently and thoughtfully resolve such an important issue of law demands a well-developed district court record, including legal positions fully argued by the parties and a merits-based decision by the district court judge."); *see Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that "an appellate court is not an appropriate forum in which to resolve disputed questions of fact").

For these reasons, I would decline to consider writ relief in the instant case, and I therefore respectfully dissent.

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[1]The district court denied Dale's motion for partial summary judgment, which left the issue to be finally resolved at the time of trial. The instant petition challenges only the discovery order entered by the district court, not the order denying the partial summary judgment motion.

VERNON NEWSON, JR., Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 75932

April 30, 2020 462 P.3d 246

Petition for en banc reconsideration of a panel opinion in an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with use of a deadly weapon, two counts of child abuse, neglect or endangerment, and ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Petition granted; affirmed in part, reversed in part, and remanded.

Darin F. Imlay, Public Defender, and *William M. Waters*, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

Vernon Newson and Anshanette McNeil were driving in a rented SUV on a freeway on-ramp when Newson turned and shot Anshanette, who was seated in the backseat next to the couple's infant son and Anshanette's toddler. Newson pulled the vehicle over to the side of the road and Anshanette either fled or was pulled from the vehicle. Newson shot her additional times before driving off, leaving her behind. Newson drove the children to Anshanette's friend, reportedly telling her that Anshanette had "pushed me too far to where I can't take it no more." Newson fled to California, where he was apprehended. The State charged Newson with open murder. Although Newson did not testify at trial, defense counsel conceded in closing argument that Newson shot Anshanette, arguing Newson did so in a sudden heat of passion and that the killing was not premeditated. The district court declined to instruct the jury on voluntary manslaughter, concluding the evidence did not establish that offense. The jury convicted Newson of first-degree murder, two counts of child abuse, neglect or endangerment, and ownership or possession of a firearm by a prohibited person.

The primary issues raised on appeal are whether the district court abused its discretion by declining to instruct the jury on voluntary manslaughter and whether sufficient evidence existed to uphold Newson's two child abuse, neglect or endangerment convictions. On October 10, 2019, a panel of this court issued an opinion in this case, reversing the first-degree murder conviction because the district court erred by failing to instruct the jury on voluntary manslaughter but affirming the remaining convictions. Newson petitioned for en banc reconsideration.[1] Having considered the petition, we conclude that en banc reconsideration is warranted to clarify the decision regarding the child abuse, neglect or endangerment convictions. *See* NRAP 40A(a). We therefore grant Newson's petition, withdraw the panel's opinion, and issue this opinion in place of the panel's withdrawn opinion.

We conclude the district court abused its discretion by declining to instruct the jury on voluntary manslaughter, as the circumstantial evidence suggested the killing occurred in a sudden heat of passion upon provocation. We reiterate that district courts must instruct juries on the defendant's theory of the case where there is any evidence, no matter how weak, to support it. We therefore reverse the first-degree murder conviction and remand for a new trial on that charge. We reject Newson's remaining assertions of error and therefore affirm the judgment of conviction as to the other charges.

I.

Late one night, witnesses driving in Las Vegas on Lamb Boulevard near the I-15 heard rapid gunfire coming from a nearby freeway on-ramp. Looking in the direction of the gunfire, they observed an SUV on the on-ramp and thought they heard more than one car door slam before the SUV sped off. Persons who arrived at the scene shortly thereafter saw a badly injured woman lying on the road. She had been shot seven times: through her cheek and neck, chin and neck, chest, forearm, upper arm, and twice in the back. At least one of the shots—the one that entered through the victim's right cheek, exited her right neck and reentered her right upper chest—was fired at a close range of six inches to two feet. Three of the shots were independently fatal, and the woman passed away shortly after the shooting. The victim had no shoes, and a cell phone damaged by a gunshot was on the ground a few feet away. Responding officers recovered six spent cartridges from the area, and the pavement showed evidence of fresh dents from bullet strikes. The toxicology report later showed that the victim had methamphetamine and its metabolite, and hydrocodone and its metabolite, in her system at the time of death.

[1]We previously denied the State's petition for en banc reconsideration.

Meanwhile, Zarharia Marshall was waiting at her residence for Anshanette McNeil to drop off Anshanette's infant son. Zarharia and Anshanette were close friends, and Zarharia often babysat for Anshanette. But Anshanette never arrived. Instead, Vernon Newson, Anshanette's boyfriend of three years and the infant's father, arrived in Anshanette's rental SUV to drop off the infant and, to Zarharia's surprise, Anshanette's two-year-old son.

As Newson exited the vehicle, bullets fell from his lap. Newson was acting frantic, irritated, and nervous. He struggled to extricate the infant's car seat from the SUV and, according to Zarharia, ordered the crying child "to shut up." Newson handed the car seat with the infant inside to Zarharia before retrieving a baby swing and diaper bag from the trunk. Newson went around the SUV to let the two-year-old out. The toddler looked frightened, and when Zarharia asked him whether he was staying with her and whether he was going to cry, the toddler looked at her without answering and then ran into the house. Newson followed Zarharia and the children inside and kissed his infant son before asking to speak with Zarharia. Zarharia followed Newson outside and watched him pick up a bullet from the driveway and place it in a gun magazine. Zarharia also noticed Anshanette's shoes and purse in the back seat of the SUV. Zarharia testified that Newson retrieved the purse from the SUV, handed it to her, and asked her to tell his son that he always loved him. Zarharia asked Newson what had happened, and she testified that he responded, "you know, just know that mother fucker's pushed me too far to where I can't take it no more." Newson drove off.

Zarharia retrieved several of the bullets that had fallen onto her driveway and tried to call Anshanette, who did not answer. Zarharia took the infant out of his car seat to change his diaper and realized he had blood on his pants and that there was blood in the car seat as well. She called Anshanette's mother, who in turn called the police. Based on her description, detectives were able to identify Anshanette as the shooting victim.

Police located and arrested Newson more than a week later in California. Newson's watch had Anshanette's blood on it, and he was carrying bullets of the same caliber and make as those used in the shooting. Police did not recover the murder weapon but did recover the SUV, which had been abandoned and still contained bloody clothing, a pair of flip-flops, a car seat, spent cartridges, and other items. Anshanette's blood was on the driver's side rear seat, seatbelt, door, and door handle, as well as on the steering wheel. Detectives also recovered six spent cartridges and one unfired round from the SUV, and those cartridges matched the cartridges recovered at the crime scene. The SUV had three bullet holes in the back seat, and there were bullet fragments in the vehicle.

The State charged Newson with murder with use of a deadly weapon, two counts of child abuse, neglect or endangerment, and ownership or possession of a firearm by a prohibited person. At trial, the State's theory of the case was that Newson was driving the SUV when he pulled the vehicle over to the side of the road, turned around, and shot Anshanette, who bled on the infant. Newson then exited the SUV, pulled Anshanette from the vehicle and threw her onto the road, stood over her, and shot her several additional times before climbing back into the SUV and driving off.

Newson did not testify at trial. However, Newson's counsel conceded that the evidence showed Newson shot Anshanette, but argued that the State's evidence fell short of proving first-degree murder. Newson's counsel contended that the circumstantial evidence showed that Newson became angry while driving and shot Anshanette while his passions were inflamed. In support, Newson's counsel pointed to evidence surrounding the shooting and testimony that the couple argued constantly, including while driving. He also pointed to evidence that Anshanette had high levels of methamphetamine in her system at the time of the shooting, which an expert witness at trial agreed may have caused her to become irrational or aggressive. Newson's counsel further argued the physical evidence did not show that Newson ever exited the SUV.

Pertinent here, Newson wished to have the jury instructed on voluntary manslaughter, and his counsel proffered instructions to that end. The State argued that the instructions were not warranted because there was no evidence of any particular provocation that incited the killing. Newson's counsel countered that circumstantial evidence justified the instructions and that the State's provocation threshold would force Newson to testify and waive his Fifth Amendment right against self-incrimination. The district court agreed with the State that the evidence did not establish sufficient context to warrant the instructions. The court thereafter instructed the jury only as to first- and second-degree murder.

The jury convicted Newson of first-degree murder with use of a deadly weapon and the remaining charges. The district court sentenced him to an aggregate sentence of life with parole eligibility after 384 months. Newson appeals.

II.

Newson alleges error only as to the convictions for first-degree murder and child abuse, neglect and endangerment. We first consider whether the district court abused its discretion by refusing to instruct the jury on voluntary manslaughter.[2] We thereafter examine

[2]Newson also contends the district court erred by declining to give his proffered instruction on two reasonable interpretations of the evidence and that the district court gave an inaccurate flight instruction. The district court was not

whether the State failed to adequately inform Newson of the child abuse, neglect or endangerment charges or prove the necessary elements of those charges.

A.

Newson first contends the district court erred by refusing to instruct the jury on his defense theory of voluntary manslaughter,[3] where that theory was supported by Zarharia's testimony regarding Newson's apparent distress and statements made shortly after the crime, as well as by the physical evidence. The State counters that the district court properly refused to instruct the jury on voluntary manslaughter because the evidence did not establish a provocation.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The failure to instruct the jury on a defendant's theory of the case that is supported by the evidence warrants reversal unless the error was harmless. *See Cortinas v. State*, 124 Nev. 1013, 1023-25, 195 P.3d 315, 322-23 (2008) (discussing when instructional error may be reviewed for harmlessness).

Existing caselaw treats voluntary manslaughter as a lesser-included offense of murder. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); *see also Collins v. State*, 133 Nev. 717, 727 & n.1, 405 P.3d 657, 666 & n.1 (2017). Voluntary manslaughter involves "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." NRS 200.050(1). Moreover, the killing must result from a sudden, violent, irresistible passion that was "caused by a provocation apparently sufficient to make the passion irresistible." NRS 200.040(2); *see also* NRS 200.060.

We have frequently addressed the circumstances in which a trial judge should give voluntary manslaughter instructions at the request of a defendant charged with murder. *See, e.g.*, *Collins*, 133 Nev. at 727-28, 405 P.3d at 666-67; *Williams*, 99 Nev. at 531, 665 P.2d at

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required to give the proffered two reasonable interpretations of the evidence instruction because the jury was properly instructed on reasonable doubt. *See, e.g.*, *Bails v. State*, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976). We do not address the flight instruction, as Newson did not raise his appellate arguments below. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (holding that the defendant must object at trial to the same grounds he or she asserts on appeal); *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

[3]Because the parties did not brief the issue of whether the proffered voluntary manslaughter instructions were correct statements of law, we do not address it.

261. In the seminal case of *Williams v. State*, the defendant claimed the killing happened in the heat of passion after he and the victim engaged in a fistfight and the victim threw the defendant to the floor, but the trial court refused to give the defendant's proffered voluntary manslaughter instruction. 99 Nev. at 531-32, 665 P.2d at 261-62. In concluding that the district court erred, we reiterated that a criminal defendant "is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Id.* at 531, 665 P.2d at 261. Applying that rule, we explained that the defendant's theory of the altercation that led to the killing could support a voluntary manslaughter conviction because the victim's actions during the fight could be viewed as an attempt to seriously injure the defendant, providing sufficient provocation under NRS 200.050. *Id.* at 532, 665 P.2d at 261-62.

Conversely, in *Collins v. State*, we upheld the district court's decision not to give a voluntary manslaughter instruction where *no* evidence supported that charge. 133 Nev. at 728-29, 405 P.3d at 666. In that case, circumstantial evidence linked the defendant to the killing, including the defendant's and the victim's prior history, cell phone records on the day the victim disappeared, the defendant's possession of the victim's jewelry, the victim's blood and acrylic nail in the defendant's home, and the victim's blood in the trunk of an abandoned car. *Id.* at 718-19, 405 P.3d at 660-61. The defendant requested a voluntary manslaughter instruction based upon his remark to a third party that the defendant thought he should delete text messages between himself and the victim for fear that the police might use those messages to link him to the victim's disappearance. *Id.* at 728, 405 P.3d at 667. We concluded that "[t]he cryptic reference to a text-message exchange" in no way "suggest[ed] the irresistible heat of passion or extreme provocation required for voluntary manslaughter," warning that to give a lesser-included offense instruction where no facts supported the lesser offense could lead a jury to return a compromise verdict unsupported by the evidence. *Id.*

Here, it is undisputed that Newson killed Anshanette. The sole question is whether the evidence warranted a voluntary manslaughter instruction where there was no direct evidence of the events immediately preceding the killing and the defendant chose to invoke his constitutional Fifth Amendment right to remain silent. In declining to instruct the jury on voluntary manslaughter, the district court specifically concluded that Newson's statement, according to Zarharia—that Anshanette had "pushed [him] too far to where [he] can't take it no more"—demonstrated neither a sudden passion nor sufficient provocation for voluntary manslaughter because the statement lacked context as to when Newson was "pushed . . . too far." We disagree that this statement lacked adequate context under

these circumstances and further disagree that the evidence taken as a whole does not support a voluntary manslaughter charge.

The State was not prohibited from arguing circumstantial evidence as a whole showed first-degree murder. Yet, Newson's counsel was prohibited from arguing Newson's theory regarding what crime the evidence showed. The record here shows abundant circumstantial evidence suggesting the killing was not planned and instead occurred in a sudden heat of passion. The circumstances of the killing itself suggest a sudden heat of passion. The shooting occurred in a rented SUV on a freeway on-ramp in a busy location, and witnesses heard rapid gunfire and at least one car door slam. Because Newson was in the driver's seat when he began shooting, he would have had to point the gun directly behind him—quite possibly while still driving the SUV—in order to fire those first few shots at Anshanette. Moreover, two young children were present in the car, and the one next to Anshanette was Newson's own baby. Either child could have easily been hit by a stray bullet or casing, to say nothing of the danger presented by two adults fighting in a moving vehicle. Meanwhile, Anshanette's friend, Zarharia, was expecting Anshanette to arrive at any moment to drop off the infant and would be sure to miss Anshanette when she did not arrive with Newson. All told, it is difficult to imagine a more unlikely setting for a deliberate, planned killing.

Newson's behavior and demeanor immediately after the killing further suggest that it may have happened in the heat of passion. Notably, Zarharia testified that Newson was very agitated when he arrived at her residence to drop off the children. Bullets fell from his lap as he stepped out of the SUV. Anshanette's purse and shoes were still in the back seat, and yet Newson made no attempt to hide these from Zarharia, and in fact handed Zarharia Anshanette's purse. He also handed Zarharia the blood-stained baby carrier, and proceeded to retrieve and load a bullet into the gun magazine while Zarharia looked on. He also openly blamed Anshanette for whatever had happened. These facts support the inference that Newson was still overwrought when he reached Zarharia's and that he was not taking any measures to conceal the evidence of the killing, such that a juror could infer that Newson had reacted in the heat of the moment when he killed Anshanette and had not planned to kill her.

Circumstantial evidence also suggests sufficient provocation. According to Zarharia, when she asked Newson what had happened, he responded that Anshanette had "pushed [him] too far to where [he] can't take it no more." This statement, viewed in light of the other evidence, supports an inference that Anshanette may have provoked Newson while they were driving to Zarharia's. The testimony that the couple fought frequently while driving, and the evidence that Anshanette was under the influence of methamphetamine along

with the coroner's testimony that these types of illicit drugs can cause a person to become irrational or aggressive, further supports Newson's argument that the couple may have been fighting when Newson shot Anshanette. The physical evidence could provide some additional support for that view. At least one bullet—the shot that entered through Anshanette's right cheek, exited her right neck, and reentered her right upper chest—was fired at a very close range, possibly as close as six inches, which could suggest that Anshanette had moved out of her seat and had her upper body near Newson when he fired that shot. Newson's demeanor when he arrived at Zarharia's suggests that he had recently been enraged. Finally, Newson's statement came in response to Zarharia's question of "what happened," which implies Newson meant he was "pushed . . . too far" and simultaneously could not "take [Anshanette's pushing] no more" while driving to Zarharia's.

While this evidence is all circumstantial, likewise, so is the State's theory of how the killing occurred. We remind district courts "that a defendant is entitled to a jury instruction on his theory of the case, so long as there is evidence to support it, *regardless of whether the evidence is weak, inconsistent, believable, or incredible.*" *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010) (emphasis added). We conclude that the evidence could support a voluntary manslaughter verdict and the district court was therefore required to instruct the jury on voluntary manslaughter. Moreover, the State's case for first-degree murder was not strong, and we therefore are not convinced that the failure to instruct the jury on Newson's theory of the case was harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of conviction on first-degree murder and remand for a new trial on the murder charge. In light of our decision, we need not address Newson's remaining assertions of error as to that charge.

B.

Newson next contends the State violated his Sixth Amendment rights by failing to inform him of the specific child abuse or neglect charges against him and failed to prove abuse or neglect at trial. Newson did not raise the first argument below, and we decline to address it. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). We therefore only consider whether the evidence supported the jury's verdict finding Newson guilty of two counts of child abuse, neglect or endangerment.

Evidence is sufficient to support a verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654

(2010) (internal quotations omitted). We conclude sufficient evidence was presented for a rational juror to find Newson guilty under NRS 200.508(1) based on negligent treatment or maltreatment of a child as defined by NRS 432B.140.[4]

NRS 200.508(1) makes it a crime to willfully cause a child "to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect *or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect*." (Emphasis added.) In *Clay v. Eighth Judicial District Court*, we explained that subsection 1 sets forth two "alternative means of committing the offense." 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). Under the first, the State must "prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect." *Id.* at 451-52, 305 P.3d at 902. Alternatively, the State must "prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to *be placed in a situation where the child may* suffer physical pain or mental suffering (4) as the result of abuse or neglect." *Id.* at 452, 305 P.3d at 902-03 (emphasis added).

Under either alternative, the fourth element is "abuse or neglect." NRS 200.508(4)(a) defines "abuse or neglect," in relevant part, as "maltreatment of a child under the age of 18 years, as set forth in . . . [NRS] 432B.140[,] . . . under circumstances which indicate that the child's health or welfare is harmed or threatened with harm." In turn, NRS 432B.140, in relevant part, provides that "[n]egligent treatment or maltreatment" occurs where "a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic."[5]

Here, the State charged Newson with two counts of child abuse, neglect or endangerment under NRS 200.508(1) for putting Anshanette's two children "in a situation where the child *may suffer* physical pain or mental suffering as a result of abuse or neglect, by shooting at or into the body of ANSHANETTE MCNEIL, . . . while [each child] was seated next to and in close proximity to ANSHANETTE." (Emphasis added.) The "may suffer" language communicated that the State was proceeding under the second theory of liability set forth in NRS 200.508(1). And the jury was instructed that negligent treatment or maltreatment was a type of "abuse or neglect" at issue.

The jury could reasonably infer from the evidence presented that Newson placed the children in a situation where they might suffer

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[4]In light of our decision, we do not address the remaining types of abuse or neglect outlined in NRS 200.508(4)(a).

[5]This language was added to NRS 432B.140 in 2015, after *Clay* was decided, and it took effect before Newson committed the charged offenses. 2015 Nev. Stat., ch. 399, §§ 26, 27(3), at 2245.

physical pain or mental suffering as the result of negligent treatment or maltreatment. *Clay*, 129 Nev. at 454, 305 P.3d at 904 (explaining that liability can attach under NRS 200.508(1) even in the absence of physical pain or mental suffering "if the defendant placed the child in a situation where the child *may* suffer physical pain or mental suffering as the result of the negligent treatment or maltreatment"). In particular, by shooting Anshanette in a moving car while she was seated next to the two children, Newson subjected the children to "harmful behavior" that was "terrorizing" or "emotionally traumatic" and therefore amounted to negligent treatment or maltreatment. NRS 432B.140. And the circumstances surrounding that negligent treatment or maltreatment placed the children in danger of physical harm for purposes of the second theory in NRS 200.508(1) and the definition of "abuse or neglect" in NRS 200.508(4)(a). Unlike NRS 200.508(2), which this court also addressed in *Clay*, *see* 129 Nev. at 452-53, 305 P.3d at 903, NRS 200.508(1) imposes no requirement that Newson be responsible for the children, nor does NRS 432B.140 impose a responsibility requirement for the form of negligent treatment or maltreatment at issue here.[6]

Even assuming, arguendo, that NRS 432B.140 requires that the defendant have been responsible for the child's welfare regardless of the form of negligent treatment or maltreatment at issue, the jury could reasonably infer that Newson was responsible for both children's welfare at the time of the shooting. Specifically, the evidence established that Newson was the baby's father; that Newson, although not the older child's father, had been in a long-term dating relationship with Anshanette, the child's mother; and that Newson was driving the car with the children inside at the time he shot into the backseat. *See* NRS 432B.130 (addressing the meaning of the phrase "[p]ersons responsible for child's welfare"); *Clay*, 129 Nev. at 454, 305 P.3d at 904 (providing an example of liability under the second theory in NRS 200.508(1) based on negligent treatment or maltreatment as defined in NRS 432B.140 where an intoxicated driver places a child in the car and drives without getting into an accident). Accordingly, a rational juror could find Newson guilty beyond a reasonable doubt of two counts of child abuse, neglect or endangerment in violation of NRS 200.508(1).[7]

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[6]The structure of NRS 432B.140 ties the responsibility requirement to the last type of neglect or maltreatment listed in that statute—when the child "lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child."

[7]We disagree with Newson's argument that cumulative error warrants reversal. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *see also Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (addressing the test for cumulative error).

III.

A district court must instruct the jury on voluntary manslaughter when requested by the defense so long as it is supported by some evidence, even if that evidence is circumstantial. We conclude that some evidence in this case suggests the shooting occurred in the heat of passion, including the physical evidence, the circumstances surrounding the shooting, the evidence regarding the couple's relationship and the victim's drug use, and the evidence regarding Newson's demeanor and emotional state. The district court therefore erred by declining to instruct the jury on voluntary manslaughter. Because we are not convinced that the error was harmless considering all of the evidence presented, we reverse the judgment of conviction as to the murder charge and remand for a new trial on that charge. But, we conclude that sufficient evidence supports the remaining convictions and that none of the other claims of error warrant relief. We therefore affirm the judgment of conviction as to the remaining charges.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Cadish, JJ., concur.

THE STATE OF NEVADA, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE KATHLEEN M. DRAKULICH, District Judge, Respondents, and DAVID CHARLES RADONSKI, Real Party in Interest.

No. 79452

April 30, 2020 462 P.3d 671

Original petition for a writ of prohibition or mandamus in a criminal action charging real party in interest David Charles Radonski with several counts of first- and third-degree arson.

Petition denied.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, Washoe County, for Petitioner.

John L. Arrascada, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Jordan A. Davis*, Deputy Public Defender, Washoe County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

The State has charged real party in interest David Charles Radonski with multiple counts of arson in connection with the July 2018 Perry Fire, which destroyed or severely damaged several structures and resulted in the expenditure of millions of dollars in fire suppression costs. At issue in this case is the level of *mens rea* the State must prove to convict Radonski of arson. The State argues that it must prove only that Radonski willfully and unlawfully started a fire in disregard of the likely harmful consequences of his conduct. Radonski argues that the State must prove that he specifically intended to cause harm emanating from his conduct. The district court concluded that Nevada's criminal arson statutes require the State to prove a specific intent to harm in addition to a volitional act. We agree with the district court. Nevada's arson statutes plainly require the State to prove that Radonski "willfully and maliciously" caused a fire, which means the State must prove that Radonski engaged in volitional conduct coupled with a specific intent to harm. Therefore, we deny the State's petition.

FACTS AND PROCEDURAL HISTORY

The State arrested Radonski in connection with the July 2018 Perry Fire that burned over 51,000 acres near Pyramid Lake, north of Reno. The Perry Fire burned over the course of several days and consumed or damaged 13 victim properties at a suppression cost of $4.8 million. The State charged Radonski with two counts of first-degree arson (NRS 205.010), two counts of third-degree arson (NRS 205.020), and one count of destruction by fire of timber, crops, or vegetation (NRS 475.040). Only the arson counts are at issue here.

Radonski admitted that he caused the fire by shooting fireworks near the desert area where the fire began. He claimed that he had tried to shoot a Roman candle toward a concrete structure but that the firework instead ignited desert brush nearby. He also claimed that he unsuccessfully tried to put the fire out with water from a water bottle and by covering the fire with dirt. Although he admitted to lighting the fireworks and causing the fire, Radonski pleaded not guilty to the charges against him.

The State preliminarily moved the district court to determine the appropriate jury instructions for the *mens rea* elements of arson and argued that arson may be charged as either a specific-intent or a general-intent crime. Explaining to the court that it had charged Radonski under a general-intent theory of arson, the State argued that Radonski could be liable for arson if he merely intended to commit the proscribed act of starting a fire, regardless of whether he intend-

ed to cause resulting harm. The State relied primarily on California caselaw for its argument, reasoning that California's arson statute "is identical" to Nevada's, and that because this court had not yet addressed arson's *mens rea* element, the district court should be guided by other jurisdictions interpreting arson as a general-intent crime.

The State proposed the following jury instruction for the "maliciously" element of arson:

> [A] person acts "maliciously" if he either (1) acts with specific intent to injure the property burned, or (2) willfully causes a fire without legal justification, with awareness of facts that would lead a reasonable person to realize that the direct, natural and highly probable consequence of igniting and shooting a roman candle or other firecracker under the circumstances . . . would be the burning of the property.

Radonski challenged the State's proposed jury instruction and countered that arson requires the State to prove the defendant's specific intent to harm, not merely the intent to act, and that he could not be liable for arson as a result of accidentally or carelessly starting a fire that subsequently harmed property. Radonski relied on *Batt v. State*, 111 Nev. 1127, 1130-31, 901 P.2d 664, 666 (1995), and *Ewish v. State*, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994), for his argument that arson is a specific-intent crime in Nevada, and he argued that Nevada's arson statutes plainly require the State to prove a volitional act coupled with the intent to cause harm.

After a hearing on the State's motion, the district court determined that arson is a specific-intent crime based on NRS 193.0175's definition of "maliciously." The district court also relied on the *Ewish* decision in concluding that this court "has clearly stated that the lack of specific intent is a sufficient defense to arson" and that arson is a specific-intent crime. The district court ordered that the jury in Radonski's trial would be instructed accordingly.

The State unsuccessfully moved the district court to reconsider its order, arguing that to the extent *Ewish* indicated that arson is a specific-intent crime, it did so only in the context of aiding and abetting the crime of arson. The district court rejected the State's argument and denied its motion to reconsider. The district court stayed the proceedings below pending resolution of the State's petition addressed here.

DISCUSSION

The State's petition challenges the district court's order denying the State's proposed jury instruction. The State requests that this court compel the district court to instruct the jury that arson is, or may be charged as, either a general-intent or a specific-intent crime, based on authorities from other jurisdictions and the common-law

understanding of arson as a general-intent crime. Because it cannot appeal from a final judgment or verdict in a criminal action, NRS 177.015(3), the State argues that it lacks an adequate remedy such that mandamus relief is appropriate.[1] Radonski does not object to this court's entertaining the State's petition, but argues that the district court's conclusions were correct and should not be disturbed.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160. A writ will not issue if the petitioner has "a plain, speedy and adequate remedy [at] law." NRS 34.170. "[M]andamus is an extraordinary remedy, and it is within the discretion of this court to determine if a [mandamus] petition will be considered." *State v. Eighth Judicial Dist. Court (Taylor)*, 116 Nev. 374, 379-80, 997 P.2d 126, 130 (2000). This court has exercised its discretion to entertain a mandamus petition where the State could not appeal the challenged trial court order in a criminal case. *Id.* (entertaining the State's mandamus petition where the State could not appeal the district court's order granting a motion to strike an amended information). This court has also granted extraordinary writ relief in a criminal action where "a proposed [jury] instruction [was] manifestly incorrect as a matter of law." *State v. Second Judicial Dist. Court (Garcia)*, 108 Nev. 1030, 1034, 842 P.2d 733, 735-36 (1992). And where a petition raises "an important issue of law requir[ing] clarification[,] . . . this court may exercise its discretion to consider a petition for extraordinary relief." *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013).

We agree that the State lacks an adequate remedy at law in this case. The State cannot appeal to challenge a jury verdict that is based on an incorrect theory of the crime of arson. *See* NRS 177.015. Additionally, the State's petition warrants our consideration because it raises an important legal question requiring us to clarify the *mens rea* the State must prove to convict a defendant of "willfully and maliciously" causing a fire under Nevada's arson statutes, NRS Chapter 205.010-.025 (defining the four degrees of arson). Accordingly, we exercise our discretion to address the merits of the State's petition.

The sole question raised here is whether Nevada's arson statutes require the State to prove that Radonski merely intended to light a firework in disregard of the risk of likely harmful consequences of his act, or whether the State must prove that he intended *harm*

[1]Acknowledging our order of October 24, 2019, in which we explained that "a petition for a writ of prohibition is the wrong vehicle to challenge the district court's decision denying the State's request for a general intent jury instruction," the State clarified in its reply brief that it seeks only mandamus relief. *State v. Radonski*, Docket No. 74592, at *1 n.1 (Order Directing Answer and Reply, Oct. 24, 2019).

as a result of lighting the firework. The question requires us to interpret NRS 205.010 and NRS 205.020, which define both first- and third-degree arson, respectively, as "willfully and maliciously set[ting] fire to or burn[ing] or caus[ing] to be burned" any property, whether the property belongs to the person charged or to another.[2]

"Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act." *Davis*, 129 Nev. at 119, 294 P.3d at 417 (internal quotation marks omitted). "[E]very word, phrase, and provision of a statute is presumed to have meaning." *Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004). "A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." *Williams v. Clark Cty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002).

"In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence." NRS 193.190. "A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any . . . [d]welling house or other structure or . . . [p]ersonal property . . . is guilty of arson in the first degree . . . ." NRS 205.010. Third-degree arson also requires that a person "willfully and maliciously set[ ] fire to or burn[ ] . . . property." NRS 205.020. "Maliciously" is defined in NRS 193.0175 as "import[ing] an evil intent, wish or design to vex, annoy or injure another person."

By their plain language, Nevada's arson statutes punish willful *and* malicious conduct. The statutes' use of the word "and" to join "willfully" with "maliciously" conveys that the terms are distinct and independent, and that the State must establish both willfulness and malice. There is no basis to conclude that we should interpret the terms synonymously. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011) (observing that the word "and" is a coordinating conjunction meant to link independent ideas); *United States v. Hassouneh*, 199 F.3d 175, 180-81 (4th Cir. 2000) (explaining that to ascribe the same meaning to the words "willfully" and "maliciously" would be impermissibly redundant, because "willfully [by itself], does not necessarily embrace any evil purpose but comprehends merely a voluntary and conscious" act (quoting *United States v. White*, 475 F.2d 1228, 1233 n.6 (4th Cir. 1973))); 6A C.J.S. *Arson* § 10 (2016) ("'[W]illfully' and 'maliciously' as employed in some

[2]Although the State has charged Radonski with first- and third-degree arson under NRS 205.010 and NRS 205.020, our analysis and interpretation of "willfully and maliciously" burning property also applies to the phrase "willfully and maliciously" as used in the definitions of second- and fourth-degree arson in NRS 205.015 and NRS 205.025.

statutes defining arson, denote distinct ideas, and some courts or particular statutes emphasize the necessity of the existence of 'malice' in addition to 'willfulness.'"). A defendant acts "willfully" when the defendant acts deliberately, as opposed to accidently: "The word 'willful' when used in criminal statutes with respect to proscribed conduct relates to an act or omission which is done intentionally, deliberately or designedly, as distinguished from an act or omission done accidentally, inadvertently, or innocently." *Robey v. State*, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980). Liability for arson will not attach where the defendant acts willfully but without malice; the statute requires a volitional act with an "evil intent." Hence, "[a]bsent the required malice and willfulness, [a defendant] cannot be convicted of arson." *Batt*, 111 Nev. at 1130-31, 901 P.2d at 666. To interpret the arson statute otherwise is to ignore its plain and unambiguous language.

The Nevada Legislature has defined "maliciously" as "import[ing] an *evil* intent, wish or design to vex, annoy or injure another person." NRS 193.0175 (emphasis added). The Legislature's definition expressly requiring an evil intent to harm or injure indicates that liability for arson requires more than merely a general intent to start a fire. Because arson is punished as a willful and malicious burning of property, there is simply no way around the conclusion that liability for arson requires the State to prove that a defendant's willful or deliberate conduct also involved an "evil intent . . . to vex, annoy or injure" property, that is, a specific intent to harm, not merely a general intent to perform a prohibited act. *Id.*; *see Glegola v. State*, 110 Nev. 344, 347, 871 P.2d 950, 952 (1994) (explaining that NRS 201.255(2)'s "with intent to annoy another" language "indicates that a specific intent is an element of the offense"). To the extent that arson proscribes a willful (volitional) act of setting fire to or burning property, coupled with a malicious state of mind, or an "evil intent" to harm or injure, arson may be described as a specific-intent crime.

Courts in other jurisdictions with statutes that define arson as willfully causing a fire with the intent to cause harm have concluded, as we do, that arson is a specific-intent crime. As the Supreme Judicial Court of Massachusetts explained, "[I]n jurisdictions where arson has been declared a specific intent crime, the statutes have been drafted or amended to achieve that end." *Commonwealth v. Pfeiffer*, 121 N.E.3d 1130, 1140-41 (Mass. 2019) (discussing *Keats v. State*, 64 P.3d 104, 107 (Wyo. 2003) (holding that arson is a specific-intent crime because it requires a malicious burning with intent to destroy or damage an occupied structure), and *Holbrook v. State*, 772 A.2d 1240, 1248 (Md. 2001) (concluding that arson in Maryland is a specific-intent crime because the Maryland Legislature defined "maliciously" "as an act done with intent to harm a person or prop-

erty" (internal quotation marks omitted))). Nevada's definition of "maliciously" as "an evil intent" to injure compels the conclusion that the State must prove a defendant's specific intent to harm.

In *Ewish*, 110 Nev. at 228, 871 P.2d at 311, this court indicated that arson is a specific-intent crime, observing that a defendant had "claimed that due to his voluntary intoxication, he could not have formed the requisite specific intent necessary to commit arson." The State attempts to distinguish *Ewish* by arguing that because the *Ewish* defendants were charged under a theory of accomplice liability, the court's discussion of specific intent referred not to the elements of arson but to the culpability required for aiding and abetting arson. Alternatively, the State urges this court to overturn *Ewish*, arguing that the court in that decision erred in determining that arson is a specific-intent crime. The State relies on California caselaw and authority from the United States Court of Appeals for the Ninth Circuit for its argument that *Ewish* should be overturned. We are not persuaded by the State's arguments.

First, the court's reference in *Ewish* to specific intent was not limited to the charges brought against the defendants in that case for aiding and abetting. In *Ewish*, three defendants were charged with two counts of arson, two counts of murder with a deadly weapon, and nine counts of attempted murder with a deadly weapon after they threw Molotov cocktails at two different homes, resulting in the deaths of two people. *Id.* at 223-24, 871 P.2d at 308. One of the defendants, Webb, "took the stand and admitted that he threw" one of the Molotov cocktails. *Id.* at 224, 871 P.2d at 308. Webb claimed as his "sole defense . . . that he was too intoxicated to form the specific intent necessary to commit arson." *Id.* at 224, 871 P.2d at 309. Ewish, on the other hand, claimed that "he could not have formed the specific intent necessary to *aid in and abet murder or arson*." *Id.* (emphasis added). This court's conclusion that Webb presented "a viable defense to [the] specific intent crime" of arson specifically applied to Webb's defense against the arson charge in spite of his admittedly causing the fire, not to Ewish's defense against the charge of aiding and abetting. *Id.* at 228, 871 P.2d at 311. The court quite clearly analyzed Webb's and Ewish's defenses as separate and distinct, describing "the weak nature of appellants' *respective defenses* (voluntary intoxication and lack of capacity to form specific intent for aiding and abetting)." *Id.* at 235, 871 P.2d at 316 (emphasis added). The State is incorrect to argue that *Ewish*'s description of arson as a specific-intent crime was limited to an aiding-and-abetting theory under which the defendants were charged in that case.

Second, the authorities that the State argues support overturning *Ewish* are inapposite here. The State posits that under *United States*

v. Doe, 136 F.3d 631, 635-36 (9th Cir. 1998), arson is a general-intent crime and *Ewish* was wrongly decided to the extent it concluded otherwise. The United States Court of Appeals for the Ninth Circuit in *Doe*, however, interpreted the federal arson statute, which included the phrase "willfully and maliciously," but, unlike Nevada's statute, lacked any definitions for those terms. *Id.* at 634 (internal quotation marks omitted). The court in *Doe*, lacking any congressional definition for "willfully and maliciously," based its conclusion that arson is a general-intent crime on its reading of the common-law definition of arson, which the dissenting judge in that case described as "a profound misunderstanding of the common law." *Id.* at 638 (Fletcher, J., dissenting). Because the federal statute interpreted by the *Doe* court fundamentally differs from Nevada's, which explicitly defines "maliciously" as "import[ing] an evil intent," *Doe*'s reasoning is unpersuasive in this case.

The State also relies heavily on California caselaw to support its argument that arson is a general-intent crime and that it need only prove that Radonski generally intended to unlawfully cause a fire in disregard of likely harmful results in order to convict Radonski of arson. The State relies on California authority because it apparently reads California's statute to be "identical" to Nevada's. There are, however, critical differences between Nevada's statute and our sister state's. While NRS 193.0175 defines "maliciously" as "import[ing] an evil intent, wish or design to vex, annoy or injure," California defines "maliciously" as "import[ing] a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." Cal. Penal Code § 7(4) (West Supp. 2019). California's definition makes no mention of an "evil" intent, as Nevada's definition does. An "evil" intent involves more than the intent to commit an unlawful act; it is the intent to act in a way that causes harm. *See Evil-Minded*, *Black's Law Dictionary* (11th ed. 2019) (defining "evil-minded" as "immoral and cruel in such a way as to be likely to cause harm or injury").

Not only does California's definition of "maliciously" lack Nevada's qualifier that the intent be "evil," but it also expressly defines the mental culpability for "maliciously" in alternative general terms, i.e., the "intent to do a wrongful act." Cal. Penal Code § 7(4) (West Supp. 2019). Nevada's statute permits an *inference* of malice based on "an act wrongfully done without just cause or excuse," but it does not define "malice" as such. NRS 193.0175. It is this distinction that renders the State's proposed jury instruction an incorrect statement of the law. Accordingly, the State's reliance on California authority to interpret Nevada's arson statute is misplaced. The State has offered no other "compelling," "weighty and conclusive reasons" to overturn this court's holding in *Ewish* that arson is a specific-

intent crime. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (internal quotation marks omitted).

In short, the plain language of Nevada's arson statute clearly and unambiguously requires the State to prove that a destructive burning was caused by willful *and* malicious conduct. Nevada's criminal statutes define "maliciously" as more than the intent to do a wrongful act; malice equates with an evil intent to cause harm. We are not at liberty to reach beyond the plain language of the statute. *See Cabrera v. State*, 135 Nev. 492, 495, 454 P.3d 722, 724 (2019) ("[W]hen a statute is clear on its face, a court can not go beyond the statute in determining legislative intent." (internal quotation marks omitted)). To be sure, the statute permits an inference of malice where an act is "done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." NRS 193.0175. That malice, the specific intent to harm, may be inferred from the circumstances surrounding an act does not relieve the State of its burden to prove that the act was done with the specific intent to harm or injure. The statute merely allows the specific intent to harm to be inferred when it is not expressly manifested, as is often the case. *See Washington v. State*, 132 Nev. 655, 662, 376 P.3d 802, 808 (2016) ("[I]ntent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime." (alteration in original) (internal quotation marks omitted)). The district court therefore properly rejected the State's proffered jury instruction.

CONCLUSION

The district court determined that arson is a specific-intent crime and ordered that the jury in Radonski's trial would be instructed accordingly. In light of the foregoing, we conclude that the district court was correct, and we deny the State's petition.

Pickering, C.J., and Gibbons, Hardesty, Stiglich, Cadish, and Silver, JJ., concur.

CHEYENNE NALDER, AN INDIVIDUAL; AND GARY LEWIS, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE DAVID M. JONES, DISTRICT JUDGE; AND THE HONORABLE ERIC JOHNSON, DISTRICT JUDGE, RESPONDENTS, AND UNITED AUTOMOBILE INSURANCE COMPANY, REAL PARTY IN INTEREST.

No. 78085

GARY LEWIS, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ERIC JOHNSON, DISTRICT JUDGE, RESPONDENTS, AND UNITED AUTOMOBILE INSURANCE COMPANY; AND CHEYENNE NALDER, REAL PARTIES IN INTEREST.

No. 78243

April 30, 2020 462 P.3d 677

Consolidated original petitions for writs of mandamus challenging district court orders granting intervention, consolidation, and relief from judgment in tort actions.

Petitions granted in part and denied in part.

[Rehearing denied July 1, 2020]

[En banc reconsideration denied September 11, 2020]

Christensen Law Offices, LLC, and *Thomas Christensen*, Las Vegas; *E. Breen Arntz, Chtd.*, and *E. Breen Arntz*, Las Vegas, for Petitioner Gary Lewis.

Stephens & Bywater, P.C., and *David A. Stephens*, Las Vegas, for Petitioner/Real Party in Interest Cheyenne Nalder.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod, J. Christopher Jorgensen*, and *Abraham G. Smith*, Las Vegas; *Winner & Sherrod* and *Matthew J. Douglas*, Las Vegas, for Real Party in Interest United Automobile Insurance Company.

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

OPINION

By the Court, STIGLICH, J.:

These writ petitions arise from litigation involving a 2007 automobile accident where Gary Lewis struck then-minor Cheyenne Nalder. A default judgment was entered against Gary after he and his insurer, United Automobile Insurance Company (UAIC), failed

to defend Cheyenne's tort action. After Cheyenne's attempt a decade later to collect on the judgment through a new action, UAIC moved to intervene in and consolidate the decade-old tort lawsuit and this new action, and the district court granted UAIC's motions. In these proceedings, we consider whether intervention and consolidation after final judgment is permissible. Because we hold that intervention after final judgment is impermissible under NRS 12.130, we conclude that the district court erred in granting intervention in the initial action where a default judgment had been entered but properly granted intervention in the new action where a final judgment had not yet been entered. We also conclude that because an action that reached final judgment has no pending issues, the district court improperly consolidated the two cases. Finally, we conclude that the district court properly vacated a judgment erroneously entered by the district court clerk when a stay was in effect. Accordingly, we grant these petitions for extraordinary relief in part and deny in part.

FACTS

In July 2007, petitioner Gary Lewis struck then-minor petitioner/real party in interest Cheyenne Nalder with a vehicle. James Nalder, as guardian ad litem for Cheyenne, instituted an action in 2007 (Case No. 07A549111, hereinafter the 2007 case) seeking damages. In 2008, the district court entered a default judgment against Gary for approximately $3.5 million. Real party in interest UAIC did not defend the action because it believed that Gary's insurance policy at the time of the accident had expired. Subsequently, in a separate proceeding that was removed to federal court, the federal district court held that the insurance policy between UAIC and Gary had not lapsed because the insurance contract was ambiguous and, therefore, UAIC had a duty to defend Gary. The court, however, only ordered that UAIC pay James the policy limits.[1] Since 2008, James (on behalf of Cheyenne) has collected only $15,000—paid by UAIC—on the $3.5 million judgment.

In 2018, the district court substituted Cheyenne for James in the 2007 case, given that she had reached the age of majority. Cheyenne subsequently instituted a separate action on the judgment (Case No. A-18-772220-C, hereinafter the 2018 case) or alternatively sought a declaration that the statute of limitations on the original judgment was tolled by Gary's absence from the state since at least 2010, Cheyenne's status as a minor until 2016, and UAIC's last payment in 2015. The complaint[2] sought approximately $5.6 million, including the original judgment plus interest.

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[1]James and Gary appealed that decision, which is now pending before the Ninth Circuit.

[2]Gary brought a third-party complaint against UAIC and its counsel in the 2018 case, which was later dismissed.

UAIC moved to intervene in both the 2007 and the 2018 cases. While those motions were pending, Cheyenne and Gary stipulated to a judgment in favor of Cheyenne in the 2018 case. The district court did not approve their stipulation and granted UAIC's motions to intervene in both the 2007 and the 2018 cases. It also granted UAIC's motion to consolidate the 2007 and the 2018 cases, concluding that the two cases shared significant issues of law and fact, that consolidating the cases would promote judicial economy, and that no parties would be prejudiced. After consolidation, the 2018 case was reassigned from Judge Kephart to Judge Johnson, the judge overseeing the 2007 case.

During a hearing on the consolidated cases, the district court orally stayed the proceedings in the 2018 case pending the resolution of certified questions before this court in *Nalder v. United Automobile Insurance Co.*, Docket No. 70504. The district court subsequently granted the stay in a minute order. On the same day, Gary filed an acceptance of an offer of judgment from Cheyenne despite the stay, and the district court clerk entered the judgment the following day. The district court subsequently filed a written order granting the stay and, because of the stay, granted UAIC relief from and vacated the judgment.

Cheyenne and Gary filed this petition for a writ of mandamus in Docket No. 78085, asking this court to direct the district court to vacate the two orders granting UAIC's intervention in the 2007 and 2018 cases and to strike any subsequent pleadings from UAIC and related orders. Gary in Docket No. 78243 seeks a writ of mandamus directing the district court to vacate its order consolidating the cases, to reassign the 2018 case back to Judge Kephart, and to vacate its order granting UAIC's motion for relief from judgment. We have consolidated both petitions.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to entertain a writ of mandamus is within this court's discretion, and the writ will not be issued if the petitioner has a plain, speedy, and adequate legal remedy. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, orders granting intervention and orders granting consolidation can be challenged on appeal. *See generally, e.g.*, *Lopez v. Merit Ins. Co.*, 109 Nev. 553, 853 P.2d 1266 (1993) (challenging intervention on appeal from final judgment); *Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 625 P.2d 1177 (1981) (challenging consolidation on appeal from permanent injunction).

Nonetheless, this court may still exercise its discretion to provide writ relief "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (internal quotation marks omitted).

Here, although we recognize that petitioners have a remedy by way of appeal, we exercise our discretion to consider these petitions because they raise important issues of law that need clarification. Namely, we clarify whether intervention is permissible in a case after final judgment has been reached. We also clarify whether consolidation of cases is proper where one case has no pending issues. Sound judicial economy and administration also militate in favor of granting this petition, as our extraordinary intervention at this time will prevent district courts from expending judicial resources on relitigating matters resolved by a final judgment and, additionally, will save petitioners the unnecessary costs of relitigation.

Intervention

Cheyenne and Gary argue that UAIC's intervention was improper in the 2007 and 2018 cases because a final judgment was reached in one and a written settlement agreement in the other. Determinations on intervention lie within the district court's discretion. *See Lawler v. Ginochio*, 94 Nev. 623, 626, 584 P.2d 667, 668 (1978). While we ordinarily defer to the district court's exercise of its discretion, "deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Because its decision rested on legal error, we do not defer here to the district court's decision to permit UAIC's intervention in the 2007 case ten years after final judgment was entered.

NRS 12.130 provides that "[*b*]*efore the trial*, any person may intervene in an action or proceeding, who has an interest in the matter *in litigation*, in the success of either of the parties, or an interest against both." (Emphases added.) In *Ryan v. Landis*, in interpreting a nearly identical predecessor to NRS 12.130, we adopted the principle that there could be no intervention after judgment, including default judgments and judgments rendered by agreement of the parties. 58 Nev. 253, 259, 75 P.2d 734, 735 (1938). We reaffirmed that principle in *Lopez v. Merit Insurance Co*., 109 Nev. at 556-57, 853 P.2d at 1268. In reversing a lower court's decision allowing an insurance company to intervene after judgment, we reasoned, "[t]he plain language of NRS 12.130 does not permit intervention subsequent to entry of a final judgment." *Id*. at 556, 853 P.2d at 1268. We do not intend today to disturb that well-settled principle that intervention may not follow a final judgment, nor do we intend to undermine the finality and the preclusive effect of final judgments.

The record clearly shows that a final judgment by default was entered against Gary in 2008 in the 2007 case. Intervention ten years later was therefore impermissible. We reject UAIC's argument that intervention was permissible because the 2008 final judgment expired and is thus void.[3] Nothing permits UAIC to intervene after final judgment to challenge the validity of the judgment itself.[4] *See Ryan*, 58 Nev. at 260, 75 P.2d at 736 (rejecting the interveners' argument that intervention was timely because the judgment was void); *see also Eckerson v. C.E. Rudy, Inc.*, 72 Nev. 97, 98-99, 295 P.2d 399, 399 (1956) (holding that third parties attempting to intervene to challenge a default judgment could not do so after judgment had been entered and satisfied). We therefore hold that the district court acted in excess of its authority in granting UAIC's motion to intervene in the 2007 case.

Turning to the 2018 case, we determine that the district court properly granted UAIC's motion to intervene. The district court never entered judgment on the stipulation between Cheyenne and Gary. The stipulation therefore lacked the binding effect of a final judgment and did not bar intervention.[5] *Cf. Willerton v. Bassham*, 111 Nev. 10, 16, 889 P.2d 823, 826 (1995) ("Generally, a judgment entered by the court on consent of the parties after settlement or by stipulation of the parties is as valid and binding a judgment between the parties as if the matter had been fully tried, and bars a later action on the same claim or cause of action as the initial suit.").

We reject Cheyenne and Gary's argument that their agreement is sufficient to bar intervention. Our precedent holds that it is judgment, not merely agreement, that bars intervention. *Cf. Lopez*, 109

[3]We additionally reject UAIC's argument that consolidation of the two cases provided a basis for intervention in the 2007 case or that there was a pending issue in the 2007 case. As discussed later, consolidation was improper, as there was no pending issue in the 2007 case. We also decline to consider UAIC's arguments that public policy warrants granting intervention or that NRS 12.130 is unconstitutional, because those arguments are waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

[4]If UAIC wanted to challenge the validity of a judgment, it could have timely intervened before judgment to become a proper party to the litigation to challenge it under NRCP 60. *See* NRCP 60(b)-(c) (2005) (allowing parties to move for relief from judgment). Alternatively, UAIC could have brought an equitable independent action to void the judgment. *See* NRCP 60(b) (permitting independent actions to relieve a party from judgment); *Pickett v. Comanche Const., Inc.*, 108 Nev. 422, 427, 836 P.2d 42, 45 (1992) (allowing nonparties to bring an independent action in equity if they could show that they were "directly injured or jeopardized by the judgment").

[5]We note that even if the court had approved the party's stipulation, there is no final judgment "[u]ntil a stipulation to dismiss this action is signed and filed in the trial court, or until this entire case is resolved by some other final, dispositive ruling . . . ." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994).

Nev. at 556, 853 P.2d at 1268 ("[T]his court has not distinguished between judgments entered following trial and *judgments entered . . .* by agreement of the parties." (emphasis added)); *see also Ryan*, 58 Nev. at 259-60, 75 P.2d at 735 ("The principle is the same if the *judgment* is by agreement of the parties." (emphasis added)). Allowing the agreement itself to bar intervention would permit the undesirable result of allowing parties to enter into bad-faith settlements and forbidding a third party potentially liable for the costs of the judgment from intervening because settlement was reached. *Cf. United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004) ("Intervention, however, has been granted after settlement agreements were reached in cases where the applicants had no means of knowing that the proposed settlements was contrary to their interests.").

We also clarify that to the extent that our prior opinion in *Ryan* relies on *Henry, Lee & Co. v. Cass County Mill & Elevator Co.*, 42 Iowa 33 (1875), that reliance was intended to explain why our statute does not distinguish between a judgment rendered through verdict or through agreement of the parties. *See Ryan*, 58 Nev. at 260, 75 P.2d at 735. We did not, nor do we intend today, to state that a settlement agreement on its own stands in the place of a judgment. Neither does our opinion in *Dangberg Holdings Nevada, LLC v. Douglas County*, 115 Nev. 129, 139-40, 978 P.2d 311, 317 (1999), suggest so. In *Dangberg Holdings*, we only noted that there was nothing in the record to support petitioner's assertion that there was a finalized settlement agreement barring intervention. *See id*. We hold that it is the judgment that bars intervention, not the agreement itself reached by the parties.

Additionally, we note that UAIC timely moved to intervene when it filed its motion one month before the agreement between Cheyenne and Gary was made. The situation here is distinguishable from the situation in *Ryan*, 58 Nev. at 259, 75 P.2d at 735, where we affirmed the district court's denial of a motion for intervention filed almost a year after judgment, and in *Lopez*, 109 Nev. at 555, 853 P.2d at 1267, where we reversed the grant of a motion to intervene filed after judgment was entered. While NRS 12.130 does not explicitly state whether the filing of the motion for intervention or the granting of the motion is the relevant date in determining timeliness, NRCP 24 permits intervention based on the timeliness of the *motion*. *See* NRCP 24(a) (2005)[6] ("Upon timely application

[6]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). Any references in this opinion to the Nevada Rules of Civil Procedure apply to the rules that were in effect during the district court proceedings in this case. *See In re Study Comm. to Review the Nev. Rules of Civil Procedure*, ADKT 276 (Order Amending the Nevada Rules of Civil Procedure, July 26, 2004).

anyone shall be permitted to intervene in an action . . . ."); NRS 12.130(1)(a) ("Before the trial, any person may intervene in an action or proceeding . . . ."); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes."). We consider the filing of the motion as controlling because any other interpretation would permit collusive settlements between parties one day after an absent third party tries to intervene or permit judicial delay and bias in determining timeliness.

UAIC also met NRCP 24's requirements for intervention. NRCP 24(a)(2) permits a party to intervene as a right where the party shows that (1) it has a sufficient interest in the subject matter of the litigation, (2) its ability to protect its interest would be impaired if it does not intervene, (3) its interest is not adequately represented, and (4) its application is timely. *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1238, 147 P.3d 1120, 1126 (2006). UAIC has shown that it has a sufficient interest in the 2018 case, as it could potentially be liable for all or part of the judgment. Its ability to protect its interests would also be impaired without intervention because as an insurer, it would be bound to the judgment if it failed to defend. *See Allstate Ins. Co. v. Pietrosh*, 85 Nev. 310, 316, 454 P.2d 106, 111 (1969) ("[W]here the [insurance] company is given notice of the action, has the opportunity to intervene, and judgment is thereafter obtained . . . we hold that the company should be bound . . . ."). UAIC's interests are not adequately represented by Gary, whose interests are adverse to UAIC's and who is represented by the same counsel as Cheyenne. Lastly, UAIC timely moved to intervene in the 2018 case. UAIC's intervention in the 2018 case was therefore proper.[7] Accordingly, we hold that the district court was required by law to deny UAIC leave to intervene in the 2007 case but did not arbitrarily and capriciously act when granting UAIC leave to intervene in the 2018 case.

Consolidation

NRCP 42(a) allows consolidation of pending actions that involve "a common question of law or fact." Like under its identical fed-

[7]We reject Cheyenne and Gary's arguments that UAIC provided them with improper notice of its motions to intervene and thereby deprived them of due process. UAIC complied with NRCP 24 and NRCP 5 to provide Cheyenne with sufficient notice of UAIC's motions. *See* NRCP 5(b)(2) (permitting service by mailing a copy to the attorney or party's last known address or by electronic means); NRCP 5(b)(4) ("[F]ailure to make proof of service shall not affect the validity of the service."); NRCP 24(c) ("A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5."). While we recognize that Gary was not given prior notice of the motions to intervene, Gary had post-hearing opportunities to be heard on the issue. *See Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981) (recognizing that due process rights may be adequately protected by postdeprivation remedies), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

eral counterpart, a district court enjoys "broad, but not unfettered, discretion in ordering consolidation." *Marcuse v. Del Webb Cmtys. Inc.*, 123 Nev. 278, 286, 163 P.3d 462, 468 (2007). However, this rule "may be invoked only to consolidate actions already pending." *Pan Am. World Airways, Inc. v. U.S. Dist. Court*, 523 F.2d 1073, 1080 (9th Cir. 1975). We determine that the district court improperly consolidated the 2007 and 2018 cases because a recently filed action cannot be consolidated with an action that reached a final judgment.

In *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000), we clarified that "a final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." Thus, when a final judgment is reached, there necessarily is no "pending" issue left. *See Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 91 n.2, 247 P.3d 1107, 1110 n.2 (2011) (noting that where issues remain pending in district court, there is no final judgment); *see also Pending*, *Black's Law Dictionary* (10th ed. 2014) (defining "pending" as "[r]emaining undecided; awaiting decision").

No pending issue remained in the 2007 case. A default judgment was entered against Gary in 2008 in the 2007 case, which resolved all issues in the case and held Gary liable for about $3.5 million in damages. Amending the 2008 judgment in 2018 to replace James' name with Cheyenne's was a ministerial change that did not alter the legal rights and obligations set forth in the original judgment or create any new pending issues. *See Campos-Garcia v. Johnson*, 130 Nev. 610, 612, 331 P.3d 890, 891 (2014) (noting that an "amended judgment" that does not alter legal rights and obligations leaves the original judgment as the final, appealable judgment). While the 2007 and 2018 actions share common legal issues and facts, no issue or fact is pending in the 2007 action that permits it to be consolidated with another case.

We reiterate our goal of promoting judicial efficiency in permitting consolidation. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 852, 124 P.3d 530, 541 (2005). Allowing a case that has reached final judgment to be consolidated with a newer case undermines that goal by permitting relitigation of resolved issues and requiring parties to spend unnecessary additional court costs. We hold that the district court improperly granted UAIC's motion to consolidate the 2007 and 2018 cases.[8]

Relief from judgment

Finally, we address whether the district court erred in vacating the judgment entered by the clerk pursuant to NRCP 68 after Gary filed

[8]Because we hold that the district court abused its discretion in granting consolidation, we do not reach Gary's due process arguments against the motion.

an acceptance of Cheyenne's offer of judgment. NRCP 60(b)(1) allows the district court to relieve a party from judgment for "mistake, inadvertence, surprise, or excusable neglect." Here, the district court granted UAIC's motion for relief from the judgment because the clerk mistakenly entered judgment when the case was stayed. Reviewing the district court's decision on whether to vacate a judgment for an arbitrary and capricious exercise of discretion, *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996), we determine that the district court did not err.

Gary argues that the district court improperly voided the judgment resulting from Cheyenne and Gary's settlement because judgment was entered before the written stay was filed. While we recognize that judgment was entered before the written stay was filed, we note that it was entered *after* the district court entered a minute order granting the stay.

Generally, a "court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective." *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006) (quoting *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987)). These include "[d]ispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy." *State, Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 455, 92 P.3d 1239, 1246 (2004). However, "[o]ral orders dealing with summary contempt, case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain a procedural or tactical advantage are valid and enforceable." *Id*.

We determine that a minute order granting a stay operates like an administrative or emergency order that is valid and enforceable. A stay suspends the authority to act by operating upon the judicial proceeding itself rather than directing an actor's conduct. *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). It is analogous to a judge orally disqualifying himself in *Ham v. Eighth Judicial Dist. Court*, 93 Nev. 409, 410-11, 566 P.2d 420, 421-22 (1977), which we deemed administrative because it did not direct the parties to take action, dispose of substantive matters, or give any party a procedural or tactical advantage. *State, Div. of Child & Family Servs.*, 120 Nev. at 453, 92 P.3d at 1244. A stay preserves the "*status quo ante*," and thus the parties may not modify the rights and obligations litigated in the underlying matter.[9] *Westside Charter Serv., Inc. v. Gray Line Tours*

[9]Gary argues that parties can settle during a stay. We need not consider that argument because he fails to cite to any supporting authority for this proposition. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that appellate courts need not consider claims that are not cogently argued or supported by relevant authority). Even assuming arguendo that parties can settle on their own during a stay, nothing permits *entry* of that settlement agreement by the court during a stay.

of S. Nev., 99 Nev. 456, 460, 664 P.2d 351, 353 (1983). We hold that the district court's minute order was an effective stay and the clerk mistakenly entered Cheyenne and Gary's settlement judgment. We likewise reject Gary's argument that the district court vacating the parties' judgment, ex parte, violated due process. We note that the district court could have *sua sponte* vacated the mistakenly entered judgment without notice to the parties. *See* NRCP 60(a) ("[C]lerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court at any time of its own initiative . . . and after such notice, if any, as the court orders."). In *Marble v. Wright*, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961), we distinguished a clerical error as "a mistake or omission by a clerk, counsel, judge, or printer [that] is not the result of the exercise of the judicial function" and "cannot reasonably be attributed to the exercise of judicial consideration or discretion." The clerk's entry here of the judgment was a clerical mistake that did not involve any judicial discretion. Therefore, notice was not required, Gary's due process rights were not violated, and the district court properly vacated the judgment.

CONCLUSION

We conclude that intervention after final judgment is impermissible, and the district court erred in granting intervention in the 2007 case. We also conclude that an action that reached final judgment has no pending issues, and therefore, the district court improperly consolidated the 2007 and 2018 cases. Finally, we conclude that a minute order granting a stay is effective, and the district court properly vacated the erroneously entered settlement judgment between the parties. Accordingly, we grant in part and deny in part Cheyenne and Gary's petition in Docket No. 78085 and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting UAIC leave to intervene in Case No. 07A549111 and to strike any related subsequent pleadings and orders. We also grant in part and deny in part Gary's petition in Docket No. 78243 and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting UAIC's motion to consolidate Case Nos. 07A549111 and A-18-772220-C, and to reassign Case No. A-18-772220-C to Judge Kephart.[10]

Gibbons and Silver, JJ., concur.

[10]Gary also seeks our intervention to direct the district court to strike as void any orders issued in the 2018 case by Judge Johnson regarding the third-party complaint. We decline that request because Gary has failed to demonstrate why he is seeking this relief and any allegations of conflicts of interest in the petition do not relate to Judge Johnson. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

CITY OF HENDERSON; AND CANNON COCHRAN MANAGEMENT SERVICES, INC., APPELLANTS, *v.* JARED SPANGLER, RESPONDENT.

No. 76295-COA

May 14, 2020 464 P.3d 1039

Appeal from a district court order granting a petition for judicial review and reversing a denial of workers' compensation benefits. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Affirmed and remanded.

Lewis Brisbois Bisgaard & Smith LLP and *Daniel L. Schwartz* and *Joel P. Reeves*, Las Vegas, for Appellants.

Greenman Goldberg Raby & Martinez and *Lisa M. Anderson* and *Thaddeus J. Yurek, III*, Las Vegas, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., TAO and BULLA, JJ.

OPINION

By the Court, TAO, J.:

Statistics tell us that most police officers will never be required to draw, much less fire, their service weapon in the line of duty. But even when they don't, they still perform a difficult and hazardous job by merely being present at the scene of danger. This appeal involves a police officer who suffered progressive hearing loss that he believes to have been caused, at least in part, by his job. It's a risk that many officers might eventually suffer, for even on the best of days the typical police officer is exposed to a variety of noises that the rest of us might never experience, from such things as sirens, radio earpieces, shouted commands, and the sound of gunfire—maybe not from the rare occasion of having to draw a weapon against a suspect, but much more routinely by being required to regularly qualify on the shooting range.

This is a workers' compensation appeal. Jared Spangler served as a police officer for the City of Henderson since 2003 and over that time lost much of his hearing, to the point where he was assigned to desk duty. He sought compensation under NRS 617.430 and .440, which entitle employees, including but not limited to police officers, to workers' compensation benefits if they suffer a disability caused by an "occupational disease." The complicating factor in this appeal is that Spangler already had some level of hearing loss, perhaps genetically induced, before he began his service that his years on the job potentially made worse. Because at least part of his current hear-

ing disability was attributable to that original pre-employment loss, the appeals officer denied benefits to Spangler. But NRS 617.366(1) provides that benefits are due when an employee's current condition results from an original condition that preexisted the job that was aggravated or accelerated by an occupational disease contracted from the job. We conclude that the plain text of this statute does not exclude the possibility of benefits under those circumstances, so long as the other requirements set forth in the statute are satisfied. We therefore affirm the order of the district court reversing the appeals officer and remand this matter for further consideration.

FACTUAL AND PROCEDURAL HISTORY

In 2005, while working as a police officer for the City of Henderson, Jared Spangler sought workers' compensation benefits, alleging that exposure to various loud noises while on patrol caused ringing in his ears and simultaneous hearing loss. Spangler was examined by Dr. Scott Manthei, who concluded that Spangler's hearing loss was not work related and that a nonindustrial cause (perhaps of genetic origin) was behind his symptoms. The City, through its third-party workers' compensation administrator, denied Spangler's claim based on Dr. Manthei's report. Spangler did not appeal that denial, so that claim is closed and cannot now be revisited.

Still experiencing significant decreased hearing 11 years later, in 2016 Spangler consulted Dr. Amanda Blake, who opined that Spangler's exposure to various work-related sounds—including police sirens, gunfire during range qualifications, and radio chatter from his left ear piece as well as his lapel microphone—caused the increased hearing loss, which she opined was an industrial condition. After this consultation, Spangler filed a second workers' compensation claim alleging that cumulative exposure to loud noise in different work environments over the years all combined to worsen his hearing even more than when he filed his 2006 claim. He also consulted Dr. Roger Theobald to determine the cause of his increased hearing loss, but Dr. Theobald could not conclusively attribute the loss to either Spangler's underlying nonindustrial cause or his work environment. Ultimately, the administrator denied Spangler's second claim because he failed to establish that his increased hearing loss arose out of his employment.

Spangler appealed and, in preparation for his administrative appeal hearing, sought out a third doctor, Dr. Steven Becker, who opined that Spangler's bilateral hearing loss and tinnitus were not work related, but that his work environment was a contributory factor in his increased hearing loss. The appeals officer affirmed the denial, claiming that Spangler failed to establish either an "injury by accident" or an occupational disease that would entitle him to benefits. Spangler then petitioned the district court for judicial review of

the appeals officer's decision. The district court granted the petition and reversed. The City and its third-party administrator now appeal from the district court order.

ANALYSIS

On appeal, the City argues that (1) the appeals officer did not err in interpreting NRS 616A.030's definition of "accident"; (2) the appeals officer's decision under NRS 616C.175(1) is supported by substantial evidence, as Spangler did not establish an "injury by accident"; and (3) the appeals officer's decision under NRS 617.440 is supported by substantial evidence because Spangler's hearing loss is not a compensable occupational disease.

Standard of review

On appeal, this court's role in reviewing an administrative agency's decision in a workers' compensation matter is identical to that of the district court. *Elizondo v. Hood Mach., Inc*., 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We do not defer to the district court's decision when reviewing an order deciding a petition for judicial review. *Id.* Instead, we examine the administrative agency's "fact-based conclusions of law" for clear error or an abuse of discretion, and we will not disturb them if supported by substantial evidence. *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005). "Substantial evidence" is defined as "evidence which a reasonable mind might accept as adequate to support a conclusion," regardless of whether we ourselves would reach the same conclusion had we been in the appeals officer's place. *Horne v. State Indus. Ins. Sys*., 113 Nev. 532, 537, 936 P.2d 839, 842 (1997) (internal quotation marks omitted). We will not reweigh the evidence or substitute our judgment for that of the appeals officer on a question of fact. *Id*. However, we review de novo an administrative agency's conclusions of law, including its interpretation of the relevant statutes. *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 509-10 (2006).

Broadly speaking, employees may seek workers' compensation benefits for two types of work-induced conditions. An employee may seek compensation for a work-related "injury" under the provisions of NRS Chapters 616A-D, or an employee may seek compensation for an "occupational disease" under the provisions of NRS Chapter 617.

Whether Spangler's hearing loss constitutes a compensable "injury by accident" under NRS Chapters 616A-D

We first address whether Spangler's claim satisfies NRS Chapters 616A-D. Spangler may only recover under these statutes if he suffered an "injury," defined in NRS 616A.265 as "a sudden and

tangible happening of a traumatic nature, producing an immediate and prompt result." Moreover, he may only recover compensation for such injuries if they resulted from an "accident," defined as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." NRS 616A.030. The words of this latter statute are plain and unambiguous, so we must follow them as written. *Poole v. Nev. Auto Dealership Invs., LLC*, 135 Nev. 280, 283, 449 P.3d 479, 482 (Ct. App. 2019). According to the Nevada Supreme Court, these words mean exactly what they say: that "[i]n order for an incident to qualify as an accident, the claimant must show the following elements: (1) an unexpected or unforeseen event; (2) happening suddenly and violently; and (3) producing at the time . . . objective symptoms of injury." *Bullock v. Pinnacle Risk Mgmt*., 113 Nev. 1385, 1389, 951 P.2d 1036, 1039 (1997).

Spangler's increased hearing loss does not fall within this statutory definition because he cannot identify a single incident which caused hearing loss at the moment it happened, but rather, he only alleges that his hearing worsened gradually and progressively over time, unrelated to any single sudden incident or even a series of sudden incidents. Even if he could tie his hearing loss retrospectively to any such single accident, he does not allege that his symptoms appeared immediately thereafter. The reports of all three physicians whose opinions were presented to the appeals officer (Dr. Blake, Dr. Theobald, and Dr. Becker) agree that Spangler's increased hearing loss and tinnitus resulted from accumulated exposure over time and not from any single sudden and violent incident which immediately induced injury at that moment. Consequently, we must conclude that substantial evidence supports the decision of the appeals officer that Spangler could not establish an "injury by accident" and he cannot recover under NRS Chapters 616A-D.

Whether Spangler's hearing loss constitutes a compensable "occupational disease" under NRS Chapter 617

The more complex question in this case is whether Spangler's hearing loss qualifies as a compensable "occupational disease" under NRS 617.440. NRS Chapter 617 provides benefits to employees who either die or suffer a "disability," whether temporary or permanent and whether total or partial, from an occupational disease. *See* NRS 617.430. NRS 617.440 lists the requirements for determining whether an employee's physical state could be an occupational disease eligible for compensation. When an employee attempts to establish that his or her disease arose out of employment and is thus compensable, the employee "must show, with medical testimony, that it is more probable than not that the occupational environment was the cause of the acquired disease." *Seaman v. McKesson Corp*., 109 Nev. 8, 10, 846 P.2d 280, 282 (1993). An employee is not enti-

tled to compensation from the mere contraction of an occupational disease, but rather must show "a disablement resulting from such a disease." *Employers Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1014, 145 P.3d 1024, 1027 (2006) (quoting *Prescott v. United States*, 523 F. Supp. 918, 927 (D. Nev. 1981)).

Here, Spangler alleges that he originally suffered from hearing loss (possibly of genetic origin) that preexisted his employment, but that his employment then made his hearing much worse to the point where he could no longer serve in the field and has been limited to desk duty. Thus, he alleges that NRS 617.440 covers his current disablement due to hearing loss even though part of the loss may have preexisted his employment.

The meaning of "preexisting"

Before we can compare Spangler's allegations and evidence to the requirements set forth in the statute, we must clarify some terminology. In its jurisprudence over the past two decades, the Nevada Supreme Court has at times used the phrase "preexisting" to mean two very different things, only one of which relates to claims like Spangler's. On the one hand, when dealing with certain types of claims, the court has used the term to refer to physical symptoms or a physical state that did not exist before the employee began working and only developed for the first time during the employment, but for which the employee never previously sought benefits before filing a claim much later. In this usage, the court has sometimes said that the symptoms "preexisted" the current claim for benefits even though they did not necessarily preexist the employment itself. An example of this is *Morrow v. Asamera Minerals*, 112 Nev. 1347, 929 P.2d 959 (1996), which broadly states that "a claimant may receive compensation where it is found that the occupation aggravates a preexisting condition." *Id.* at 1354, 929 P.2d at 964 (citing *Desert Inn Casino & Hotel v. Moran*, 106 Nev. 334, 337, 792 P.2d 400, 402 (1990)). *Morrow* involved a miner who suffered work-incurred back problems that became progressively worse over the course of the 30 years during which he continued to work as a miner. *Id*. at 1348, 929 P.2d at 960. He sought compensation not for the original disease (even though it arose after he began working as a miner), but only for the aggravation of it over time. *See id*. at 1348-49, 929 P.2d at 960. The supreme court held his claim to state a compensable condition. *Id.* at 1354, 929 P.2d at 964.

Thus, *Morrow* actually addressed a scenario very different from Spangler's claim: *Morrow* involved a physical manifestation that did not exist before the job but did worsen over the course of employment, while Spangler's claim seeks compensation for hearing loss of possible genetic origin that was not originally incurred while working but rather pre-dated his employment to some extent and then worsened over the course of his employment. As used in

Morrow, the term "preexisting" refers not to something that existed before employment ever began, but only to something that first developed on the job but for which no previous claim was made; it "preexisted" the current claim but not the employment itself.

A number of other cases use the term in this same way. *See Desert Inn*, 106 Nev. at 337, 729 P.2d at 402 (stating that it implicitly used the term in this manner in *State Industrial Insurance System v. Christensen*, 106 Nev. 85, 88, 787 P.2d 408, 409-10 (1990)). *Desert Inn* involved a masseuse who entered into her employment with no preexisting genetic disease or injury but then developed hand issues on the job that worsened over the course of employment. 106 Nev. at 335, 792 P.2d at 401-02. The court specifically noted that her "degenerative joint disease qualifies as an occupational disease which arose out of and in the course of her employment," and then "[a]s she continued her employment, her problems worsened." *Id.* at 337, 792 P.2d at 402. She never filed a claim at the time of initial onset of the disease but only after its aggravation, and the court concluded that she was entitled to compensation for her occupational disease under NRS 617.440. *Id*. Thus, like *Morrow*, *Desert Inn* uses the word "preexisting" not to mean that her disease existed before she started working, but only to mean that it developed on the job before she filed her later claim seeking compensation for its aggravation over time.

State Industrial Insurance System v. Christensen is much like *Morrow* and *Desert Inn*, involving a claim for an occupational disease that only developed on the job and did not exist before employment. 106 Nev. at 86, 787 P.2d at 408. A welder and steamfitter who worked for 40 years discovered he had developed asbestosis from on-the-job exposure. *Id*. at 86, 787 P.2d at 408-09. He was originally diagnosed in 1978 but did not file a claim at that time, only seeking compensation years later in 1985 after his symptoms worsened to the point where he became unable to work. *Id.* at 86-87, 787 P.2d at 409. The court found that he had stated a proper claim for compensation for an occupational disease based upon the aggravation of his asbestosis and remanded the matter for further fact-finding. *Id*. at 88, 787 P.2d at 409-10.

But on the other hand, with other types of claims the term "preexisting" means something else entirely, namely, a disease or symptom that preexisted not merely the current claim, but the employment itself. The clearest example of this lies in NRS 617.366, a statute that neither party cites in their briefing but which appears to actually govern Spangler's claim. NRS 617.366 states as follows:

> 1. The resulting condition of an employee who:
>
> (a) Has a preexisting condition from a cause or origin that did not arise out of and in the course of the employee's current or past employment; and

> (b) Subsequently contracts an occupational disease which aggravates, precipitates or accelerates the preexisting condition,
>
> shall be deemed to be an occupational disease that is compensable pursuant to the provisions of chapters 616A to 617, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the occupational disease is not a substantial contributing cause of the resulting condition.
>
> 2. The resulting condition of an employee who:
>
> (a) Contracts an occupational disease; and
>
> (b) Subsequently aggravates, precipitates or accelerates the occupational disease in a manner that does not arise out of and in the course of his or her employment,
>
> shall be deemed to be an occupational disease that is compensable pursuant to the provisions of chapters 616A to 617, inclusive, of NRS, unless the insurer can prove by a preponderance of the evidence that the occupational disease is not a substantial contributing cause of the resulting condition.

Section 1 of this statute addresses an aggravation of a "condition" that preexisted the employment itself, not one that merely preexisted the claim. Under it, such an aggravation is not compensable unless an occupational disease is also independently established. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 51, 200 P.3d 514, 517 (2009). Thus, NRS 617.366(1) uses the phrase "preexisting" in the same sense that Spangler uses it, which is not the sense in which *Morrow*, *Desert Inn*, and *Christensen* use it. Consequently, Spangler's claim is best resolved under NRS 617.366 rather than *Morrow*, *Desert Inn*, and *Christensen.*

To sum up, the statutory scheme contemplates claims arising from four discrete types of "preexisting" conditions that are all handled differently: (1) an employee who develops an occupational disease for the first time on the job that becomes further aggravated over the course of the employment, even when the initial onset of the disease "preexisted" the final condition that gave rise to the claim for compensation, a scenario governed by *Morrow*, *Desert Inn*, and *Christensen*; (2) an employee who entered a job with a disease that preexisted the employment and was subsequently aggravated by an industrial accident causing "sudden injury" that made the original disease worse, a scenario governed by NRS Chapters 616A-D; (3) an employee who initially entered the employment with a "condition" that preexisted the employment itself and was subsequently aggravated, precipitated, or accelerated by the onset of an "occupational disease" that the employee first contracted while working, a scenario governed by NRS 617.366(1); and (4) an employee who contracted an occupational disease and suffered the nonindustrial aggravation of that occupational disease, a scenario governed by NRS 617.366(2). Of these four, Spangler's claim falls under NRS

617.366(1), as he claims to have entered employment with a condition that partially preexisted the employment and may have worsened over time by itself, but whose course was aggravated or accelerated by an occupational disease.

The meaning of "condition" and "occupational disease" within the statutes

Spangler's claim thus must be analyzed under NRS 617.366(1): he entered employment with hearing loss that preexisted the job and that he alleges was made worse by his work conditions. The question before us is whether his evidence meets the requirements of the statute. However, attempting to apply NRS 617.366(1) to his claim poses another terminology problem: the statute contains important terms that are not defined anywhere in the statute, namely, "condition" and "occupational disease." The plain language of the statute quite clearly assumes that there exists a meaningful difference between the two things (awarding compensation when a "condition" is aggravated by an "occupational disease"), yet does not define the two in any independent way.

Workers' compensation law is entirely a creation of statute with no historical roots or tradition anywhere in common law. Quite to the contrary, it represents a clear legislative departure from ancient and established common-law principles of liability. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 787-89 (1982). Consequently, we must apply the statute faithfully as written, with no power to change or rewrite the statutory mandates. "It is the prerogative of the Legislature, not this court, to change or rewrite a statute." *Holiday Ret. Corp. v. State*, *Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012). Nor can we ignore statutes or apply them selectively: "[w]hen a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch." *Beazer Homes*, 120 Nev. at 578 n.4, 97 P.3d at 1134 n.4; *see City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 867, 59 P.3d 477, 483 (2002) (invalidating vague statute because, to enforce it, "this court would have to engage in judicial legislation and rewrite the statute substantially"), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 482 n.1, 245 P.3d 550, 553 n.1 (2010). Emphatically, our goal is not to rewrite the statute into one that we think might work better than the one the Legislature actually drafted and voted upon and that the Governor signed. Doing so would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS v. Chadha*, 462 U.S. 919, 951 (1983). We would risk, too, upsetting reliance

interests in the settled and established meaning of a statute. *Cf.* 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 56A:3 (rev. 7th ed. 2012).

As applied to this case, Spangler may recover compensation if he had a "preexisting condition" that was aggravated or accelerated by an "occupational disease" he later contracted on the job. We know that Spangler came to the job with some pre-employment hearing loss of possible genetic origin, and then as a police officer was exposed to loud noises that made the hearing loss worse. Did he originally suffer from a preexisting "condition" that was aggravated by "occupational disease"? That depends upon whether his original pre-employment hearing loss was a "condition" or something else under NRS 617.366. It then further depends upon whether his exposure to loud noises on the job resulted in his contracting an "occupational disease" that aggravated his original hearing loss, or rather was merely a job-related aggravation of his original hearing loss that did not rise to the level of an "occupational disease."

In this case, however, we need not dive too deeply into the statutory text, as neither party disputes that the current state of Spangler's hearing loss was the kind of thing theoretically eligible for compensation as an occupational disease. In their briefing below and on appeal, both parties agreed that his current hearing loss could potentially qualify as an occupational disease but disagreed regarding whether sufficient evidence supported the appeals officer's conclusion that the current state of his hearing loss was not sufficiently connected to his employment under NRS 617.440. Thus, we must conclude that Spangler's claim was of a kind eligible for compensation under NRS 617.366 when he alleges that he suffered from a condition that preexisted his employment and whose course was aggravated or accelerated by the onset of an occupational disease that he contracted from the job.

The appeals officer's findings of fact and conclusions of law

The next step of the inquiry is to assess whether the appeals officer's denial of Spangler's claim was justified in light of the evidence presented below. Dr. Theobald opined that "there is a high likelihood that there is an underlying condition that may be contributing to Mr. Spangler's hearing loss," but also opined in the very next sentence that "there is a high probability that Mr. Spangler's threshold shift may be as a result of on the job noise exposure." Similarly, Dr. Blake opined that Spangler lost some hearing before becoming a police officer but that he also suffered further loss due to noise exposure. Dr. Becker opined that Spangler's condition was originally not work related, but he also noted that the hearing loss became "steadily" worse over the course of Spangler's employment. Thus, every physician opined that Spangler's hearing loss had some preexisting

component that was made substantially worse by his employment over the years.

In weighing these medical reports, the appeals officer found that Spangler had not met his burden of proof, "especially given the prior 2006 claim denial and the intervening primarily desk job assignment." The appeals officer sets forth no other factual findings supporting his conclusion. Fairly read, the appeals officer seems to mean that in 2006, Spangler was found to have had some combination of preexisting hearing loss coupled with some job-related exposure to loud noises that resulted in the denial of his 2006 claim, and that his job-related exposure to noise was reduced after he was later assigned to a desk job. Putting these together logically, the conclusion appears to be that Spangler has not met his burden of proof because he failed to prove that the current level of his hearing loss was entirely attributable to his employment.

But the appeals officer incorrectly interpreted NRS 617.440, which draws no distinction between conditions that originated wholly on the job and those that previously existed in some form before the job but were made worse by an occupational disease incurred on the job. The appeals officer also ignored NRS 617.366(1), which goes beyond NRS 617.440 to specifically provide for compensation when a condition that preexisted the job was aggravated, precipitated, or accelerated by the contraction of an occupational disease. Under the plain words of these statutes, Spangler would be entitled to compensation if he can prove that the current level of his hearing loss resulted from some combination of a preexisting condition that was made worse by an occupational disease that he subsequently contracted on the job. Contrary to the appeals officer's conclusion, the statutes do not permit denial of compensation solely on the grounds that some of Spangler's current level of hearing loss preexisted his employment. They only permit denial when either (1) his current level of hearing loss resulted wholly from the original preexisting condition alone and would have naturally progressed to be exactly the same today even if he had never held the job of police officer for a single day, or (2) his original pre-employment hearing loss worsened over the course of his employment but not because of any "occupational disease."

This interpretation is not only mandated by the text, but is also consistent with the "last injurious exposure rule" set forth in *Grover C. Dils Medical Center v. Menditto*, 121 Nev. 278, 284, 112 P.3d 1093, 1097-98 (2005). It can even be said to be something of an analogy to or extension of the "last injurious exposure rule." Under that rule, if an injured employee has worked for different employers and alleges that he or she suffered various injuries or aggravations of injuries under each, the responsibility to pay workers' compensation falls upon the liability carrier for the employer at the time of the injury. A new injury or a new aggravation of a prior injury is the

responsibility of the most recent employer, but a mere recurrence of a previous injury suffered under a former employer is the responsibility of the former employer. *Id*. at 284, 112 P.3d at 1098. A new injury or new aggravation must amount to "more than merely the result of the natural progression of the [original or prior] disease or condition." *Id*. at 287, 112 P.3d at 1099. In a sense, NRS 617.366 can be said to apply this rule to situations in which the employee had no prior employment under which he or she either originally incurred or aggravated the condition. In those situations, even if the condition was originally genetically inherited and always present since birth in some limited form, after later becoming employed, the employee may nonetheless be entitled to compensation if his or her current employment triggered an occupational disease that aggravated the original condition beyond its natural progression. On the other hand, if the current state of the condition is nothing more than a mere recurrence of the same condition that was always present and does not constitute a new aggravation of it beyond its the natural progression without the employment, then no compensation is due.

Here, the appeals officer's decision is brief and therefore not entirely clear, but one reasonable interpretation of it (and perhaps the most reasonable interpretation of it) is that it appears to deny compensation solely because some, even though not all, of Spangler's hearing loss was partially attributable to a condition that preexisted his employment rather than being entirely the product of an occupational disease. If that is what the decision meant to say, it is legally incorrect. Had the appeals officer made clearer factual findings more consistent with the statutes, we would be required to defer to them, as we "shall not substitute [our] judgment for that of the agency as to the weight of evidence on a question of fact." NRS 233B.135(3). But based upon the factual findings we have, the most natural interpretation of them is that the appeals officer applied the statutes incorrectly as a matter of law.

CONCLUSION

Because the appeals officer appeared to have improperly applied NRS 617.366 to the evidence before it, we remand this matter for further proceedings consistent with this opinion. We therefore affirm the district court's order granting Spangler's petition for judicial review, but on different grounds than those set forth by the district court, and remand with instructions that the district court refer the matter back to the appeals officer for further proceedings as noted herein.

Gibbons, C.J., and Bulla, J., concur.